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EDITORIAL

It is with great pleasure that we present Volume 6 of *De Lege Ferenda*. As the *Cambridge Law Review*'s supplementary undergraduate journal, *De Lege Ferenda* was established with the aim of allowing undergraduate students to showcase their legal scholarship. It has been hugely successful to that end: this year, as with previous years, we received many submissions of remarkable quality.

The articles published in this Volume offer valuable insight into a wide range of legal issues, including the doctrine of *res judicata* and the need for its reform; the relationship and similarities between English concept of the rule of law and its German counterpart, the *Rechtsstaat*; the admission of illegally obtained evidence in international law; and how jurisdiction as a matter of private international law should be determined in respect of transactions involving digital assets. This Volume, coincidentally, also contains two articles on competition law as it relates to the digital sector. The first argues for the adoption of a consumer welfare standard grounded in economic and organisational theory. The second examines how existing EU merger control regulations ought to be modernised to cope with the age of big data. Overall, the six articles included in this Volume constitute interesting and enjoyable reads that will hopefully provide food for thought.

We would like to express our gratitude to the Editorial Board for their work in reviewing and editing submissions, especially to the International Editors for providing comments and guidance in respect of submissions pertaining to jurisdictions other than England and Wales.

Leo Pang and Sebastian Aguirre
March 2023

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Mutuality in *Res Judicata*: The Feeling is No Longer Mutual

AVIN PERSAD-FORD*

ABSTRACT

This article argues that English courts should abandon mutuality in *res judicata* cases, thereby expanding *res judicata*'s application. As the Supreme Court summarised in *Virgin Atlantic v Zodiac Seats*, for a court to strike out a pleading or submission on *res judicata* grounds, one of the conditions is that the parties in the previous proceeding and the proceeding at bar must be the same. This article argues that this is an unnecessary condition. It does so in four parts. First, it examines how English courts interpret the *res judicata* doctrine. It distinguishes between 'offensive' and 'defensive' *res judicata* submissions and explains how English courts have traditionally enforced the mutuality requirement, with reference to the most important case in this area, *Hunter v Chief Constable of West Midlands*. Second, it identifies the traditional reasons for preserving mutuality. Third, it explains why mutuality is a problematic concept in English law because courts have failed to identify doctrinal reasons for preserving it and it improperly conflates *res judicata* with abuse of process. Fourth, it explains why non-mutuality *res judicata* is preferred, subject to protections for offensive *res judicata* cases.

I. INTRODUCTION

At what point is a matter decided, such that repeated attempts to decide the same matter would be unjust? In a courtroom, it is a long-held principle of English law that *res judicata* ('a thing adjudged') will only apply where the parties or their privities in the original proceeding are the same as those in the subsequent proceedings,¹ a principle known as 'mutuality'.

This article argues that English law should abandon mutuality in *res judicata* cases. It does so in four parts. First, it examines how English courts interpret the *res judicata* doctrine. It looks at the leading Supreme Court decision analysing *res*

* LLB (UCL). I am grateful to the participants of UCL's 2022 Private Law Conference, especially Lady Hale and Anna Pavičić, for their feedback on an earlier draft. Thank you also to DLF's anonymous editors for their comments.

¹ *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 [47].

judicata, distinguishes between so-called ‘offensive’ and ‘defensive’ *res judicata* submissions, and considers how English courts have traditionally enforced the mutuality requirement. While English law should abandon mutuality in both ‘offensive’ and ‘defensive’ cases, the former will need to be subject to qualifications. Second, it identifies the traditional reasons for preserving mutuality. Third, it explains why mutuality is a problematic concept in English law through analysis of the leading case on this subject, *Hunter v Chief Constable of West Midlands*.² In *Hunter*, Lord Denning MR in the Court of Appeal forcefully argued in favour of non-mutuality *res judicata*. In the House of Lords, however, Lord Diplock reverted to abuse of process.³ Fourth, it explains why non-mutuality *res judicata* is to be preferred.

II. *RES JUDICATA*: A PRIMER

The leading modern case discussing *res judicata* is the Supreme Court’s decision in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*.⁴ That case involved a patent dispute between VA (the Plaintiff and Respondent) and PA (the Defendant and Appellant). There, the Court of Appeal held that VA’s patent for an airplane seat design was valid, a judicial declaration for which was ordered on 20 January 2020. PA then sought to vary the order on 1 December 2020, to the extent of arguing that VA had suffered no damages as a result of the infraction. The Court of Appeal dismissed the application, finding it to be an attempt to relitigate the issue of the patent’s validity and thus *res judicata*.

The Supreme Court upheld the Court of Appeal’s decision, finding the issue of the patent’s validity to be *res judicata*. Writing for the majority, Lord Sumption articulated six principles which govern *res judicata* in modern English law, all of which speak to the same broad principle that judgments are final, subject to appeal rights.⁵ Where appeal rights are exhausted and an action is decided between two parties, those parties cannot then relitigate the same issues in a further action. While the *res judicata* doctrine may have ‘many rooms under one roof’, as Lord Denning described it,⁶ this article does not distinguish between those principles—or ‘rooms’—except where appropriate.

A. *RES JUDICATA*: SHIELD, SWORD, OR BOTH?

Doctrinal arguments in favour of amending *res judicata*’s mutuality requirement differ depending on how parties invoke the *res judicata* doctrine. Generally, a party does so either offensively or defensively. In an offensive situation, party A succeeded against party B in an earlier case and wants to enforce that decision

² *Hunter v Chief Constable of the West Midlands* [1980] QB 283 (CA).

³ *Hunter v Chief Constable of the West Midlands* [1982] AC 529 (HL).

⁴ *Virgin Atlantic* (n 1).

⁵ *ibid* [17].

⁶ *Hunter* (n 2) 317.

against party C in a later case. In a defensive situation, party A lost against party B in an earlier case and party C wants to enforce that decision against party A in a later case. English courts should remove *res judicata*'s mutuality requirement for offensive and defensive cases, subject to safeguards for offensive cases.

B. THE MUTUALITY REQUIREMENT IN MODERN ENGLISH LAW

There is little jurisprudence on mutuality in English law. Where the courts speak to mutuality, the courts struggle to defend mutuality's place beyond simply affirming that it is the law. In *Virgin Atlantic*, for example, Lord Neuberger described the potentially 'anomalous' consequences of mutuality as still 'a clear and principled application of the fundamental rule'.⁷ In fairness to his Lordship, mutuality was not a central issue of dispute in *Virgin Atlantic*, so it made little sense to analyse the matter at great length.

Five earlier cases dealt with mutuality more extensively,⁸ the most important of which is *Hunter*. There, the plaintiffs were alleged members of the Irish Republican Army who had been convicted in earlier criminal proceedings for bombing a hotel. The plaintiffs argued during their earlier criminal proceedings that the police beat confessions out of them. The trial judge rejected this contention, finding the confessions to be voluntary. The plaintiffs then sued the Chief Constable of the West Midlands Force (the force that detained the plaintiffs) under section 48 of the Police Act 1964, which would impose liability on the Chief Constable for any misconduct carried out by his or her constables.⁹ According to the plaintiffs, the constables assaulted, battered, threatened, and harassed them while in the constables' custody.

The Court of Appeal for the civil matter affirmed the trial judge's decision dismissing the plaintiffs' claim.¹⁰ The Court, however, was divided in its reasons for doing so. Lord Denning preferred non-mutuality *res judicata*, Goff LJ preferred abuse of process, while Sir George Baker would have dismissed the plaintiffs' claim on both non-mutuality and abuse of process grounds. While Goff LJ sympathised with the defendant's submission that Sir Edward Coke's *Commentaries*—from which the mutuality rule originates—was unpersuasive on this point, '[the] repeated pronouncements in the House of Lords and... the length of time that the rule of mutuality... has been considered part of English law'¹¹ precluded his Lordship from finding there to be non-mutuality *res judicata*. The House of Lords upheld

⁷ *Virgin Atlantic* (n 1) [47].

⁸ *Carl Zeiss Stiftung v Raynor & Keeler Ltd (No 2)* [1967] 1 AC 853 (HL); *Gleeson v J Wipphell & Co Ltd* [1977] 1 WLR 510 (Ch); *Hunter* (n 3); *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1982] 2 Lloyd's Rep 132 (CA); and *North West Water Authority v Binnie & Partners* [1990] 3 All ER 547 (QB).

⁹ Police Act 1964, s 48.

¹⁰ *Hunter* (n 2).

¹¹ *ibid* 330.

the Court of Appeal's decision but only based on Goff LJ's reasoning.¹² Mutuality's place in English law was thus affirmed.

III. DOCTRINAL ARGUMENTS IN FAVOUR OF PRESERVING MUTUALITY

Although English courts have not spoken extensively about a justification for preserving mutuality, academic commentators have filled the void. There appear to be five arguments in favour of preserving mutuality's central role in *res judicata*. The arguments range from principled, to policy-based, to personal. Adrian Zuckerman argues from a principled perspective. According to Zuckerman, because most judgments are *in personam*—that is, they bind the parties or their privities to the decision—it would be wrong to extend *res judicata* to bind parties who were not a party to the proceeding. That would make an *in personam* judgment *in rem*—that is, speaking to a state of legal affairs that would bind the whole world.¹³

Turning to the policy-based arguments, Fred Bartenstein suggests that the doctrinal arguments in favour of *res judicata* as a whole—the costs and vexation of multiple lawsuits, conserving judicial resources, and preventing inconsistent decisions—are weaker in offensive non-mutual *res judicata* cases.¹⁴ This is so because a defendant in a later case may believe they can persuade a court where a separate defendant in an earlier case failed to do so on the same issue. Marvin Frankel then argues that an adversarial trial's inherent weaknesses may result in a court in the first case wrongly deciding an issue. A party in a subsequent case may be 'stuck' with what was decided in the first case.¹⁵ Finally, as Jack Ratliff argues, non-mutuality would not guarantee consistent verdicts where its application would be unfair to the defendant in the subsequent proceeding.¹⁶ An example of this situation may be a personal injury jury trial in which there are multiple potential claimants and one defendant. The claimants' lawyers might try the claimant with the most severe injuries first to win a higher damages award for the first claimant that subsequent claimants would point to in their own trials.¹⁷

On a more personal level, as Garry D Watson argues in the *Canadian Bar Review*, Lord Denning might have been driven by personal animus in *Hunter*.¹⁸ There, his Lordship referred to the plaintiff bombers as being 'bad persons' who

¹² This article's final two sections explain why, although Goff LJ's reasoning (as endorsed by the House of Lords) is the authority for mutuality, Lord Denning's reasoning should be preferred.

¹³ Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (4th edn, Sweet & Maxwell 2021) para 26.100.

¹⁴ Fred Bartenstein Jr, 'The Mutuality Requirement in Res Judicata and Estoppel by Record' (1940) 2 Washington and Lee Law Review 233, 249.

¹⁵ Marvin E Frankel, 'The Search for Truth: An Umpireal View' (1974–75) 123 University of Pennsylvania Law Review 1031, 1035–1041.

¹⁶ Jack Ratliff, 'Offensive Collateral Estoppel and the Option Effect' (1988) 67 Texas Law Review 63, 70.

¹⁷ Garry D Watson, 'Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality' (1990) 69 Canadian Bar Review 623, 634.

¹⁸ *ibid* 638.

had been found guilty of ‘a most wicked murder’, then engaged in ‘gross perjury’ by pleading that they gave false confessions.¹⁹ Lord Denning also used that opportunity to state that ‘[b]eyond doubt, *Hollington v Hewthorn*... was wrongly decided’.²⁰ *Hollington v Hewthorn* was another case that dealt with mutuality in *res judicata*. Lord Denning was the losing counsel in that case, in which the court upheld mutuality’s role.

This paper focuses on the policy-based arguments. While Zuckerman’s argument has doctrinal appeal, it is suggested that the expediency and cost savings on the judicial system that non-mutuality would bring outweighs any doctrinal appeal, especially for defensive *res judicata* cases. There, a plaintiff seeks to relitigate issues that were already decided against her. For offensive *res judicata* cases, meanwhile, this paper advocates for sufficient guardrails that should protect non-parties to the initial proceeding without turning a party from the initial proceeding’s right to a right *in rem*.

IV. PROBLEMS WITH MUTUALITY

Despite the arguments in favour of preserving mutuality, English courts have adopted a non-mutuality-*res-judicata*-by-stealth approach by affixing an abuse of process label to the analysis. It is welcome that the courts realise that the benefits of non-mutuality *res judicata* outweigh the benefits of preserving mutuality. Less welcome is shifting the burden to abuse of process, which is so for two reasons.

A. NO PRINCIPLED BASIS

First, there is no principled reason for doing so. Goff LJ’s criticism of non-mutuality *res judicata* relies on authority that itself merely restates the rule of mutuality without examining its justification. Such authority admittedly came from pre-eminent jurists, to say nothing of Goff LJ’s own reputation. But His Honour’s analysis is left wanting. He begins by citing a commentary by Sir Edward Coke: ‘First, that every estoppel ought to be reciprocal, that is, to binde both parties; and this is the reason, that regularly a stranger shall neither take advantage, nor be bound by the estoppel’.²¹ Goff LJ correctly acknowledges the defect in Sir Edward Coke’s statement—that ‘it is not a reason why estoppels must be mutual, but the consequence of that condition if it exists’.²² Although His Honour noted the ambivalence of that statement, he did not substitute his own rationale for originally adopting the rule in Sir Edward Coke’s time.

Goff LJ then cites *Mills v Cooper* (Diplock LJ), *R v Humphreys* (Viscount Dilhorne), and *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Lord Reid, Lord Guest, and

¹⁹ *Hunter* (n 2) 323–24.

²⁰ *ibid* 320.

²¹ *ibid* 328.

²² *ibid*.

Lord Upjohn) as authority for the reasons for preserving mutuality.²³ In each cited case, however, the jurists merely state the rule. They do not examine *why* the rule exists. An examination of each of these three cases shows the extent to which the courts did not consider mutuality.

In *Mills v Cooper*,²⁴ an information was preferred against a defendant in a criminal proceeding for being a gypsy, under section 127 of the Highways Act 1959, in December 1965. The magistrates' court dismissed the information because there was no evidence to suggest that the defendant was in fact a gypsy. In March 1966, however, the information was re-sworn based on new evidence. On appeal, the question for the Divisional Court was whether this was issue estoppel. The Court upheld the preferring of the information on the March 1966 because, according to the Court '[i]t cannot be said that "once a gypsy always a gypsy"'.²⁵

Importantly, mutuality was not a deciding factor in *Mills*. Diplock LJ did, however, state that one of the differences between *res judicata* in civil proceedings and *autrefois* acquit or *autrefois* convict in criminal proceedings is the requirement for mutuality in *res judicata*.²⁶ His Lordship did not, however, analyse why mutuality should be a requirement for *res judicata* in civil proceedings but not for *autrefois* acquit or *autrefois* convict in criminal proceedings. In fact, his Lordship specifically held that 'it is unnecessary in the present appeal to inquire into the precise limits of the wider application of the rule against double jeopardy to situations in which the pleas of *autrefois* convict and *autrefois* acquit are not strictly available...'²⁷

In *DPP v Humphrys*,²⁸ the defendant was charged with driving a motorcycle with a suspended license. He was acquitted at trial because the prosecution could not prove the driver's identity as being the defendant's. The defendant said during cross-examination that he never drove in 1972. The defendant was then charged with perjury for this statement. The arresting officer from the first trial was the prosecution's witness in the second trial, allowing the officer to give evidence in the second trial about the defendant's identity as the motorcycle driver—that is, the issue from the first trial. The question for the House of Lords was whether this was issue estoppel.

The House held that it was not issue estoppel because the concept does not—and should not—apply to criminal law. According to Viscount Dilhorne, issue estoppel should not apply to criminal matters because, for the defendant in a jury trial, it would be impossible to decide if a jury's acquittal in a first trial was an affirmative finding on an issue or a finding that the Crown failed to discharge its

²³ *ibid* 329–31.

²⁴ *Mills v Cooper* [1967] 2 QB 459 (QB).

²⁵ *ibid* 468.

²⁶ *ibid* 469.

²⁷ *ibid*.

²⁸ *DPP v Humphrys* [1977] AC 1 (HL).

onus of proof.²⁹ Importantly, mutuality was irrelevant to Viscount Dilhorne's finding.

The only points at which Viscount Dilhorne addressed mutuality were to agree with Diplock LJ's finding in *Mills*³⁰ and to say that issue estoppel 'must apply equally to both parties, to the Crown and the defendant, as it does to the parties in civil litigation'.³¹ It is trite that mutuality applies to *autrefois convict* or *autrefois acquit* in criminal proceedings because the parties to criminal litigation (the Crown and the accused) are fixed. Such is not the case in civil litigation. Again, however, like Goff LJ in *Hunter*, Viscount Dilhorne in *Humphreys* adopts Diplock LJ's *ratio* from *Mills* without analysing the requirement for mutuality in civil proceedings.

Finally, in *Carl Zeiss Stiftung v Rayner & Keeler Ltd*, CZS, an East German corporation sued CS, a West German corporation, in England and in West Germany to prevent CS from selling goods in England and West Germany with an identical name to those that CZS sold in those jurisdictions. CS applied before the Federal Supreme Court of West Germany to strike CZS' claim on the grounds of CZS' solicitors not being instructed by an internationally recognised government. CS were successful before the West German court because, according to the Court, CZS was not properly before the Court because its supposed agent—the 'Council of the District of Gera'—was not an internationally recognised government. CS then moved to dismiss the English action on the grounds of *res judicata* based on the West German court's decision.

The House of Lords dismissed the *res judicata* argument, partly because of a lack of mutuality between the West German and English proceedings. Lord Reid, Lord Guest, and Lord Upjohn delivered judgments on this point. Importantly, none of their Lordships analysed why mutuality between the West German and English proceedings were important. Instead, the crux of the analysis on this point focused on whether there was any privity between the Council of the District of Gera in the West German proceedings and the solicitors that CZS instructed in the English proceedings. The closest that their Lordships came to analysing why mutuality is important was to say that a person in a later proceeding must have had 'a community or privity of interest' to a party in an earlier proceeding.³² This, however, was only in the context of parties in an earlier action and their privities in a later action. It did not address the issue of where the parties themselves were the same in both actions. Additionally, justifying mutuality on the grounds of there being 'a community or privity of interest' is subject to the same criticism as Sir Edward Coke's statement that Goff LJ cited in *Hunter*—it is a consequence instead of a reason.

²⁹ *ibid* 20–21.

³⁰ *ibid* 19–20.

³¹ *ibid* 20.

³² *Carl Zeiss* (n 8) 936 (Lord Guest).

B. INVOKING ABUSE OF PROCESS IN NON-ABUSIVE CASES

Once courts started conflating non-mutuality *res judicata* with abuse of process, they exercised their inherent procedural powers to invoke the abuse of process doctrine in non-abusive cases. *Hunter* is a good example of the negative consequence of doing so.

When the parties in *Hunter* argued their case before the House of Lords, Lord Diplock requested that the appellants' counsel direct their submissions towards abuse of process instead of non-mutuality.³³ His Lordship stressed that the case turned on whether Goff LJ's interpretation of abuse of process was correct, and that the disagreement between Goff LJ and Lord Denning at the Court of Appeal was a matter 'not of substance but of semantics'.³⁴

The difference between non-mutuality and abuse of process is more substantive than semantical. Lord Sumption alluded to the difference in *Virgin Atlantic*:

The focus in *Johnson v Gore-Wood* was inevitably on abuse of process because the parties to the two actions were different... *Res judicata* and abuse of process are juridically very different. *Res judicata* is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive.³⁵

The first sentence reflects the judiciary's current view of mutuality. It does so, however, without any doctrinal support. While Lord Sumption then properly distinguishes between *res judicata* and abuse of process based on the latter's requirement for abusive conduct, his Lordship does not explain what constitutes 'abuse', such that a matter would be settled on abuse of process grounds instead of *res judicata*. This is key. As Matthew Dyson and John Randall argue, it is to preclude 'truly abusive claims', where the claim is brought for an 'improper purpose'.³⁶

In *Hunter*, for example, the plaintiffs had both proper and improper purposes in bringing their claim. The plaintiffs had a proper claim against the Home Office because the Home Office acknowledged it was liable to the plaintiffs for the officers' conduct during the interrogations. The Home Office should therefore not

³³ Watson (n 17) 638.

³⁴ *Hunter* (n 3) 540.

³⁵ *Virgin Atlantic* (n 1) [25].

³⁶ Matthew Dyson and John Randall, 'Criminal Convictions and the Civil Courts' (2015) 74 Cambridge Law Journal 78, 101. See also *Crawford Adjustors (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17, [2014] AC 366 [62] (Lord Wilson).

have been able to benefit from a claim struck on abuse of process grounds. The plaintiffs would have then been entitled to damages from the Home Office. Lord Denning sought to preclude this possibility by finding the matter to be non-mutuality *res judicata* by ignoring the plaintiff's purposes. The focus would have strictly been on the issue in dispute in the criminal proceeding and the civil trial. His Lordship held:

[T]he real reason why the claim was struck out was because the self same issue had previously been determined against the party by a court of competent jurisdiction. What is that but issue estoppel?... The truth is that as of the date of those cases the doctrine of issue estoppel had not emerged as a separate doctrine. So the courts found it necessary to put it on "abuse of the process of the court". Now that issue estoppel is fully recognized, it is better to reach the decision on that ground: rather than on the vague phrase "abuse of process of the court". Each doctrine is based on the same considerations and produces the same result.³⁷

Despite Lord Denning's confidence that abuse of process and *res judicata* would produce the same result, they did not in this case. Before the House of Lords, Lord Diplock dismissed the claims against the Home Office *and* the police because his Lordship found the claim against the latter to be improper. The Court found that the plaintiffs, in continuing their action against the police, were indirectly trying to overturn their criminal convictions through a civil procedure, an improper purpose to which abuse of process would have applied.³⁸ It is submitted that to extend the abuse of process doctrine to non-abusive cases, as Lord Diplock did with the plaintiff's claim against the Home Office, is a mistake when it vitiates a claim with a proper purpose. The clear solution would have been to find that cause-of-action estoppel applied to the plaintiff's invalid claim against the police, thereby dismissing it, while allowing the valid claim against the Home Office to continue.

Later cases rely on *Hunter* as authority for invoking abuse of process where *res judicata* does not apply. These cases, however, fail to analyse fully the House of Lords' reasoning in *Hunter* and how it only partially engages with the Court of Appeal's analysis. In *LA Micro Group (UK) Ltd v LA Micro Group Inc*, Sir Christopher Floyd, writing for a unanimous Court of Appeal, held that:

In cases where there is no *res judicata* or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated; see Lord Diplock in *Hunter's case* [1982]

³⁷ *Hunter* (n 2) 322.

³⁸ *Hunter* (n 3) 541. See also Brian Hillard, 'Soldiers of Nothing' (1990) 140 *New Law Journal* 160.

AC 529, Lord Hoffmann in the *Arthur J S Hall case* [2002] 1 AC 615 and Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1. These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in *Hunter's case*. Both or either interest may be engaged.³⁹

Arthur and *Johnson* may be distinguished from *Hunter*. The issue in *Arthur* was whether the law of negligence included ‘advocates’ immunity’ if a court had jurisdiction to dismiss a matter on abuse of process grounds. Mutuality was not before the House in *Arthur* because the same parties were involved in both proceedings. In *Johnson*, the House of Lords applied the *Henderson v Henderson* principle to preclude a solicitors’ firm from raising a defence in an individual’s subsequent proceeding against them for negligence that the solicitors should have raised in that individual’s company’s earlier proceeding against the firm. Although, like *Hunter* at the Court of Appeal, this was a case to which mutuality would have been relevant, unlike *Hunter* at the Court of Appeal, the House did not discuss mutuality in *Johnson*.

V. A PROPOSAL FOR REFORM: NON-MUTUALITY

Removing the mutuality requirement from *res judicata* would bestow significant benefits on parties in later proceedings without unduly affecting the *res judicata*’s doctrinal principles. Whether for defensive or offensive *res judicata*, non-mutuality offers three benefits. First, it would reduce the risk of inconsistent judgments while giving parties their day in court. In *Hunter*, for example, the plaintiffs would have been able to proceed with their claim against the Home Office because it was brought with a proper purpose. Only the claim against the police would have been dismissed on abuse of process grounds.

Second, it would spare a party the cost of litigating an issue that has already been decided. Legal fees in the UK are not cheap. The guideline hourly rates for solicitors published in the White Book’s most recent edition range between £126 to £512.⁴⁰ To put those rates in context, as one Lord Justice of the Court of Appeal acknowledged in a recent decision, a party spending £900,000 in costs for a one-day appeal in the Commercial Court was ‘modest by the standards of commercial cases’.⁴¹ Limiting such costs on parties should be encouraged where the matters to be litigated were already decided in earlier proceedings.

Third, it would protect an already overburdened court system against parties clogging dockets with re-litigation. The average time for an English court to hear a small claim is currently 52 weeks, a 28% increase from 2019, and the wait is

³⁹ *LA Micro Group (UK) Ltd v LA Micro Group Inc* [2021] EWCA Civ 1429, [2022] 1 WLR 336 [44].

⁴⁰ Coulson LJ (ed), *Civil Procedure* (Sweet & Maxwell 2022) para 44SC.31.

⁴¹ *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 466 [7] (Males LJ).

74 weeks for a multi-track claim, up 18% from 2019.⁴² By one estimate, each court day costs the Treasury approximately £2,692.00.⁴³ Courts should welcome any measure that cuts down on expenditure of money for or time, whether for the litigants or the public as a whole, if that measure does not unduly affect a party's rights.

Removing mutuality does not unduly affect a party's rights in defensive cases. As the previous sections explained, English courts will already preclude a party from advancing a claim or submission against a third party. The only problem is they improperly do so under the guise of abuse of process, where there is no abusive element in any party's conduct. A shift to non-mutuality would have the added benefit of redirecting abuse of process' focus to 'abusive' cases.

There are, however, two risks with removing mutuality for offensive *res judicata* specifically. First, without guardrails, a court would prevent a new defendant in a subsequent proceeding from presenting its own case if the plaintiff in the subsequent proceeding prevailed in the earlier proceeding. That would be a step too far. This article therefore recommends adopting a rule like that found in section 11 of the Civil Evidence Act 1968,⁴⁴ except it would apply to all judgments, not just criminal judgments applied in civil proceedings. That is, for offensive *res judicata*, the judgment in the earlier proceeding would be *prima facie* evidence in the subsequent proceeding, subject to the defendant's rebuttal. Such a solution would strike a fair balance between preserving *res judicata*'s doctrinal benefits (lower costs to parties, preservation of judicial resources, and consistent findings) while allowing a defendant who was uninvolved in the earlier proceedings their day in court.

The second risk is the so-called 'wait-and-see' approach that a subsequent plaintiff may use to gain an unfair advantage against a defendant. In *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd*,⁴⁵ for example, two plaintiffs brought separate actions against Oceanus. The allegations were that Oceanus was contractually obligated to each plaintiff to pay for damages pursuant to a shipping contract. Oceanus responded that an insurance agent misrepresented the plaintiffs' financial status to Oceanus. Oceanus sought to have both claims consolidated but failed. It then lost at trial against the first plaintiff. The second plaintiff argued in the subsequent trial that Oceanus could not raise the misrepresentation defence again because it failed in the first trial. The Court, however, held that there was no *res judicata* because it was the second plaintiff's own conduct in opposing consolidation that precipitated Oceanus raising the misrepresentation defence twice.

⁴² Ministry of Justice, 'Civil Justice Statistics Quarterly: October to December 2021' (*Gov.uk*, 3 March 2022) <<https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-october-to-december-2021>> accessed 12 December 2022.

⁴³ The Law Society of England and Wales, 'Cost of a Day in Court—New Analysis by the Law Society' (*The Law Society of England and Wales*, 27 July 2018) <<https://www.lawsociety.org.uk/topics/research/cost-of-day-in-court-new-analysis-by-law-society>> accessed 2 March 2023.

⁴⁴ Civil Evidence Act 1968.

⁴⁵ *Bragg* (n 8).

Courts may curtail this abusive conduct by imposing requirements on both the subsequent plaintiff and the subsequent defendant. For the plaintiff, where she is aware of the earlier action and a court would have been likely to grant consolidation of the earlier and subsequent action had she sued at the time of the earlier action, then the court should require her to do so. This would be keeping in the *Henderson v Henderson*⁴⁶ principle's spirit, which requires a party to present its whole case in the earlier case and, absent special circumstances, precludes that party from raising new arguments about the same matter in a subsequent case. The United States imposes such a condition on plaintiffs.⁴⁷ For the defendant, if a subsequent action was pending at the time of a former action, the subsequent plaintiff should be entitled to rely on non-mutuality *res judicata* if the defendant did not request consolidation in the earlier proceeding.

VI. CONCLUSION

Res judicata is an ancient principle in English law. The mutuality requirement, while newer, is still accepted as settled law. Without any meaningful reform of the law in this area, however, Jeremy Bentham's warnings from the nineteenth century about mutuality's shortcomings would remain as relevant as ever today:

There is reason for saying that a man shall not lose his cause in consequence of the verdict given in a former proceeding to which he was not a party; but there is no reason whatever for saying that he shall not lose his cause in consequence of the verdict in a proceeding to which he was a party, merely because his adversary was not. It is right enough that the verdict obtained by A against B should not bar the claim of a third party, C; but that it should not be evidence in favour of C against B, seems the very height of absurdity (Original emphasis).⁴⁸

An analysis into why the mutuality requirement exists reveals its shortcomings, insofar as the mutuality requirement impedes *res judicata*'s benefits: consistent adjudication, lower costs to parties, and a lesser burden on the legal system. Courts seem to recognise those shortcomings too, which is perhaps why they are so willing to expand the abuse of process doctrine that, as this article argues, properly belong to *res judicata*'s domain. It is especially worrisome that the leading case in this area has now granted courts permission to find abuse of process in matters where there is no 'abusive' conduct. The better approach is therefore to remove the mutuality requirement, subject to protections for offensive *res judicata* positions.

⁴⁶ *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313.

⁴⁷ See, for example, *Parklane Hosiery Co v Shore* 439 US 322 (1979).

⁴⁸ Jeremy Bentham, 'Rationale of Judicial Evidence' in John Bowring (ed), *Works of Jeremy Bentham* (Athlone Press 1843) 171.

The *Rechtsstaat* and its Rule of Law Counterpart: A Recentring

LIONEL SCHOR*

ABSTRACT

The constitutional landscapes in Germany and the United Kingdom are inconceivable without the *Rechtsstaat* and the rule of law respectively. At the same time, the two concepts should not be understood as only existing within their national context. They should, instead, be conceived of as a bridge between the constitutional frameworks of the two countries as they are fundamentally similar in nature. This article takes Meierhenrich's '*Rechtsstaat* versus the Rule of Law', in which he argued that historical, philosophical, and conceptual differences exist between the two concepts, as a starting point. In contrast to his conclusion, this article maintains that Meierhenrich's argument is based on a mischaracterisation of the *Rechtsstaat* concept's historical development and that, in fact, the opposite is the case: both concepts are fundamentally similar. This article guides the reader through the most significant historical reference points of the *Rechtsstaat* and the rule of law and in doing so, analyses the aims that govern both concepts. Regarding the rule of law, it examines the formal and substantive understandings of the concept and how today's understanding of the concept compares with its historical roots. In relation to the *Rechtsstaat*, it analyses its underlying aims and the different phases of its historical development: the concept's substantive origins, the 'formal era', and the modern *Rechtsstaat*. This article focuses especially on the *Rechtsstaat*'s 'formal era' as an important stage in the concept's evolution and in this way corrects the assertion advanced by Meierhenrich that this phase in the *Rechtsstaat*'s development amounted to nothing more than a reactionary episode.

Keywords: rule of law, *rechtsstaat*, legal history, comparative public law

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I. INTRODUCTION

The *Rechtsstaat* and the rule of law are fundamentally similar concepts. An examination of the historical development of both concepts allows for an understanding that they are based on the same foundational aims and core tenets.

This view stands in stark contrast with Jens Meierhenrich's argument that not only semantic but fundamental historical, philosophical, and conceptual differences exist between the two concepts.¹ According to him, conceptions of the *Rechtsstaat* and the rule of law have converged only after the Second World War, which should not lead one to assume that this has always been the case.² As I contend in this article, however, Meierhenrich's argument is based on a fundamental mischaracterisation of the *Rechtsstaat's* historical and conceptual development. Correcting this mischaracterisation can lead to a better understanding of the fundamentally similar nature of the *Rechtsstaat* and the rule of law.

This article is divided into four sections. It starts with a brief summary of the arguments that led Meierhenrich to his conclusion (Section II). The next section outlines the fundamental aims of the English rule of law concept by examining Dicey's definition as well as today's understanding of it (Section III). It then takes a close look at the three phases of the *Rechtsstaat's* historical development: its liberal origins, the 'formal era' and the *Rechtsstaat* of the *Grundgesetz* (German Basic Law) (Section IV). Finally, the final section brings together the findings of the preceding sections to underscore the conceptual continuity in both concepts and the fundamental similarity between the *Rechtsstaat* and the rule of law (Section V).

II. JENS MEIERHENRICH'S REASONING

Meierhenrich's main argument is that the difference between the idea of the *Rechtsstaat* and the rule of law is fundamental and more than merely a variation on a theme. He argues that accounts equating the two concepts ignore historical, philosophical, and conceptual differences that exist between them.³ While he concedes that the 'conceptions of the *Rechtsstaat* and of the rule of law have, for all intents and purposes, converged, a trend that has continued in the twenty-first century', he sees the modern *Rechtsstaat* as something that was crafted in post-war Germany and therefore as an aberration in the concept's historical development.⁴ To support this argument, he submits that the *Rechtsstaat* was 'subject to reinvention from the get-go'.⁵ According to him, the originally liberal *Rechtsstaat* concept was, after the failed revolution of 1848, replaced by a reactionary idea of the *Rechtsstaat* which

¹ Jens Meierhenrich, 'Rechtsstaat versus the Rule of Law' in Jens Meierhenrich and Martin Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021).

² *ibid* 66.

³ *ibid* 39, 40.

⁴ *ibid* 66.

⁵ *ibid* 66.

reduced its role to that of a guarantor of institutional form, with authoritarian legalism being the ‘order of the day’ after 1870.⁶ On the basis of his understanding of the formal *Rechtsstaat* as a reactionary idea, he concludes that Heller’s ‘social *Rechtsstaat*’, which he crafted during the last years of the Weimar republic, and the *Rechtsstaat* as it was set out in the post-war *Grundgesetz*, completely invented the concept anew.⁷ He submits that, overall, the *Rechtsstaat* concept’s ‘colourful history’ makes it historically, philosophically, and conceptually problematic to reduce the idea of the *Rechtsstaat* to that of the rule of law.⁸

With these points in mind, the next sections examine the foundations of the English rule of law concept as well as the historical development of the *Rechtsstaat*, focusing in particular on the argument that the liberal *Rechtsstaat* idea was replaced with a reactionary concept in the aftermath of the 1848 revolution.

III. THE ENGLISH RULE OF LAW CONCEPT

Despite numerous attempts to lend the concept analytical precision, today’s discourse on the rule of law revolves around an idea with ambiguous contents. In light of this ambiguity, a number of public lawyers ‘have apparently abandoned even the attempt to understand and restate the rule of law doctrine, thinking it futile and unrewarding’.⁹ Judith Shklar even went as far as asserting that the concept has become entirely devoid of meaning owing to its over-use and adoption as a rhetorical tool for political point-scoring on all sides.¹⁰ Yet, the concept remains a central constitutional principle of the United Kingdom and carries tremendous intellectual force. I seek to edge closer to a better understanding of the concept by way of exploring its foundational aims, historical reference points and different conceptions.

The English rule of law concept has been described as ‘an amalgam of standards, expectations and, aspirations: it encompasses traditional ideas about individual liberty and natural justice, and, more generally, ideas about the requirements of justice and fairness in the relations between government and governed’.¹¹ At the core of this ‘amalgam’ stands the principle that ‘all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts’, as Lord Bingham has formulated.¹² In this way, the rule of law ‘constitutes a shield against tyranny or arbitrary rule’ as

⁶ Jens Meierhenrich, *The Remnants of the Rechtsstaat: An Ethnography of Nazi Law* (Oxford University Press 2018) 79, 81.

⁷ Meierhenrich (n 6) 86; Meierhenrich (n 1) 53.

⁸ Meierhenrich (n 1) 41, 66.

⁹ RW Blackburn, ‘Dicey and the Teaching of Public Law’ [1985] Public Law 679, 692–3.

¹⁰ Judith Shklar, ‘Political Theory and The Rule of Law’ in Allan C Hutchinson and Patrick Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell 1987) 1.

¹¹ Trevor RS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford University Press 1994) 21.

¹² Tom Bingham, *The Rule of Law* (Penguin 2010) 8.

political rulers and their agents must exercise power under legal constraints, respecting accepted constitutional limits.¹³ This core principle gives expression to John Locke's famous assertion that 'wherever law ends, tyranny begins'.¹⁴

Aside from Locke, the concept owes much to AV Dicey, who introduced it into English constitutional discourse.¹⁵ Dicey identified three elements of the rule of law. The first element of the rule of law, he stated, is the 'absolute supremacy... of regular law as opposed to the influence of arbitrary power'. The rule of law, secondly, contains equality before the law. The third element is that the unwritten constitution in the United Kingdom can be said to be pervaded by the rule of law because civil liberties are a result of judicial decisions, instead of flowing from a written constitution.¹⁶

Dicey's fundamentally liberal understanding of the rule of law is characterised by formal requirements intended to protect individual liberty and guarantee equality before the law. Dicey went further, however, as he, with his third element, tied the rule of law concept directly to the particularities of English constitutional history, suggesting that the rule of law is a product of the common law tradition.¹⁷ An understanding of the rule of law as a product of the common law tradition would run counter to the assertion that the rule of law and the *Rechtsstaat* are fundamentally similar concepts. It has, however, been identified early on that Dicey has overstated the link between the rule of law and the English common law tradition. By 1935, the rule of law had been described as 'in no way peculiar to this country' in an influential textbook.¹⁸ In more contemporary discussions of the rule of law, Dicey is similarly seen as having 'no doubt... exaggerated the merits of the British version of the doctrine, at the expense of other Western democracies'.¹⁹ Judith Shklar went further and maintained that Dicey's rule of law concept was 'trivialised as the peculiar patrimony of one and only one national order', leading her to state that his definition amounted to an 'unfortunate outburst of Anglo-Saxon parochialism'.²⁰ While Dicey's formulation of an inseverable connection between the rule of law and the English common law tradition was exaggerated, his definition was influential for the development of the concept. To this day, the great majority of expositions on the rule of law start with Dicey's definition even though 'the constitutional law of [today] differs in many respects from that of 1885'.²¹

The discourse on the rule of law has, even though Dicey's definition might serve as a starting point, evolved since the late 19th century. Today, a fundamental

¹³ Trevor RS Allan, 'Rule of law (Rechtsstaat)', *Routledge Encyclopedia of Philosophy* <www.rep.routledge.com/articles/thematic/rule-of-law-rechtsstaat/v-1> accessed 6 February 2023.

¹⁴ John Locke, *Two Treatises of Government* (Peter Laslett ed, Cambridge University Press 1988) 400.

¹⁵ Martin Loughlin, *Foundations of Public Law* (Oxford University Press 2010) 315.

¹⁶ Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915) 198–199; Constitution Committee, *Constitution—Sixth Report* (HL 2006–07) Appendix 5.

¹⁷ Loughlin (n 15) 316.

¹⁸ ECS Wade and GG Phillips, *Constitutional Law* (2nd edn, Longmans 1935) 102.

¹⁹ Allan (n 11) 47.

²⁰ Shklar (n 10) 5, 6.

²¹ Emlyn CS Wade and G Godfrey Phillips, *Constitutional Law* (6th edn, Longmans 1960) 59.

distinction is made between formal and substantive understandings of the rule of law. Formal conceptions confine the rule of law to formal and procedural aspects of legality.²² They focus on the manner in which the law was declared (i.e., in a properly authorised manner and by a properly authorised person), the clarity of the norm and the temporal aspect of the norm (i.e., whether it is retrospective or prospective).²³ Lon Fuller attempted to provide clarity as to what the formal elements refer and spelled out eight requirements: laws should be (1) general, (2) publicly promulgated, (3) prospective, (4) intelligible, (5) consistent, (6) practicable, (7) not too frequently changeable, and (8) congruent with the behaviour of officials.²⁴ Joseph Raz, another influential proponent of a formal understanding of the rule of law, maintained that the rule of law does not place substantive limits on the content of the law by only governing the manner in which government may pursue its ends.²⁵ This line of argument led him to the conclusion that the rule of law is morally neutral and does not have to exist within a specific political system, for example a democratic one.²⁶

Proponents of a substantive understanding, on the other hand, incorporate the formal elements of rule of law into their understanding but in addition explicitly include substantive elements. The substantive elements frequently concern the inclusion of protections of individual rights within the rule of law framework. In view of this focus on the protection of individual rights, Ronald Dworkin termed the substantive understanding the ‘rights conception’. He described that this conception assumes that citizens have moral rights and duties with respect to each other and political rights against the state. The conception insists that these rights are recognized in positive law so that they might be enforced. The rule of law, under this definition, does not distinguish between the rule of law and substantive justice but requires that the ‘rules in the book capture and enforce moral rights’.²⁷ Similar to the rights conception is Tom Bingham’s account of a substantive understanding. His definition of the rule of law rests upon eight points and includes the condition that ‘the law must afford adequate protection of fundamental human rights’.²⁸ Bingham stated that while he recognises ‘the logical force in Professor Raz’s contention’, he ‘would roundly reject it in favour of a “thick” definition, embracing the protection of human rights within its scope’.²⁹ The key distinction between both understandings is, therefore, whether the rule of law is a constitutional principle that exists alongside other constitutional principles, such as the

²² Jeremy Waldron, ‘The Rule of Law as an Essentially Contested Concept’ in Jens Meierhenrich and Martin Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021) 123.

²³ Paul Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] Public Law 467, 467.

²⁴ Lon L. Fuller, *The Morality of Law* (Yale University Press 1964) 39.

²⁵ Joseph Raz, ‘The Rule of Law and its Virtue’ (1977) 93 *Law Quarterly Review* 195, 197.

²⁶ *ibid.* 196.

²⁷ Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 11–12.

²⁸ Bingham (n 12) 66.

²⁹ *ibid.* 67.

protection of fundamental rights, or whether it includes such principles within its scope.

No definitive conclusion has been reached as to whether the United Kingdom's constitution today includes a substantive or formal rule of law understanding. Tom Bingham concedes that his assertion concerning the inclusion of the requirement to afford adequate protection of fundamental human rights 'would not be universally accepted as embraced within the rule of law'.³⁰ At the same time, fundamental rights and civil liberties are afforded robust protection by the judiciary, especially after the introduction of the Human Rights Act 1998, whether this requirement is included within the scope of the rule of law or not. The rule of law, furthermore, takes a central place within the UK's constitution, as evidenced by judicial dicta suggesting that the 'rule of law is the ultimate controlling factor upon which our constitution is based'.³¹

It might be counterintuitive to observe that the rule of law is a cornerstone of the British constitutional landscape, while disagreement remains around whether it includes substantive elements within its scope. This predicament can be settled, however, when the rule of law is considered in light of its underlying aims. Formal and substantive understandings of the concept are both based on the aim of safeguarding individual autonomy and securing the enjoyment of personal liberty through the rule of law's application. In this way, the foundation of both conceptions is indeed substantive; including, as outlined, ideas of moral autonomy and the respect for the individual.³² This fundamental similarity of both conceptions explains how the concept can be such an important constitutional principle even though disagreement lingers as to how its aims can be best achieved. Focusing on the concept's aims, furthermore, allows for an understanding as to why modern rule-of-law thinking is still influenced by Dicey's definition. His definition was centred on the same aims that are still informing the discussion around the concept today. This historical continuity is central to the concept of the rule of law, and it is something that the rule of law shares with its *Rechtsstaat* counterpart, as the next section demonstrates.

IV. THE GERMAN *RECHTSSTAAT* CONCEPT

A. KANT'S INFLUENCE ON THE *RECHTSSTAAT*

The combination of the words *Recht* and *Staat* to form *Rechtsstaat* have been introduced into the political and constitutional discussion by Robert von Mohl in his

³⁰ *ibid* 136.

³¹ *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868 [51].

³² Allan (n 11) 28, 39.

Staatsrecht des Königreichs Württemberg.³³ The ‘intellectual foundations’ of the *Rechtsstaat*, however, lie in Immanuel Kant’s *Rechtslehre* (Doctrine of Right).³⁴

At the centre of Kant’s *Rechtslehre* stands the *rechtlicher Zustand*.³⁵ Byrd and Hruschka translate the *rechtlicher Zustand* as ‘juridical state’ owing to its linguistic proximity to *status iuridicus* which Kant uses elsewhere.³⁶ The term *status iuridicus* is not only linguistically intertwined with the word *Rechtsstaat*—a disciple of Kant’s, Johann William Petersen, invented the term ‘*Rechtsstaat*’ as a direct translation of it, expressly referring to Kant’s theory—but is also the source of the idea behind the *Rechtsstaat*.³⁷ According to Kant, individuals possess rights by virtue of being human beings.³⁸ As these rights exist *a priori*, individuals already possess them in a state of nature, a state in which there is no distributive justice.³⁹ In this state of nature, however, these rights are not secured and, in this way, have only provisional character.⁴⁰ In the juridical state, on the other hand, individual rights can be secured because there is, in contrast to the natural state, a judge who may reach a final binding decision when rights are in dispute and a state power to enforce the judge’s decision.⁴¹ Kant defined the juridical state as ‘the relationship among human beings which contains the conditions solely under which everyone can enjoy [“*teilhaftig werden kann*”] his rights’.⁴² Thus, Kant’s idea behind the juridical state is to make it possible for everyone not only to *have* subjective rights (which is also the case in the natural state) but to be able to *exercise* them.⁴³ It has its purpose in safeguarding the liberty and property of its citizens and guaranteeing formal equality of opportunity.⁴⁴

When it comes to the institutional structure of the juridical state (in other words, how the juridical state can be realised and how a nation-state can become a *Rechtsstaat*), the *Gesetz* (law as statute) is of central importance. It is ‘the axis around which the constitution of [Kant’s] *Rechtsstaat* revolves’.⁴⁵ Kant, furthermore, considers the idea of separation of powers to be essential for the functioning of his *Rechtsstaat*: it is the legislature that must authorise all acts that change, enforce, or demarcate rights, the executive that must enforce rights in accordance

³³ Robert von Mohl, *Das Staatsrecht des Königreichs Württemberg*, vol 1 (Laupp 1829) 8.

³⁴ Roman Herzog, ‘Art. 20 und die allgemeine Rechtsstaatlichkeit’ in G Dürig and others (eds), *Grundgesetz-Kommentar* (CH Beck 2021) 3. See also Immanuel Kant, *Die Metaphysik der Sitten, Erster Theil: Metaphysische Anfangsgründe der Rechtslehre* (Nicolovius 1797).

³⁵ Joachim Hruschka, *Kant und der Rechtsstaat und andere Essays zu Kants Rechtslehre und Ethik* (Karl Alber 2015) 15.

³⁶ Sharon Byrd and Joachim Hruschka, *Kant’s Doctrine of Right* (Cambridge University Press 2010) 25.

³⁷ *ibid* 15, 25.

³⁸ *ibid* 27.

³⁹ *ibid* 23.

⁴⁰ Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Harvard University Press 2009) 165.

⁴¹ Kant (n 34) 312–313; Byrd and Hruschka (n 36) 26.

⁴² Kant (n 34) 305, 306.

⁴³ Hruschka (n 35) 17.

⁴⁴ Wolfgang Böckenförde, *State, Society, and Liberty: Studies in Political Theory and Constitutional Law* (JA Underwood tr, St Martin’s Press 1991) 51; Ripstein (n 40) 268.

⁴⁵ Böckenförde (n 44) 52.

with law and the judiciary that must decide disputes and on remedies in accordance with law, with the laws flowing from the will of the citizens.⁴⁶ With this institutional framework, Kant's idea of the juridical state as a 'coming together of men under laws' can be realised.⁴⁷

The fundamentally liberal framework of the Kantian *Rechtsstaat*—based on the legality of state action and the protection of individual autonomy as the core of the state's *ratio*⁴⁸—remains visible and continuous throughout the *Rechtsstaat's* historical development up until today, as the next sections demonstrate.

B. ROBERT VON MOHL AND THE LIBERAL *RECHTSSTAAT*

Robert von Mohl introduced the concept of the *Rechtsstaat* into constitutional and political discussion.⁴⁹ His concept stands for the liberal and substantive *Rechtsstaat* like no other and was profoundly influential for the development of today's concept.

According to Mohl, a *Rechtsstaat* is a certain type of state, specifically a state governed by the law of reason.⁵⁰ When referring to a 'state', Mohl is characterising a type of nation-state and not a conceptual state of being. His starting point, therefore, distinguishes his understanding from Kant's juridical state. The 'sense and goal' of the state which Mohl describes is 'the protection of the citizen against state authority'.⁵¹ The highest order in the *Rechtsstaat*, therefore, is the citizen's liberty.⁵² Mohl's *Rechtsstaat* is comprised of three elements.⁵³ Firstly, the point of reference of the political order is the free, equal, and self-determined individual and not any kind of supra-personal idea.⁵⁴ Secondly, the function of the state is the safeguarding of individual liberty and individual self-fulfilment.⁵⁵ Thirdly, the organisation of the state should be in accordance with the principles of reason which includes the recognition of fundamental civil rights and equality before the law, the existence of an independent judiciary, the rule of law (in the form of statutes) and some form of parliament that can influence the legislative process.⁵⁶ As part of this third organisational element, the constitution of Mohl's *Rechtsstaat* revolves around the *Gesetz* (law as statute) which, according to him, is a general norm that comes into

⁴⁶ Carsten Bäcker, *Gerechtigkeit im Rechtsstaat* (Mohr Siebeck 2015) 134; Ripstein (n 40) 173; Kant (n 34) 313.

⁴⁷ Kant (n 34) 313.

⁴⁸ Bodo Pieroth, 'Historische Etappen des Rechtsstaats in Deutschland' (2011) 33 *Juristische Ausbildung* 729, 730.

⁴⁹ Mohl (n 33) 8.

⁵⁰ Böckenförde (n 44) 49.

⁵¹ Carl Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr, Duke University Press 2008) 170.

⁵² Robert von Mohl, *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates*, vol 1 (Laupp 1832) 5.

⁵³ Böckenförde (n 44) 49.

⁵⁴ Mohl (n 33) 9; Böckenförde (n 44) 49.

⁵⁵ Mohl (n 33) 8ff; Böckenförde (n 44) 49.

⁵⁶ Mohl (n 33) 18, 23, 268ff, 453, 451ff, 529ff; Böckenförde (n 44) 50.

existence with the consent of parliament and preceded by public discussion.⁵⁷ Individual autonomy, therefore, is the ultimate source of justification of the *Rechtsstaat*. It is clear from Mohl's tripartite arrangement, which entails the creation of structures to realise the core tenet of liberty, that his version of the *Rechtsstaat* was based on the Kantian attempt to 'reconcile the establishment of order with the maintenance of freedom' through the medium of the law.⁵⁸

Mohl's *Rechtsstaat* idea is, in spite of suggestions to the contrary,⁵⁹ a radical concept as he advocated for an overhaul of the organisation and function of the state. As part of his *Rechtsstaat* concept, formal and substantive elements come together to establish a new type of state. When his *Rechtsstaat* is compared with Dicey's rule of law understanding, we find that both concepts have very similar foundational aims—guaranteeing individual liberty and equality before the law through the rule of law instead of arbitrary rule—but differ when it comes to the elements of Mohl's *Rechtsstaat* that are related to the political organisation of the state. Mohl's *Rechtsstaat* concept is central to the concept's subsequent evolution. Not only can today's *Rechtsstaat* be traced back directly to Mohl's idea, but his understanding also highlights that the aims the *Rechtsstaat* is based on are shared with its rule of law counterpart.

To understand the *Rechtsstaat's* subsequent development, it is important to be aware of the interplay between the legal and the political realm as part of Mohl's *Rechtsstaat*. His concept was embedded in a programme of political liberalism. This connection between legal discourse and the political realm was, primarily, owing to the fact that the academic treatment of public law itself was 'highly politicised' in the first half of the nineteenth century, which was 'unavoidable' at the time.⁶⁰ Mohl's *Rechtsstaat* was the political *Leitideal* (guiding principle) of constitutional liberalism, and even though Mohl insisted that his *Rechtsstaat* concept is not tied to a specific form of government, it could best be realised in a constitutional monarchy.⁶¹ This explicit politicisation of constitutional law led to the shift in focus towards the formal elements of the *Rechtsstaat*.

C. THE 'FORMAL ERA'

The substantive *Rechtsstaat* concept was highly influential in the years before the failed 1848 revolution and influenced both constitutional life and political thinking.⁶² After 1848, *Rechtsstaat* thinking entered a new phase, with the focus on the formal elements of the concept.⁶³ The next section highlights the continuity in

⁵⁷ Mohl (n 33) 36–37; Böckenförde (n 44) 52.

⁵⁸ Loughlin (n 15) 318.

⁵⁹ Meierhenrich (n 6) 78.

⁶⁰ Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland. Band 2: Staatsrechtslehre und Verwaltungswissenschaft 1800–1914* (CH Beck 1992) 119.

⁶¹ Katharina Sobotta, *Das Prinzip Rechtsstaat* (Mohr Siebeck 1997) 311; Bäcker (n 46) 139.

⁶² Böckenförde (n 44) 53.

⁶³ *ibid.*

Rechtsstaat thinking during the ‘formal era’ and shows that it would be inaccurate to describe the formal *Rechtsstaat* as nothing more than a ‘reactionary’⁶⁴ iteration. The examination focuses on the two most influential *Rechtsstaat* thinkers of the postrevolutionary era: Friedrich Julius Stahl and Rudolf von Gneist.

(i) *The Content of Friedrich Julius Stahl’s Rechtsstaat Concept*

Stahl’s definition of the *Rechtsstaat* concept is widely accepted as the encapsulation of the formal *Rechtsstaat* understanding *par excellence*.⁶⁵ His definition starts with a statement that makes the *Rechtsstaat* out to be a historical necessity: ‘[t]he state shall be a *Rechtsstaat*; that is the answer, and it is also the very evolutionary impulse of the modern age’.⁶⁶ Outlining the objective of the *Rechtsstaat*, Stahl described that it should ‘precisely determine and unswervingly secure the paths and limits of [the state’s] activity as well as the free spheres of its citizens in the manner of the law’.⁶⁷ Furthermore, it should not ‘implement moral ideals further than benefits the legal sphere’ and only determines ‘the manner of realising’ the objectives and substance of the state and not these objectives in themselves.⁶⁸ Stahl directly contrasted his understanding to the liberal *Rechtsstaat* understanding by no longer describing it as a type of state but rather as a formal element that, divorced it from political ends, restrains the political ruling power.⁶⁹

The slashing of the concept’s explicitly political (and substantive) elements should not be misunderstood as leaving merely a reactionary version, however. While Stahl’s *Rechtsstaat* is ‘apolitical’ to the extent that it restrains the political ruling power of whatever kind,⁷⁰ his definition remains attached to the central aim of a liberal *Rechtsstaat* idea: the idea that state actors can only act in the limits provided by the law in order to protect individual liberty. The connection of Stahl’s *Rechtsstaat* to liberal core of the concept does not align with Meierhenrich’s argument that ‘law and liberty, this hallmark of the liberal variant of the *Rechtsstaat*, was pushed to the margins of legal and political thought’ in postrevolutionary Germany.⁷¹ That his argument cannot stand becomes even clearer when the material features of Stahl’s *Rechtsstaat* and the political environment that provided the setting for the *Rechtsstaat*’s shift to a greater focus on its formal elements are considered.

⁶⁴ Meierhenrich (n 1) 58.

⁶⁵ Bäcker (n 46) 140.

⁶⁶ Friedrich Julius Stahl, *Rechts- und Staatslehre auf der Grundlage christlicher Weltanschauung. Zweite Abteilung: Die Staatslehre und die Principien des Staatsrechts* (5th edn, Mohr 1878) 137ff.

⁶⁷ *ibid.*

⁶⁸ *ibid.*

⁶⁹ Böckenförde (n 44) 54.

⁷⁰ *ibid.* 54.

⁷¹ Meierhenrich (n 1) 58.

(a) Material features of Stahl's *Rechtsstaat*

Stahl has opted for a *Rechtsstaat* concept that appears disconnected from moral ideals. According to him, those legal norms that have been passed by the constitutionally established state institutions are legally binding and enforceable, even if they might seem to go beyond the limit of reason.⁷² His focus on the procedural aspects rather than the content of laws marks an explicit repudiation of the substantive *Rechtsstaat* that aimed to create a state governed by the law of reason. Yet, even under his definition, state authorities do not enjoy completely unfettered powers to pass laws. While his *Rechtsstaat* concept contains no formal limits to the ability of the state to pass laws, Stahl's definition accepts that there are material limits.⁷³ A state that ignores the existence of a 'higher order' which exists 'independently of the state' would be an absolutist state.⁷⁴ The core of this 'higher order' is attacked when state actors, for example, force a citizen to practice a certain religion or do a certain job.⁷⁵ It follows that the law is independent of outside influences, such as morals, religion, or public opinion, only if one takes an internal view of the legal system. This is the case as a citizen could not seek redress in court if state authorities exceed the material limits.⁷⁶ Once the state is considered from a philosophical perspective, however, it becomes clear that the law is founded on supra-positive norms (which Stahl calls the 'higher order') and which the law is in constant interaction with.⁷⁷ Therefore, it is not entirely accurate to decry Stahl's *Rechtsstaat* as nothing more than a 'proceduralist' account, as Meierhenrich has done.⁷⁸ His definition should instead be seen as a development of the *Rechtsstaat* concept which focuses on the concept's formal elements while being embedded in a larger philosophical idea. Furthermore, the focus on the formal elements is itself based on a substantive foundation as it is aimed at protecting individual liberty. The rejection of the liberal political programme behind the substantive *Rechtsstaat* does not alter the fact that Stahl's *Rechtsstaat* was based on a fundamentally liberal idea concerning the environment the concept was intended to create.

(b) The political environment after 1848 and liberal continuity in the formal *Rechtsstaat*

Stahl's definition was met with general recognition and accepted as expressing the essence of the *Rechtsstaat*, with Gneist declaring that every opponent of

⁷² Friedrich Julius Stahl, *Die Philosophie des Rechts* (2nd edn, Mohr 1847) 117–118, 155.

⁷³ Sobotta (n 61) 323.

⁷⁴ Stahl (n 72) 155, 157.

⁷⁵ *ibid* 156.

⁷⁶ *ibid* 156ff.

⁷⁷ Sobotta (n 61) 334ff.

⁷⁸ Meierhenrich (n 1) 58.

Stahl's views could 'affirm' this principle 'verbatim'.⁷⁹ Gneist's declaration of a consensus around Stahl's definition is surprising as the *Rechtsstaat* was central to liberals' politics before 1848 and Stahl was a conservative thinker. Once the constitutional and political environment is considered, however, it is possible to see that the formal *Rechtsstaat* developed out of the substantive *Rechtsstaat* idea instead of the being a reactionary reinvention of it.

The *Rechtsstaat* had, in the years leading up to the 1848 revolution, often been used as a synonym for a constitutional state and one that protected fundamental rights.⁸⁰ At the same time, even though a liberal nation-state did not materialise after the 1848 revolution, constitutionalism 'had already carried the day' throughout Germany.⁸¹ Prussia, for example, was for the first time in its history a constitutional state with an elected parliament which marked a completely new starting point for the political and constitutional developments in the Prussian state.⁸² The existence of a constitutional state led to the realisation of many demands that were inherent to the original substantive *Rechtsstaat* concept, for example the guarantee of civil liberty in most of its manifestations, equality before the law, independence of the judiciary and the organisation of criminal procedure.⁸³ The existence and importance of a constitutional state was broadly accepted and even conservative thinkers, especially Stahl, opposed Friedrich Wilhelm IV's plan to abolish the constitution and parliament again after 1849 with great determination (and in the end successfully).⁸⁴ Furthermore, even though the subject of fundamental rights was left 'trauma-stricken' as a result of the failed the *Paulskirchenverfassung* (Frankfurt Constitution) of 1849, many demands connected to fundamental rights, for example freedom of movement or equality of all religious groups, were fulfilled by the legislature.⁸⁵ Many aspects of the substantive, pre-1848, *Rechtsstaat* idea had, therefore, already achieved constitutional protection.

The post-1848 *Rechtsstaat* can be seen as part of a political compromise between moderate conservatives and liberals.⁸⁶ This compromise led to the separation of the *Rechtsstaat's* formal and substantive elements. A state could be a *Rechtsstaat* without guaranteeing fundamental rights. But it was a *Rechtsstaat* that, while insisting on its formal elements, remained based on a substantive foundation.

⁷⁹ Rudolf von Gneist, *Der Rechtsstaat* (Julius Springer 1872) 60; Böckenförde (n 44) 54.

⁸⁰ Michael Stolleis, 'Rechtsstaat' in Wolfgang Stämmler, Adalbert Erler, and Albrecht Cordes (eds), *Handwörterbuch zur deutschen Rechtsgeschichte*, vol 4 (Erich Schmidt 1990) 369.

⁸¹ Böckenförde (n 44) 54.

⁸² Christopher Clark, *Preußen. Aufstieg und Niedergang. 1600–1947* (Richard Barth, Norbert Juraschitz, and Thomas Pfeiffer trs, 2nd edn, Deutsche Verlags-Anstalt 2007) 574.

⁸³ Böckenförde (n 44) 54.

⁸⁴ Hans-Christof Kraus 'Nur Reaktion und Reichsgründung? Ein neuer Blick auf Preußens Entwicklung 1850 bis 1871' in Wolfgang Neugebauer (ed), *Oppenheim-Vorlesungen zur Geschichte Preußens: an der Humboldt-Universität zu Berlin und der Berlin-Brandenburgischen Akademie der Wissenschaften* (Duncker & Humblot 2014) 229.

⁸⁵ Stolleis (n 80) 371ff.

⁸⁶ *ibid* 155.

The substantive foundation of the formal *Rechtsstaat* fits neatly into Nicholas Barber's argument around linguistic precision when it comes to characterising the rule of law and the *Rechtsstaat*. He put forward that it would be better to characterise the different conceptions of the *Rechtsstaat* and the rule of law as 'legalistic and non-legalistic' rather than as formal and material. This linguistic distinction is important, he argued, as 'legalistic models of these concepts may contain substantive demands, but these demands relate to the legal process and to the form that rules ought to take' while 'non-legalistic conceptions also include claims that are not directly related to the legal process, such as, for example, rights to freedom of expression and autonomy'.⁸⁷ We find this distinction in Stahl's *Rechtsstaat*. He adopted the existing elements of the concept that relate to the legal process, and which stand on a liberal and substantive footing themselves. He, however, rejected liberal demands around the incorporation of political liberties and active citizenship under the *Rechtsstaat* heading.⁸⁸ This *Rechtsstaat* understanding is not dissimilar to the rule of law understandings advocated for by Dicey and Raz and is not merely a reactionary concept.

The failure to acknowledge the liberal and substantive foundation of Stahl's formal *Rechtsstaat* is where the confusion as to the role of his understanding in the concept's historical development emanates from. His idea should be understood as a shift of focus towards the legalistic elements of the concept and not as a reactionary reinvention. The understanding of the Stahl's *Rechtsstaat* as a stage in the concept's evolution explains why conservatives and liberals were able to agree on his *Rechtsstaat* after 1848.

(ii) *Gneist's Rechtsstaat*

(a) Content of Gneist's *Rechtsstaat*

Gneist expressly takes up Stahl's definition but pours his *Rechtsstaat* concept into a very particular institutional form.⁸⁹ His understanding of the *Rechtsstaat* is based on three fundamental ideas. It means, firstly, 'government in accordance with laws' in the way that laws constitute the parameters and limits of an executive that is able to act on its own authority. It, secondly, refers to an 'organisational framework' for the administration according to the principle of 'self-government'.⁹⁰ He understands this idea of self-government not as the state freely administering its affairs but as the fulfilment of local governmental functions by society regulating itself through offices of state in accordance with state laws.⁹¹ It

⁸⁷ Nicholas Barber, 'The Rechtsstaat and the Rule of Law' (2003) 53 *University of Toronto Law Journal* 443, 445.

⁸⁸ Stolleis (n 80) 371.

⁸⁹ Rudolf von Gneist, *Der Rechtsstaat und die Verwaltungsgerichte in Deutschland* (2nd edn, Julius Springer 1879) 33; Böckenförde (n 44) 55.

⁹⁰ Böckenförde (n 44) 56.

⁹¹ Gneist (n 89) 286ff; Böckenförde (n 44) 56.

is, thus, aimed at political co-responsibility, at reconciling democratic participation and executive rule.⁹² His *Rechtsstaat*, finally, refers to an independent administrative jurisdiction that exercises the necessary control of the administration through a procedure that is locally based and close to the matter in question.⁹³ Gneist imagined that his ideas about the *Rechtsstaat* could be realised through permanent administrative laws, the reform of local government and the creation of independent administrative courts.⁹⁴

We find that Gneist's *Rechtsstaat* concept is closely tied to the realm of administrative law. The connection of the concept to the realm of administrative law is striking since the *Rechtsstaat* had before only been considered as a concept at the heart of constitutional law. To gain a better understanding of the ties between his *Rechtsstaat* and its substantive and politically liberal origins, it is valuable to trace the political environment in which his ideas developed.

(b) The 'consolidation' of the *Rechtsstaat*

Gneist is often mentioned in one breath with the politically conservative Stahl when the development of the *Rechtsstaat* is traced.⁹⁵ Yet, his own career can throw an interesting light onto the relationship between political liberals and the emergence of the depoliticised *Rechtsstaat* idea. A young Gneist took an active role during the revolutionary events of 1848/49, arguing for the rights of junior staff within the University of Berlin and, as an elected member of the Berlin City Council, for a constitutional arrangement which respected the rights of both crown and parliament. After the revolution failed, he was under police surveillance and had to wait ten years to secure a full professorship.⁹⁶ Gneist himself, in a letter to Robert von Mohl in 1860, described the failed revolution as a 'deep break in our political consciousness'.⁹⁷ This impact of the failed revolution helps to explain the desire to strengthen the liberal demands that had already been secured.

In the decades after the revolution, Gneist and the majority of political liberals focused on the 'consolidation' of the *Rechtsstaat* to secure and protect individual rights.⁹⁸ To achieve this goal, they concentrated mostly on the reform of administrative law and the administrative courts to 'enforce [this consolidation] on the long way down to the lowest administrative authority'.⁹⁹ Focusing on reform of administrative law was not a new strategy; it had been a priority of political

⁹² Stolleis (n 80) 386.

⁹³ Gneist (n 89) 270ff.

⁹⁴ Böckenförde (n 44) 56.

⁹⁵ Cf Meierhenrich (n 6) 79.

⁹⁶ Frank Lorenz Müller, 'Before "the West": Rudolf von Gneist's English Utopia' in Riccardo Bavaj and Martina Steber (eds), *Germany and 'The West': The History of a Modern Concept* (Berghan Books 2015) 157; Stolleis (n 80) 385.

⁹⁷ Erich Hahn, 'Gneist and the Prussian *Rechtsstaat*: 1862–78' (1977) 49 *Journal of Modern History* 1361, 1363.

⁹⁸ Stolleis (n 80) 388.

⁹⁹ *ibid* 382.

liberals since the start of the nineteenth century and was included in the *Paulskirchenverfassung* (Frankfurt Constitution) of 1849.¹⁰⁰ After 1848/49, it was taken up as the liberals' main project to secure the achievements connected to the *Rechtsstaat*, with Gneist spearheading this movement which culminated in the establishment of independent administrative courts.¹⁰¹ The focus on administrative law reform to protect individual rights tells a story about the nature of *Rechtsstaat* thinking in Germany at this time. The concept was not understood as a synonym for constitutionalism anymore, as it had been before 1848, but it was also not merely a reactionary shadow of the concept's substantive origins. The *Rechtsstaat* was now accepted as one constitutional principle among others which stood on substantive foundations and was aimed at protecting the liberty of all citizens.

Gneist's own role during the so-called *Preussischer Verfassungskonflikt* (constitutional conflict, 1862–1866) emphasises the substantive foundations of the formal *Rechtsstaat*. The conflict was caused by the refusal of the (liberal-dominated) Prussian parliament to provide the funds for Wilhelm I's proposed improvement of the army. At issue was the question of who had the right to determine the army's character.¹⁰² Gneist rejected the execution of the army budget, arguing that it was not sanctioned by statute.¹⁰³ When Otto von Bismarck (Prussia's Prime Minister) asserted that a court could not be allowed to add to the constitution by ruling on the army reform, Gneist replied that every law, and above all the constitution, was useless unless it could be enforced through a court.¹⁰⁴ Even though Bismarck was ultimately successful—coming up with the *Lückentheorie*, or gap theory, which rested on the argument that the constitution left a gap—this conflict shows that the post-1848 legalistic *Rechtsstaat* was a concept that put the rule of law (in contrast to arbitrary rule) at its centre. It did not leave a proceduralist concept, devoid of all content, but rather a central constitutional principle.

(c) The *Rechtsstaat* as a two-piece puzzle

The *Rechtsstaat*, like its rule of law counterpart, can be understood as a two-piece puzzle. One piece of the puzzle is the formal (or legalistic) side of the concept, with the substantive (or non-legalistic) side of the concept constituting the other piece. The failed 1848 revolution caused the puzzle to break apart, creating the depoliticised *Rechtsstaat* which focused on the concept's legalistic elements. The connection of this evolution to the political environment can be described as 'uniquely German'.¹⁰⁵ Yet, even though one puzzle piece was removed, the remaining concept was not a new one. The *Rechtsstaat* had not been reinvented, its

¹⁰⁰ Cf §§181–182 of the Frankfurt Constitution.

¹⁰¹ Stolleis (n 80) 372; Bäcker (n 46) 141.

¹⁰² Müller (n 96) 156.

¹⁰³ Ernst Rudolf Huber, *Deutsche Verfassungsgeschichte seit 1789*, vol 3 (3rd edn, W Kohlhammer Verlag 1988) 281–285.

¹⁰⁴ Hahn (n 97) 1367.

¹⁰⁵ Stolleis (n 80) 371.

depoliticised iteration still had the same foundational and substantive aims as the concept's original iteration. This understanding highlights the similarity to the rule of law concept. After all, Dicey's understanding was of a legalistic nature, focusing on the virtues of the legal procedure and the need for the state to show a legal basis for its actions, while remaining safely placed on a substantive foundation.¹⁰⁶

This continuity in *Rechtsstaat* thinking allowed for the second puzzle piece to be added again—i.e., for the concept to be *re-materialised*—at the end of the Weimar Republic and especially in the *Grundgesetz*.

D. THE DISAPPEARANCE OF THE *RECHTSSTAAT* AS A CONCEPT OF CLASSIC CONSTITUTIONAL SCHOLARSHIP

After 1870, the *Rechtsstaat* disappeared almost entirely from classic German constitutional law scholarship.¹⁰⁷ It was the strong role of the sovereign German state following the unification of Germany that 'banished [the *Rechtsstaat* concept] from its constitutional dimension'.¹⁰⁸ The concept, which had before been related to political and constitutional theory, became a dogmatic concept in constitutional law and was focused nearly completely on administrative law scholarship.¹⁰⁹ The *Rechtsstaat's* new role went hand in hand with a prevailing climate of juridical positivism in which ideas connected to political and constitutional theory were seen as 'political *raisonnement*', to be excluded from the juridical scope.¹¹⁰ Gerhard Anschütz highlighted the new role for the *Rechtsstaat* when he described that the *Rechtsstaat* denotes 'a certain arrangement of the relationship between law, the administration, and the individual', whereby 'the administration may not interfere in the realm of individual liberty either against a law or without a legal foundation'.¹¹¹

At the same time, however, the 'rule of law' as a guarantee of civil liberty was still 'very strongly present in this view of the [*Rechtsstaat*] concept', and the protection of civil liberty was concentrated in the 'constitutionality of the administration' and bound to the law through the introduction of judicial control procedures.¹¹² Even though the concept was not front and centre of constitutional scholarship at this time, it can be said that the belief in the law as a guarantee for and a guarantor of liberty has prevailed.¹¹³ The focus on the concept's formal elements did not indicate a move away from its underlying aims but rather a

¹⁰⁶ Barber (n 87) 446.

¹⁰⁷ Luc Heuschling, 'Etat de Droit: The Gallicization of the *Rechtsstaat*' in Jens Meierhenrich and Martin Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021) 78.

¹⁰⁸ Sobotta (n 61) 392.

¹⁰⁹ Böckenförde (n 44) 58; Heuschling (n 107) 78.

¹¹⁰ Böckenförde (n 44) 58.

¹¹¹ Gerhard Anschütz and Georg Meyer, *Lehrbuch des deutschen Staatsrechts* (7th edn, Duncker & Humblot 1919) 29; Böckenförde (n 44) 58.

¹¹² Böckenförde (n 44) 58.

¹¹³ Bäcker (n 46) 143.

shaping that was in line with the basic evolutionary principle of the *Rechtsstaat*: a focus on the security of liberty and property.¹¹⁴ A lack of mention of the concept in classic constitutional scholarship need not indicate a vanishing of the concept as a constitutional principle. In fact, as a survey of the rule of law in British public law textbooks has showed: the rule of law, after Dicey's remarks on the concept, 'did not feature heavily in most public law textbooks' until approximately the middle of the 20th century.¹¹⁵ And yet it remained a central constitutional principle in the United Kingdom. It is the same for the development of the *Rechtsstaat* concept: the *Kaiserreich* era marked a time of consolidation for the concept which laid the groundwork for its upcoming re-materialisation.

E. THE RE-EMERGENCE OF THE *RECHTSSTAAT* AS A CONCEPT AT THE HEART OF GERMAN CONSTITUTIONAL LAW

Even though the term '*Rechtsstaat*' did not appear in the Weimar Constitution, a legalistic *Rechtsstaat* based on the parliament's broad legislating power and a thorough control of the administration by administrative courts was constitutional reality in the Weimar Republic.¹¹⁶ This understanding of the *Rechtsstaat* and its constitutional protection was not in principle 'up for debate'.¹¹⁷ Jellinek went as far as uttering the fateful words in 1931 (a mere two years before the Weimar *Rechtsstaat* was destroyed following the Nazi's seizure of power) that the *Rechtsstaat* will 'remain in place in Germany'.¹¹⁸

The legalistic *Rechtsstaat*—which Sobotta termed a 'decapitated torso' of a *Rechtsstaat* concept owing to the lack of focus on the concept's substantive elements (or the second puzzle piece)—was able to fulfil its purpose for more than three decades.¹¹⁹ However, legal scholars, foreseeing the rise of fascism, returned to the *Rechtsstaat* as a constitutional and substantive concept during the final years of the Weimar Republic.¹²⁰

(i) Heller's '*Social Rechtsstaat*'

In his seminal 1929 essay, Hermann Heller formulated his idea of a 'social *Rechtsstaat*'.¹²¹ He defined it as a state that would actively counter social inequality as otherwise, so he argued, the individual freedom and equality before the law which were the object of the *Rechtsstaat's* guarantees would be reduced to an empty

¹¹⁴ Böckenförde (n 44) 59.

¹¹⁵ Brian Christopher Jones, 'The Rule of Law in UK Public Law Textbooks: From Critique to Acceptance?' [2018] Public Law 594, 594–599.

¹¹⁶ Cf art 68 and art 107 of the Weimar Constitution; Bäcker (n 46) 145.

¹¹⁷ Stolleis (n 60) 363.

¹¹⁸ Walter Jellinek, *Verwaltungsrecht* (3rd edn (reprint), Verlag Dr Max Gehlen 1966) 97.

¹¹⁹ Sobotta (n 61) 529.

¹²⁰ Bäcker (n 46) 145 and Böckenförde (n 44) 61, 66.

¹²¹ Hermann Heller, 'Rechtsstaat or Dictatorship?' (Ellen Kennedy tr) (1971) 16 *Economy and Society* 127.

phrase for many citizens.¹²² The social *Rechtsstaat* represents a ‘re-materialisation’ of the *Rechtsstaat* concept with a distinct focus on the social realities of society in the 1920s.¹²³ Heller refers explicitly to the origins of the *Rechtsstaat* by prefacing that the ‘sociological, political and juridical meaning of the modern *Rechtsstaat* can only be grasped if it is understood as the ‘rule of law’ in the original sense of its creators’.¹²⁴ He, furthermore, makes direct reference to Mohl’s *Rechtsstaat* concept which, according to him, had after the revolution of 1848 become ‘something formal-technical’ that required the ‘predictable application of the law’ without consideration of its content.¹²⁵ Heller’s effort to connect his understanding of the concept to its historical roots highlights that he did not, in contrast to Meierhenrich’s assertion, ‘invent [the *Rechtsstaat* concept] anew’.¹²⁶ He, instead, traced the concept back to its substantive roots and re-materialised a concept that was already in existence by adding the substantive component (or the second puzzle piece) again and, furthermore, adding a social component.

(ii) *Schmitt’s Bourgeois Rechtsstaat*

Carl Schmitt’s analysis of the *Rechtsstaat* in his 1928 work, and magnum opus, *Verfassungslehre* (Constitutional Theory) provides further evidence for the finding that a re-materialisation of the *Rechtsstaat* was possible because the concept never lost its identity.

In the preface to his book, Schmitt made it clear that the book is not a commentary on the constitution of the Weimar Republic but rather a theory of a particular type of state ‘which is dominant today’ and of which the Weimar constitution was one example.¹²⁷ Schmitt understood the liberal (or bourgeois, as he calls it) idea of freedom to be the core of the *Rechtsstaat* component of every modern constitution. He argued that the modern *Rechtsstaat’s* sense and goal, in line with its historical development, is ‘*liberté*, protection of the citizen against the misuse of state authority’.¹²⁸ From this ‘fundamental idea of bourgeois freedom’ follow two principles, he stated, constituting the *Rechtsstaat* component of every modern constitution. The principle of distribution, which implies that the individual’s sphere of freedom is presupposed as something prior to the state and the organisational principle which suggests that state power is distributed and comprised in a system of defined competencies.¹²⁹ He regarded the bourgeois *Rechtsstaat’s* principles as (at least in part) realised in the Weimar Constitution by the enumeration of basic

¹²² Heller (n 121) 141; Böckenförde (n 44) 61.

¹²³ Sobotta (n 61) 530.

¹²⁴ Heller (n 121) 128.

¹²⁵ *ibid* 130.

¹²⁶ Meierhenrich (n 6) 86.

¹²⁷ Schmitt (n 51).

¹²⁸ *ibid* 170.

¹²⁹ *ibid* 170.

rights and duties of Germans and the indirect declaration of the organisational principle of separation of powers.¹³⁰

Schmitt, thus, describes a distinctly substantive *Rechtsstaat* that is based on the aim of protecting individual liberty against state authority. He puts the two pieces of the *Rechtsstaat* puzzle together again, thereby going back to the concept's origins. Yet, his effort of re-establishing a substantive *Rechtsstaat* was only possible because the foundations of the concept remained intact throughout its historical development. The *Rechtsstaat* never lost its identity and was not, contrary to Meierhenrich's arguments, completely stripped of all substance during the formal era. The re-establishment of a substantive *Rechtsstaat* was a matter of adding substantive elements to a concept already in existence and not the emergence of an entirely new concept.

(iii) *The Nazi 'State of Injustice'*

The Weimar Republic was succeeded by a 12-year 'state of injustice' after the Nazi's seizure of power in 1933. This state of injustice was the opposite of a *Rechtsstaat*, highlighted by the German translation of 'state of injustice' as '*Unrechtsstaat*'. Theory and practice of the National Socialist state marked a clear and fundamental break with the intellectual foundations and fundamental aims of the *Rechtsstaat* and the National Socialist practice of proclaiming a 'new *Rechtsstaat*' can only be described as a 'deformation of the *Rechtsstaat*'.¹³¹ I mention the break with *Rechtsstaat* traditions in Nazi Germany to underline that whenever I speak of a continuity in German *Rechtsstaat* thinking, I explicitly exclude the Nazi rule as there can be no continuity where a likeness is only in name.

F. THE *RECHTSSTAAT* CONCEPT IN THE *GRUNDGESETZ*

The substantive *Rechtsstaat* of the *Grundgesetz* brings the *Rechtsstaat*, as Meierhenrich concedes, 'in a substantive alignment with the rule of law'.¹³² Interestingly, the question of why the drafters of the *Grundgesetz* decided to 're-materialise' the *Rechtsstaat*, after the term itself was not mentioned in the Weimar Constitution, is rarely asked. The next section examines this re-materialisation by way of exploring the discussions of the *Rechtsstaat* in the *Parlamentarische Rat* (Parliamentary Council)—the assembly that drafted and adopted the text that was to become the *Grundgesetz*—and the analysis of the *Rechtsstaat* by leading commentators in the aftermath of the passing of the *Grundgesetz*.

¹³⁰ *ibid* 172.

¹³¹ Stolleis (n 80) 373; Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, vol 1 (CH Beck 1984) 774.

¹³² Meierhenrich (n 1) 53.

(i) *The Parlamentarische Rat*

During the deliberations in the *Ausschuss für Grundsatzfragen* (committee for fundamental questions) of the *Parlamentarische Rat*, a liberal *Rechtsstaat* that includes formal and substantive elements was—without much discussion—accepted as describing the essence of the *Rechtsstaat*. It was the chairman of the committee, Herrmann von Mangoldt, who made it clear that ‘the essence of the *Rechtsstaat* lies in the rule of law [*Herrschaft des Gesetzes*]’ and asserted that it is ‘the *Rechtsstaat* principle in the highest degree’ if civil liberties are protected while at the same time the connection between liberty and the social circumstances is recognised.¹³³ Furthermore, Richard Thoma, who was called to speak as an expert, stated that it is the task of Article 2 of the *Grundgesetz* to ‘enshrine the formal and material principles of the *Rechtsstaat* into the constitution’.¹³⁴ These statements highlight the realignment with the concept’s substantive origins.

(ii) *Comments on The Rechtsstaat in The Grundgesetz*

Hans Peter Ipsen saw the *Rechtsstaat* of the *Grundgesetz* as being inextricably tied to its substantive origins and, in a speech held six months after the *Grundgesetz* came into effect, went as far as stating that there is ‘unanimity’ that the *Grundgesetz* ‘in particular in guaranteeing fundamental rights and in the use of judicial power, makes use of legal instruments and structures that have been developed in the past’, and that ‘the *Grundgesetz* has spoken not only in the language of 1919, but in that of the nineteenth century’.¹³⁵ Ipsen, therefore, made it clear that the drafters of the *Grundgesetz* did not invent the *Rechtsstaat* anew. Instead, the post-war concept rests on the foundations laid in the nineteenth century.

Ernst Forsthoff, in his contribution to the annual conference of German constitutional experts in 1953, went even further in his examination of the relationship between the modern *Rechtsstaat* and its substantive origins.¹³⁶ He argues that the ‘western world has preserved and restored the *Rechtsstaat*, which was inherently bourgeois and associated with the bourgeois society of the nineteenth century, for the present state of affairs’.¹³⁷ This characterisation of the *Rechtsstaat* as a concept that goes beyond German borders is not dissimilar to Schmitt’s bourgeois *Rechtsstaat*—which is not surprising in light of the fact that Schmitt supervised Forsthoff’s doctoral thesis.

¹³³ Eberhard Pikart and Wolfram Werner (eds), *Ausschuß für Grundsatzfragen: Parlamentarischer Rat. Band 5* (Oldenbourg Wissenschaftsverlag 2010) 292, 1041.

¹³⁴ *ibid* 364.

¹³⁵ Hans Peter Ipsen, *Über das Grundgesetz* (JCB Mohr (Paul Siebeck) 1988) 16.

¹³⁶ Ernst Forsthoff, ‘Erster Beratungsgegenstand: Begriff und Wesen des sozialen Rechtsstaates’ in Ernst Forsthoff and others, *Die auswärtige Gewalt der Bundesrepublik: Berichte und Aussprache zu den Berichten in den Verhandlungen der Tagung der deutschen Staatsrechtslehrer zu Bonn am 15. und 16. Oktober 1953* (De Gruyter 2013).

¹³⁷ *ibid* 30.

While other commentators, chiefly Wolfgang Abendroth (as part of what has been dubbed the ‘Abendroth-Forsthoff controversy’¹³⁸), disagreed with the suggestion that the substantive *Rechtsstaat* of the nineteenth century has been completely restored and wanted to focus more on the concept’s social elements,¹³⁹ it is clear that the *Rechtsstaat* of the *Grundgesetz* is strongly influenced by and based on the substantive origins of the concept. The modern *Rechtsstaat* must therefore be understood as a result of, rather than an aberration in, the concept’s historical development.

V. THE FUNDAMENTAL SIMILARITY BETWEEN THE *RECHTSSTAAT* AND THE RULE OF LAW

The *Rechtsstaat* and the rule of law take up central roles in German and British constitutional theory respectively. They represent a fundamentally liberal ideal and exist to create an environment in which an individual can live freely and make autonomous choices. As to how best to achieve this aim, there is disagreement concerning the separation of the formal and substantive elements of the concepts which has characterised the historical development of both concepts. Today’s versions of the concepts are products of and not aberrations in their historical development.

Meierhenrich has argued that this assertion does not ring true for the *Rechtsstaat*. Yet, the examination of the concept’s historical development has shown that the *Rechtsstaat* idea has always sought to ‘limit and contain the power and supremacy of the state in the interests of individual’, with the primacy of law over the political sphere appearing as a ‘recurring postulate of all thinking associated with the concept’.¹⁴⁰ Since the concept was introduced into German constitutional thinking, the focus has shifted on how this goal could best be achieved. The liberal concept in the first half of the nineteenth century combined legalistic and substantive elements and was a type of state that placed individual autonomy at the centre. The depoliticised concept that emerged after the 1848 revolution shifted the focus onto the legalistic aspects of the *Rechtsstaat*, with a special focus on the realm of administrative law. Yet, this iteration of the concept should not be understood as a reactionary iteration of the concept. It should rather be understood as a concept which rested on substantive foundations—with its aim to safeguard individual liberty and autonomy at the centre—and which influenced the *Rechtsstaat* as it exists today. At the end of the Weimar Republic, a concept emerged that re-materialised

¹³⁸ Clara Maier, ‘The Weimar Origins of the West German Rechtsstaat, 1919–1969’ (2019) 62 *The Historical Journal* 1069, 1088.

¹³⁹ Ernst Forsthoff and others, *Die auswärtige Gewalt der Bundesrepublik: Berichte und Aussprache zu den Berichten in den Verhandlungen der Tagung der deutschen Staatsrechtslehrer zu Bonn am 15. und 16. Oktober 1953* (De Gruyter 2013) 87ff.

¹⁴⁰ Konrad Hesse, ‘Der Rechtsstaat im Verfassungssystem des Grundgesetzes’ in Konrad Hesse, Siegfried Reicke, and Ulrich Scheuner (eds) *Staatsverfassung und Kirchenordnung* (Paul Siebeck 1962) 75; Böckenförde (n 44) 69.

the *Rechtsstaat* and added social protections. Finally, today's *Rechtsstaat* takes up all three strings of emphasis. As Bodo Pieroth has identified, it embraces the liberal emphasis by virtue of being part of a western tradition of constitutionalism, the formal emphasis as it attaches great importance to procedures which guarantee sophisticated legal protection and finally a social emphasis as it also includes aspects of the social *Rechtsstaat* that was developed in Weimar.¹⁴¹ The identification of the different strings of emphasis materialising in today's concept allows for an understanding that today's version of the concept marks a synthesis of the shifts of focus that appeared over the course of its historical development.

The rule of law is equally a product of its historical development and has also experienced shifts of focus concerning its formal and substantive elements. The rule of law is certainly embedded in a different constitutional tradition than the *Rechtsstaat* concept. The role of parliament or the judiciary is, for example, different in the United Kingdom to the role of these institutions in Germany. While that is the case, however, the rule of law is only one of a range of constitutional principles in the United Kingdom's constitutional set-up. In this set-up, it takes a unique role as it shares its fundamental aims and core tenets with concepts that similarly stand in the tradition of a certain idea of liberal constitutionalism, such as the *Rechtsstaat*. The connection of the rule of law to concepts that stand in the same tradition of liberal constitutionalism was already recognised in 1935 when the concept was described as 'in no way peculiar to this country', followed up by an assertion in the same publication thirty years later that the rule of law is 'now considered as a basic idea which can serve to unite lawyers of many differing systems, all of which aim at protecting the individual from arbitrary government'.¹⁴² Importantly, this similarity between the *Rechtsstaat* and the rule of law is not a recent development that only started after the Second World War. Instead, the concepts have always been fundamentally similar. When Dicey defined the rule of law, he laid the foundations for its modern iteration. Even though he characterised it as something peculiar to the British common law tradition, he described a concept that found its intellectual sibling in the *Rechtsstaat*. Over the course of the rule of law's historical development, there have been fluctuations regarding the focus on its formal or substantive elements. Dicey's, and later Raz's and Fuller's, understanding focused more on the formal elements. Dworkin or Bingham, on the other hand, argued for a convergence of formal and substantive elements. The disagreements in relation to which elements to focus on, however, always took place within a certain intellectual arena. Specifically, an arena that was liberal to its core and always recognised the concept's fundamental aims: the safeguarding of individual autonomy and liberty. In this way, every rule of law definition and characterisation contributed to the concept as it exists today.

¹⁴¹ Pieroth (n 48) 733.

¹⁴² Wade and Phillips (n 18) 102; ECS Wade and AW Bradley, *Constitutional Law* (7th edn, Longmans 1965) 72–73.

Both the *Rechtsstaat* and the rule of law concepts are products of an overarching movement of liberal thought in Europe and North America and should, therefore, be acknowledged as being fundamentally similar.

VI. CONCLUSION

A common argument that is often, and most prominently by Meierhenrich, put forward to refute an account that the *Rechtsstaat* and the rule of law are fundamentally similar is that the *Rechtsstaat's* historical development makes it substantially different from the rule of law concept. In this article, I have tried to show that this view reveals itself as inaccurate when both concept's historical developments and fundamental aims are examined.

The rule of law rests on Dicey's conception, which was more focused more on the concept's formal elements. Today, the concept is characterised by a disagreement as to whether it also includes substantive elements, but also an understanding that it remains based on the same aims that Dicey has laid out.

When the theory of a *Rechtsstaat* was first introduced, the concept was characterised by a convergence of both formal and substantive elements. During the 'formal era' a shift in focus toward the concept's formal elements took place. This shift should be understood as a stage in the evolution of the concept, which was influenced by the intent to separate the concept from its explicitly political elements, and not as a rupture or a reactionary reinvention of the concept. Furthermore, during the 'formal era', the concept remained on a substantive and liberal foundation which put the protection of individual liberty against state authority at the centre. The *Rechtsstaat* of the *Grundgesetz* builds on the foundations of the concept's origins, the modifications in the sphere of administrative law that were added during the 'formal era' and the re-materialisation which began to be discussed at the end of the Weimar Republic.

Germany and the United Kingdom may differ in their constitutional traditions, institutions, and history. The *Rechtsstaat* and the rule of law, however, must be understood as fundamentally similar concepts.

Two Shades of Impunity? Introducing The General Principle of Balancing of Sovereign Interests in Admitting Illegally Obtained Evidence

ABHIJEET SHRIVASTAVA*

ABSTRACT

From as early as the *Corfu Channel* case in 1949, debates have persisted over whether there is a general principle of law that could exclude illegally obtained evidence from being used in interstate proceedings. On one hand, the fullest submission of evidence is treated as a manifestation of equality in dispute resolution. The opposite approach argues that States constrain this freedom to present evidence by committing to respect international legal obligations, and thus illegally obtained evidence should become inadmissible. This paper argues that both of these polar approaches are flawed. The first approach of free reign in presenting evidence would regress the modern conception of limited sovereignty. The second approach of absolutely gatekeeping such evidence entirely dismisses a claimant State's interest in proving the other's illegalities. This paper makes the renewed case that rather than an absolute exclusion or inclusion, there is a requirement of 'balancing' competing interests in each such case. Instead of making futile attempts at reconciling municipal approaches on this point, it argues that this general principle has arisen from within the international legal system itself, drawing from recent discourse on general principles arising in this manner.

Keywords: illegally obtained evidence, dispute resolution, general principles of law, balancing

* Fifth-year law student at Jindal Global Law School, India. This paper was first presented at the 2022 University of Kent Graduate Conference, where it was enriched by the kind inputs of Professor Shahd Hammouri and many fellow panellists. It further drew from research collaborations with Karan Himatsingka and Rudraksh Lakra, my teammates in the 2022 Jessup Moot Court. My thanks are also owed to our coach, Professor Aman, whose guidance was instrumental in shaping the arguments presented here.

I. INTRODUCTION

Certain scholars have argued that illegally obtained evidence ('IOE') is inadmissible, that is, cannot be taken notice of in inter-State proceedings.¹ To this branch of the debate, allowing the use of IOE could grant a license for impunity such that it could encourage States to reap benefits from violating their international obligations.² This position typically emphasises that the modern conception of sovereignty cannot tolerate free reign and requires maximal respect for the international legal system.³ Such logic demonstrates what Koskenniemi identifies as 'descending' forms of international legal argumentation. The central premise in this logic is that the will of the international 'community' must bind each State *equally*.⁴ The contrasting position generally takes a two-fold stance. First, the concept of sovereign equality in dispute resolution in fact entitles States to freely and fully present their case.⁵ Second, an automatic restriction on this entitlement cannot be presumed when evidence is illegally obtained.⁶ This is since there is allegedly no restriction to that effect under the sources of law mentioned in article 38(1) of the ICJ Statute.⁷ Much of this perspective is informed by what Koskenniemi characterises as 'ascending' argumentation, given its emphasis on sovereign freedoms.⁸

There is more nuance to Koskenniemi's thesis in that it could be possible to re-articulate either of these positions in ascending or descending forms.⁹ The critical point is, however, in its usual articulation, the position favouring 'free reign' is seemingly *apologetic*, given its unconditional defence of the State engaging in illegal 'self-help'.¹⁰ Therefore, it becomes vulnerable to the aforementioned criticisms of potentially granting impunity for violations of international law. Such impunity would arise especially for more powerful States that could envision committing illegalities with greater ease than others. In contrast, the position automatically excluding IOE appears *utopian*. This is considering not only the

¹ William Michael Reisman and Eric E. Freedman, 'The Plaintiff's Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication' (1982) 76 *American Journal of International Law* 737, 749; Peter Tomka, 'Speech to the Sixth Committee of the General Assembly' (International Court of Justice 31 October 2014) <<https://www.icj-cij.org/public/files/press-releases/8/18398.pdf>> accessed 3 June 2022.

² Reisman and Freedman (n 1).

³ On this conception of sovereignty, see generally John H. Jackson, 'Sovereignty – Modern: A New Approach to an Outdated Concept' (2003) 97 *American Journal of International Law* 782.

⁴ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2005) 59.

⁵ See generally Anne Peters, 'International Dispute Settlement: A Network of Co-operational Duties' (2003) 14 *European Journal of International Law* 1.

⁶ Restrictions on state actions cannot be presumed, see *Case of the SS 'Lotus' (France v Turkey)* (1927) PCIJ Rep Series A No 10.

⁷ William Thomas Worster, 'The Effect of Leaked Information on the Rules of International Law' (2013) 28 *American University International Law Review* 443, 464.

⁸ Koskenniemi (n 4).

⁹ David Scott and Ukri Soirila, 'The Politics of the Moot Court' (2021) 32 *European Journal of International Law* 1079, 1087.

¹⁰ Reisman and Freedman (n 1) 747.

grandeur in its narrativization of equality in an inherently unequal legal system,¹¹ but also its wholesale dismissal of any factors that could otherwise justify the use of IOE.¹² Ultimately, Koskenniemi's view is that, owing to these argumentative dichotomies between equality (utopia) and autonomy (free reign), international law is largely 'indeterminate'.¹³ Thus, among other things, he proposes that international lawyers should reflect on their role as advancing particular theories of justice, as opposed to pure legal doctrine.¹⁴ Yet for courts and tribunals, bodies which are responsible for articulating legal doctrine, indeterminacy is an unsuitable recourse. Thus, D'Aspremont retorts that the imagination that the law has *some* 'coherent logic' cannot be entirely abandoned.¹⁵

This paper seeks to advance a case that in its backdrop remains inspired by these perspectives when examining the question of admitting IOE. However, its position does not concede that an answer to this question is indeterminate. I present a new argument for the existence of a 'general principle of law' ('GPL') as per article 38(1)(c) of the ICJ Statute addressing the issue. This is a principle of 'balancing' competing sovereign interests on a case-by-case basis with regard to excluding evidence that is illegally obtained. While introducing this third position to the existing binary of scholarship, my contention is also that a principle of this nature is the most appropriate means to address contentions around IOE. A balancing approach would allow the inquiry to become context-driven and thus to acknowledge varying moral contestations between sovereign States in each case. Such potential permutations of distinct stakes cannot be foreseen by absolute exclusionary or inclusionary rules.

To establish this renewed principled case, this paper makes the following contributions. I argue in Section II that no GPL in this context can arise from the traditional route of 'transposition' from municipal legal systems. Instead, a balancing GPL has arguably arisen in an alternative route: from *within* the international legal system itself, a possibility that Special Rapporteur Vázquez-Bermúdez has recently affirmed.¹⁶ In Section III, I elaborate on my arguments for a balancing GPL, visiting the pertinent jurisprudence of the ICJ. This analysis focuses on the cases traditionally invoked in debates concerning IOE as well as some cases thus far omitted from this dialogue. Examining the case law, I argue that the Court's approach does not support either an inclusionary or exclusionary rule and can potentially be read as supporting the balancing GPL. Thereafter, to empirically cement the balancing GPL, I discuss the jurisprudence of other international fora from various regimes in Section IV. I also discuss how these

¹¹ Scott and Soirila (n 9).

¹² On the variety of possible approaches, see generally Gamini Lakshman Peiris, 'The Admissibility of Evidence Obtained Illegally: A Comparative Analysis' (1981) 13 *Ottawa Law Review* 309.

¹³ Koskenniemi (n 4) 60.

¹⁴ Jean d'Aspremont, 'Uniting Pragmatism and Theory in International Legal Scholarship: Koskenniemi's From Apology to Utopia revisited' (2006) 19 *Revue Québécoise de Droit International* 353, 356.

¹⁵ *ibid* 355.

¹⁶ International Law Commission, 'Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez' (2020) UN Doc A/CN.4/741 ('Second Report on General Principles').

authorities could show the threshold for a GPL to arise internationally having been met. Finally, in Section V, I reflect on both the normative and practical merits and risks of this GPL with a focus on its implications for State sovereignty. Section VI concludes, recalling the primary arguments of this paper.

II. THE DIVERSITY OF MUNICIPAL PRACTICES

As per article 38(1)(c) of the ICJ Statute, a principle should be ‘recognized’ by ‘civilized nations’ to become a GPL. To begin with, this phrase is mired with colonial legacies, given its implication that certain nations are *uncivilized*, supposedly those apart from ‘European and North Atlantic’ States.¹⁷ To be clear, the colonial and imperial features of the international legal system have already been foregrounded, inter alia, in Third World scholarship.¹⁸ It should therefore be no surprise that far too often in constructions of legal argument, the practices of some States are intuitively given more weight than others.¹⁹ In an attempt to shift from this legacy, Special Rapporteur Vázquez-Bermúdez supports the growing reference to the phrase ‘community of nations’.²⁰ The aim behind this is not purely symbolic. Indeed, he proposes that when attempting to locate generalities in municipal practices, a *diverse* comparative study must be adopted to avoid hegemonizing the practices of a handful of states.²¹ This caution is crucial for the present debate since some authors have taken for granted that there *is* sufficient generality in municipal practices for an exclusionary rule to arise.²² Such an assertion cannot be sustained in view of the practices discussed hereafter.

According to Special Rapporteur Vázquez-Bermúdez, the comparative analysis need not account for the practices of *all* states, but must account for practices from various legal ‘families’ existing across different regions to ensure a ‘wide and representative’ survey.²³ In respect of IOE, there is a tendency to exaggerate the importance of the practices of certain Anglo-American (‘common’) or Continental (‘civil’) legal jurisdictions.²⁴ Adopting a representative survey would eliminate regional bias and account for any differing legal or moral values in legal families apart from civil and common systems.²⁵ Furthermore, it would allow

¹⁷ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* [1969] ICJ Rep 3; see also, Separate Opinion of Judge Ammoun [1969] ICJ Rep 101, 132.

¹⁸ See generally Bhupinder Singh Chimni, ‘Third World Approaches to International Law: A Manifesto’ (2006) 8 *International Community Law Review* 3.

¹⁹ George Rodrigo Bandeira Galindo and César Yip, ‘Customary International Law and the Third World: Do Not Step on the Grass’ (2017) 16 *Chinese Journal of International Law* 251.

²⁰ International Law Commission, ‘First Report on General Principles of Law by Marcelo Vázquez-Bermúdez’ (2019) UN Doc A/CN.4/732 (‘First Report on General Principles’)

²¹ *ibid* 55.

²² Rüdiger Wolfrum and Mirka Möldner, ‘International Courts and Tribunals, Evidence’ in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013) para 60.

²³ Second Report on General Principles (n 16) 7.

²⁴ For study of this vast literature, see Dimitrios Giannouloupoulos, *Improperly Obtained Evidence in Anglo-American and Continental Law* (Bloomsbury 2019).

²⁵ Second Report on General Principles (n 16).

acknowledging heterogenous practices *within* the same legal family.²⁶ In that vein, Sara Fallah's recent research highlights stark differences in the municipal practices of a select sample of common and civil law states from all five United Nations (UN) regional groups.²⁷ From this sample, some states prefer automatic exclusionary rules, some support free admissibility, and yet others conduct some form of a balancing exercise.²⁸ Many states which exclude IOE often do so *only* for violations of specific legal norms like the prohibition on torture.²⁹ Added to this is the difference in positions states may take on the issue in the municipal and the international stages respectively. For instance, the United States (US) is considered the most well-known candidate for an automatic exclusionary rule on the municipal level.³⁰ Nonetheless, it refuted the existence of such a rule in inter-state exchanges in the *Avena* case³¹ (discussed further in Section III).

To be clear, there is a notable set of municipal practice across the five UN regional groups supporting variants of a 'balancing' exercise. This exercise could involve, for instance, weighing the importance of the concerned evidence in resolving a particular dispute against the seriousness of the illegalities in its obtainment. Consider, as examples, the practices of South Africa³² and Nigeria³³ (African Group), India³⁴ (Asia and the Pacific Group), Hungary³⁵ (Eastern European Group), Jamaica³⁶ (Latin American and Caribbean Group), alongside France³⁷ and Canada³⁸ (Western States and Others Group). Thus, it is worth asking if a balancing principle could be extrapolated from all the foregoing domestic practices. Perhaps one could account for the instances supporting balancing directly. Supplementing this set, one could argue that a centrist position could be excavated in harmonising the remaining polar exclusionary or inclusionary approaches from other states. Yet the ICJ has stated that it cannot modify municipal practices as presented to it when assessing GPLs and can only

²⁶ Sué González Hauck, 'All Nations Must be Considered to be Civilized' (*Verfassungsblog*, 20 July 2020) <<https://verfassungsblog.de/all-nations-must-be-considered-to-be-civilized/>> accessed 3 June 2022.

²⁷ For a discussion around the five-fold division, see Ingo Winkelmann, *A Concise Encyclopedia of the United Nations* (2nd edn, Brill 2010) 592.

²⁸ Sara Mansour Fallah, 'The Admissibility of Unlawfully Obtained Evidence before International Courts and Tribunals' (2020) 19 *The Law and Practice of International Courts and Tribunals* 147.

²⁹ Center for Justice and International Law, *Torture in International Law: A Guide to Jurisprudence* (Association for the Prevention of Torture and Center for Justice and International Law 2008) 69.

³⁰ See generally Robert M Pilder, 'The Fruit of the Poisonous Tree Revisited and Shepardized' (1968) 53 *California Law Review* 579.

³¹ Counter-Memorial of the United States of America in *Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)* (Counter-Memorial vol I, 3 November 2003) para 8.27 <<https://www.icj-cij.org/public/files/case-related/128/10837.pdf>> accessed 29 January 2023.

³² *S v Tandava and Others* (538/06) (2007) ZASCA 34.

³³ *State v Musa Sadau* (1968) 1 All NLR 124; *State v Musa Sadau* [1968] NMLR 208.

³⁴ Paras Marya, 'A Relook at the Admissibility of Illegally or Improperly Obtained Evidence' (2019) 8 *National Law Institute University Law Review* 213.

³⁵ Act CXXX of 2016 on the Code of Civil Procedure (as in force on 1 April 2020), s 269.

³⁶ *Herman King v The Queen* (1968) 10 JLR 438.

³⁷ Giannouloupoulos (n 24) 89.

³⁸ *R v Grant* (2009) SCC 32.

apply any general consensus visible between available practices.³⁹ Therefore, any effort to disguise these municipal practices as reflecting a generality would be disingenuous. Indeed, even in a panel with speakers from only four states, the only consensus that could be reached regarding IOE was that there *was* no consensus.⁴⁰ This aside, the question of whether the practices on balancing referenced earlier differ within states from the same legal families requires further research. Another issue that complicates the comparative survey further is the position of some authors that domestic practices concerning ‘criminal’ proceedings are immaterial and should not be considered.⁴¹ This view assumes that inter-state proceedings tend to resemble ‘civil’ proceedings more closely—though such assertions are also debatable.⁴²

Consequently, it can at least be concluded that it is extremely onerous to attempt to argue that a GPL concerning IOE has emerged from the municipal level so to be transposed to the international legal system. In the subsequent parts of this paper, I discuss the case for a balancing GPL having instead arisen *within* the international legal system itself. Primarily, my analysis will attempt to excavate the principle from the jurisprudence of various international courts and tribunals in Section IV. Before this, I interrogate the case law of the ICJ, refuting possible claims of inclusionary or exclusionary rules arising from its decisions. Simultaneously, I show how reading these decisions contextually can indicate a support for, or at least compatibility with, the balancing principle.

III. THE INTERNATIONAL COURT OF JUSTICE

Needless to mention, despite the emergence of many other international fora, the decisions of the ICJ continue to have the highest legitimacy and influence in shaping international legal discourse.⁴³ In fact, most scholars debating the admissibility of IOE focus on offering conflicting understandings of the ICJ’s earliest case—the 1949 *Corfu Channel* Merits decision.⁴⁴ There, the IOE was collected by the UK through ‘Operation Retail’, a unilateral minesweeping operation in Albanian waters. The UK collected this IOE in hopes of supporting its argument that Albania violated its obligation to notify the UK of the presence

³⁹ *Case Concerning Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Second Phase) [1970] ICJ Rep 3, 38.

⁴⁰ UAA Ukraine Arbitration Association, ‘UAA Conference.Session 4.Use of Illegally Obtained Documents or Materials as Evidence in Arbitration’ (*YouTube*, 4 June 2021) <www.youtube.com/watch?v=ybiCagsQaFk&t=3001s&ab_channel=UAAUkrainianArbitrationAssociation> accessed 3 June 2022.

⁴¹ Hugh Thirlway, ‘Dilemma or Chimera? Admissibility of Illegally Obtained Evidence in International Adjudication’ (1984) 78 *American Journal of International Law* 622, 639.

⁴² For a discussion, see Stacie Strong, ‘General Principles of Procedural Law and Procedural Jus Cogens’ (2018) 122 *Penn State Law Review* 347.

⁴³ Wolfgang Alschner and Damien Charlotin, ‘The Growing Complexity of the International Court of Justice’s Self-Citation Network’ (2018) 29 *European Journal of International Law* 83.

⁴⁴ Reisman and Freedman (n 1); Thirlway (n 41).

of mines in these waters.⁴⁵ In a judgment apparently supporting those favouring free admissibility, the Court did not declare the IOE inadmissible. Much later in 2014, in its provisional measures order in the *Timor-Leste v Australia* case, the Court dealt with a situation where Australia had seized attorney-client communications from Timor-Leste's counsels (pertaining to their pending maritime arbitration).⁴⁶ Here, the Court ordered Australia to keep these documents sealed and not to use it to Timor-Leste's disadvantage. Importantly, the case never reached the Merits stage and was settled privately.⁴⁷ In an order that seemingly supports the proponents of *excluding* IOE, some authors have lamented the missed opportunity for the Court to definitively address the issue of the admissibility of IOE.⁴⁸

My analysis of both these cases hereafter will problematise this discourse and highlight the difficulties in extrapolating any rule favouring a wholesale inclusion or exclusion of IOE. Simultaneously, I will discuss the importance of accounting for their unique factual contexts so as to support a third vantage point, that of 'balancing' sovereign interests in admitting IOE. I will also focus on the ICJ's observations in the *Avena* case, which has astonishingly been hidden in plain sight in the discourse concerning IOE thus far. This is despite the fact that it is the *only* ICJ dispute where a state (Mexico) argued that the exclusion of IOE is a GPL.⁴⁹ I also discuss the Court's remarks in other contentions surrounding matters of evidence that highlight support for balancing when applying its discretion.

A. *CORFU CHANNEL* 1949 MERITS

In *Corfu Channel*, the ICJ held that the UK's minesweeping in Albanian territorial waters was in violation of Albanian sovereignty.⁵⁰ The UK sought to defend its actions by arguing that the minesweeping aimed at securing evidence that would be material to the Court's international adjudication of their dispute.⁵¹ Responding, the Court in a provocative paragraph held that, after the World War II era, such a policy of 'self-help' cannot be sustained in international law since it could be abused by the 'most powerful States'.⁵² This imagination strikes to the root of Koskenniemi's 'utopian' form of argumentation. In sum, the UK's illegal actions did not become justified on the ground that such actions were in the pursuit of gaining important evidence. The proponents of excluding IOE attempt

⁴⁵ *Corfu Channel Case (The United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4, 34–35.

⁴⁶ *Questions Relating to the Seizure and Detention of Certain Documents and Data, (Timor-Leste v Australia)* (Request for the Indication of Provisional Measures: Order) [2014] ICJ Rep 147, paras 27–28.

⁴⁷ Siyuan Chen, 'Re-assessing the Evidentiary Regime of the International Court of Justice: A Case for Codifying its Discretion to Exclude Evidence' (2015) 13 *International Commentary on Evidence* 1, 24.

⁴⁸ Fallah (n 28) 165.

⁴⁹ Memorial of Mexico, '*Case Concerning Avena And Other Mexican Nationals (Mexico v United States of America)*' (20 June 2003), para 374 <<https://www.icj-cij.org/public/files/case-related/128/8272.pdf>> accessed 29 January 2023.

⁵⁰ *Corfu Channel Case* (n 45) 33.

⁵¹ *ibid* 34.

⁵² *ibid* 35.

to expand this dictum to argue that, by *implication*, the use of IOE must also be prohibited as it carries laden potential for abuse.⁵³

The opponents of this view respond that, despite these strong remarks, the Court actually *retained* the IOE on its case record, going against the suggestion of any automatic exclusion of IOE.⁵⁴ However, the fact is that Albania never formally raised an objection to the admissibility of the IOE.⁵⁵ For that reason, perhaps the most sensible perspective is that *Corfu Channel* is irrelevant on the question of IOE, as it was never in issue in the case.⁵⁶ To argue otherwise, one would have to establish that the Court had the power to consider objections to the admissibility of evidence *proprio motu*—that is, on its own motion⁵⁷—even in the absence of an Albanian objection. The argument would then be that, were there an arguable case for the existence of an exclusionary GPL, the Court *would* have chosen to address its merit as a matter of judicial responsibility. For example, the Court in *Nicaragua* undertook to examine whether the prohibition on inter-state force formed part of customary law, even though neither state had contested this point.⁵⁸

However, this position would be fraught with two difficulties. *First*, there is no precedent for a *proprio motu* deliberation of this nature being exercised by the Court. Even in *Nicaragua* or other cases where the admissibility of *claims* was examined *proprio motu*,⁵⁹ such examinations connected directly to the prayers that were explicitly sought by the parties. Indeed, in *Nicaragua*, the Court was specifically asked to find that the use of force prohibition had been violated, necessitating its inquiry on its customary status.⁶⁰ *Second*, inspired by the logic behind the principles of acquiescence or waiver of rights,⁶¹ which focus on the ‘failure to react’ when a state ought to,⁶² one could argue that Albania’s failure to object perhaps indicated an implied consent to the use of the IOE. The merits of this aside, it should be clear that reliance on *Corfu Channel* cannot support either polar approach concerning IOE.

Yet if at all *Corfu Channel* is to have any bearing on this dialogue, a holistic reading of the judgment would reveal that it best supports a ‘balancing’ approach. Consider that the ICJ noted that it could have ‘liberal recourse’ to the UK’s

⁵³ Reisman and Freedman (n 1); Tomka (n 1).

⁵⁴ Peters (n 5); Worster (n 7).

⁵⁵ Judge Tomka and Vincent Joel Proulx, ‘The Evidentiary Practice of the World Court’ in Juan Carlos Sainz-Borgo (ed) *Liber Amicorum: In Honour of a Modern Renaissance Man: His Excellency Gudmundur Eiríksson* (Lexis Nexis 2017) 361.

⁵⁶ Thirlway (n 41) 635.

⁵⁷ See generally Serena Forlati, *The International Court of Justice: An Arbitral Tribunal or a Judicial Body?* (Springer 2014) 168.

⁵⁸ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US)* (Merits) [1986] ICJ Rep 14, para 184.

⁵⁹ *Nuclear Tests (Australia v France)* (Admissibility) [1974] ICJ Rep 253; *Nuclear Tests Case (New Zealand v France)* (Admissibility) [1973] ICJ 457.

⁶⁰ *Nicaragua* (n 58) para 15.

⁶¹ See generally Anthony D’Amato, ‘Consent, Estoppel, and Reasonableness: Three Challenges to Universal International Law’ (2010) 10 *Virginia Journal of International Law* 1, 2.

⁶² *Temple of Preah Vihear (Cambodia v Thailand)* (Merits) [1962] ICJ Rep 6, 20.

circumstantial evidence, including the IOE, since any supposed direct evidence proving the UK's claims would be under Albania's 'exclusive' control.⁶³ Consider also that, despite this flexibility, the Court held that in using such evidence the UK would have to prove its allegations beyond 'reasonable doubt'⁶⁴ so as to ensure that Albania's interests were not prejudiced.⁶⁵ Subsequent ICJ case-law has confirmed that the principle of sovereign equality must be respected in dispute resolution.⁶⁶ Seen in this vein, one can appreciate the Court's acknowledgement of the *unequal* placement of the UK as regards its incapacity to collect direct evidence. This is alongside the Court's setting a high standard of proof to ensure that Albania is also not treated *unequally*. This approach is an attempt to balance the sovereign equality of the UK and Albania in their respective evidentiary interests.

Furthermore, Albania had asked the Court⁶⁷ to grant the relief of satisfaction,⁶⁸ i.e. a declaration that Operation Retail violated international law, which the Court heeded.⁶⁹ Thus, by in fact imposing the 'sanction' of satisfaction on the UK,⁷⁰ the Court did not give any legitimacy to the IOE submitted before it. Without this sanction, the Court would arguably have granted the UK impunity. Yet if the Court had excluded the IOE altogether, it would have treated the UK's illegalities as a *smokescreen* to conceal Albania's illegalities and thus granted Albania impunity. The ICJ's declaration of *both* States having distinctly violated international law struck the appropriate balance in the case and was consistent with the purposes of the law on state responsibility, which is to ensure 'maximal compliance with international law'.⁷¹

B. THE *AVENA* 2004 JUDGMENT

Surprisingly, the only judgment where the ICJ was *in fact* explicitly asked to pronounce on the issue of an exclusionary GPL finds no mention in mainstream literature on the topic.⁷² In *Avena*, the Court upheld Mexico's claim that the US had violated the Vienna Convention on Consular Relations ('VCCR'). This was because of the latter's two-fold failure to notify Mexico of the ongoing criminal trials of Mexican nationals and to facilitate consular access for them.⁷³ Citing the

⁶³ *Corfu Channel Case* (n 45) 18.

⁶⁴ *ibid.*

⁶⁵ Michael P Scharf and Margaux Day, 'The International Court of Justice's Treatment of Circumstantial Evidence and Adverse Inferences' (2012) 13 *Chicago Journal of International Law* 123, 129.

⁶⁶ *Nicaragua* (n 58) para 31; *Timor-Leste* (n 46) paras 27–28.

⁶⁷ *Corfu Channel Case* (n 45) 6.

⁶⁸ UNGA, 'Responsibility of States for Internationally Wrongful Acts' Res 56/83 (2002) Annex Article 37 (ARSIWA).

⁶⁹ *Corfu Channel Case* (n 45) 35.

⁷⁰ Thirlway (n 41), 635.

⁷¹ Abhijeet Shrivastava and Rudraksh Lakra, 'Strolling by The River Meuse: A Definitive Case Against the Clean Hands Doctrine' (*Opinio Juris*, 22 April 2022) <<https://opiniojuris.org/2022/04/22/strolling-by-the-river-meuse-a-definitive-case-against-the-clean-hands-doctrine/>> accessed 3 June 2022.

⁷² See generally Reisman and Freedman (n 1); Tomka (n 1); Thirlway (n 41); Peters (n 5); Worster (n 7).

⁷³ *Avena and Other Mexican Nationals (Mexico v United States)* (Merits) [2004] ICJ Rep 12.

municipal practices of several ‘civil’ and ‘common’ law states, Mexico argued that illegally obtained confessions become inadmissible as evidence in criminal trials as a matter of a GPL.⁷⁴ Much of this argument was informed by Mexico’s perspective that the use of such confessions automatically *prejudiced* the trial against its accused nationals, making these trials unfair.⁷⁵ The US responded that Mexico exaggerated the extent of the generality of such practice and that, in fact, even in Mexico’s own domestic legal system, there was no rule of *automatic* exclusion of IOE.⁷⁶

Despite holding that the US violated the VCCR in collecting the confessions, the Court held that their inadmissibility would not be an automatic result of such violations.⁷⁷ It held that the ‘legal consequences’ of such violations had been ‘sufficiently discussed’ in relation to Mexico’s previous prayers.⁷⁸ Against those prayers, the Court had held that the US need only provide a ‘review and reconsideration’ of the trials that occurred in breach of the VCCR.⁷⁹ Furthermore, without further explanation, the Court held that the question of whether to exclude the IOE would have to be assessed ‘under the concrete circumstances of each case’ by the appropriate US courts considering such review.⁸⁰ These domestic courts were tasked with finding whether there was a causal nexus between the illegalities (i.e. the violations of the VCCR) and the convictions and penalties finally imposed on Mexican nationals in the trials.⁸¹

Unlike *Corfu Channel*, there is no need here for a debate of whether the Court could consider exclusionary rules proprio motu given Mexico’s explicit submissions on the matter. Given this, the judgment at least goes against the proposal that *any* violation of international law would make corresponding IOE inadmissible automatically. Arguably, the observation that this question is more fit for US courts to decide in each case supports a ‘balancing’ approach, since the Court impliedly recognises that an examination of the alleged prejudice caused to the trial would have to be context-driven. What is unfortunate is the Court’s simultaneous remark that it did not consider it ‘necessary to enter into...the merits’ of Mexico’s contention regarding an exclusionary GPL under article 38(1)(c).⁸² At best, this is constructive ambiguity⁸³ since, by enabling US courts to potentially admit the IOE, the Court *is* in effect negating the alleged GPL advanced by Mexico (a GPL that, if existent, would have precluded US Courts from admitting the confessions). At worst, this is an abdication of judicial responsibility without reason-

⁷⁴ Memorial of Mexico in *Avena* (n 73), para 374.

⁷⁵ *Avena* (n 73) para 124.

⁷⁶ United States Counter-Memorial (n 31) para 8.27.

⁷⁷ *Avena* (n 73) paras 126–127.

⁷⁸ *ibid.*

⁷⁹ *ibid.*

⁸⁰ *ibid.*

⁸¹ *ibid* para 122.

⁸² *ibid* para 127.

⁸³ See generally Valerie Oosterveld, ‘Constructive Ambiguity and the Meaning of “Gender” for the International Criminal Court’ (2014) 16 *International Feminist Journal of Politics* 563.

giving. If at all some logic *has* to be ascribed to the judgment, however, then it supports neither the apologist position of free reign nor the utopian suggestion of automatic exclusion but a context-driven balancing exercise.

C. THE TIMOR-LESTE 2004 ORDER

As mentioned earlier, this case involved the seizure of Timor-Leste's attorney-client communications by Australia, including materials concerning their pending arbitration.⁸⁴ Concerned not only by the divulgence of confidential discussions as to its future positions in the arbitration but also the potential use of such materials in their pending delimitation arbitration, Timor-Leste argued that the attorney-client privilege is linked to sovereign equality.⁸⁵ This was because no state, *especially* less powerful ones, could present its cases meaningfully if left in the constant fear of external intervention in its legal preparation.⁸⁶ At the stage of provisional measures, the ICJ need not definitively examine the merits of a claim; finding the claim 'plausible' suffices if other requirements for the grant of such measures are met.⁸⁷ Accordingly, the Court found it 'plausible' that Timor-Leste's alleged right to confidential communications 'might be derived from...sovereign equality' and ordered Australia to seal the documents until the resolution of the ICJ dispute.⁸⁸ Subsequently, the case was withdrawn owing to a private settlement.

Let us set aside the fact that the order only ascribes *plausibility* to Timor-Leste's claim. In their best case, proponents of excluding IOE might extrapolate from the order that if a state uses IOE against another, especially when obtained in violation of the latter's own rights, it will automatically become inadmissible. Yet I argue that this would take for granted that *any* use of IOE would necessarily prejudice the equality of a state in proceedings, which is unsupported by the *Timor-Leste* order. Indeed, the Court's remarks appear highly tailored to the exceptional instance of attorney-client privilege breaches in that case, especially considering that the IOE seized appertained to a pending dispute between the states. Thus, to reconcile the order with the balancing approach, it is possible to consider that the preclusion of the IOE was appropriate in the context of the case. This is given that Australia's conduct prejudiced a protection so *serious* that Timor-Leste's equality as a sovereign state was disturbed. Furthermore, Australia's formal position before the ICJ was that it *never* intended to use the documents as crucial evidence in the arbitration in the first place. Instead, Australia submitted that the materials were necessary for domestic prosecutions of Timor-Leste's counsels for certain

⁸⁴ *Timor-Leste* (n 46) para 30.

⁸⁵ Memorial of the Democratic Republic of Timor-Leste in *Questions Relating to The Seizure and Detention of Certain Documents And Data (Timor-Leste v Australia)* (28 April 2014) para 6.5 <<https://www.icj-cij.org/public/files/case-related/156/18698.pdf>> accessed 29 January 2023.

⁸⁶ *ibid.*

⁸⁷ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* (Request for the Indication of Provisional Measures: Order) [2011] ICJ Rep 6, para 53.

⁸⁸ *Timor-Leste* (n 46) paras 27 and 55.

offences.⁸⁹ One is therefore left wondering if the Court might have responded differently had Australia formally sought to defend its sovereign right to present evidence. In the least, it is clear that the order does not offer clear support to the position of automatically excluding IOE.

D. OTHER ICJ CASE-LAW

There are some important but scattered observations across other cases heard by the ICJ that reflect a broad approach of balancing sovereign interests in evidentiary questions. In the *Bosnian Genocide* case,⁹⁰ Bosnia and Herzegovina highlighted that Serbia and Montenegro was relying on redacted versions of military documents in arguing that the genocide was not attributable to it.⁹¹ To this end, the former argued that the latter must be instructed by the ICJ to produce their ‘unredacted’ versions because otherwise the former would be placed unequally against the latter.⁹² Not commenting on this facet of equality, the Court noted that the Applicant already had ‘extensive documentation and other evidence’ of which it made ‘ample use’, especially the records of the International Criminal Tribunal for the Former Yugoslavia.⁹³ Without further explanation, the Court rejected the Applicant’s requests for the unredacted documentation.

This appears to be informed by considerations of balancing in that, because of availability of extensive alternative evidence, the Applicant was *not* placed unequally against the Respondent in the first place. This suggestion can, however, be problematised since the Court later rejected⁹⁴ the Applicant’s claim of attribution on the ground that there was *insufficient* evidence to satisfy the stringent⁹⁵ test of ‘effective control’. Perhaps, the balance ought to have been struck in favour of introducing further evidence. Indeed, the Court had further held that it would apply a strict evidentiary scrutiny given the ‘exceptional’ nature

⁸⁹ Counter-Memorial of Australia in *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (Counter-Memorial vol I, 28 July 2014) para 3.47 <<https://www.icj-cij.org/public/files/case-related/156/18702.pdf>> accessed 29 January 2023.

⁹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43.

⁹¹ *ibid* para 44.

⁹² *ibid* para 205.

⁹³ *ibid* para 206.

⁹⁴ *ibid* paras 413–15.

⁹⁵ On the stringency of this test, see Antonia Cassese, ‘The *Nicaragua* and *Tadic* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’ (2007) 18 *European Journal of International Law* 649. Indeed, the difficulties in proving attribution of conduct has led to scholarship making assumptions of attribution without analysis or searching for norms that could attract responsibility for conduct in indirect ways. See Abhijeet Shrivastava and Rudraksh Lakra, ‘Revisiting Due Diligence in Cyberspace: Crafting International Law’s Arsenal Against Transboundary Botnets’ (2022) 20 *International Journal of Law and Information Technology* 1; also see Aarohi Chaudhari, ‘The Red Echo Cyberattack: Locating India’s Recourse in International Law’ (*Jindal Forum for International and Economic Laws*, July 30 2021), <<https://jindalforinteconlaws.in/2021/07/30/the-red-echo-cyberattack-locating-indias-recourse-in-international-law-aarohi-chaudhuri/>> accessed 9 June 2022.

of the charge of genocide.⁹⁶ This aside, in the case of non-appearance of a party such as in *Nicaragua*⁹⁷ or when parties sought to introduce further evidence after stipulated deadlines,⁹⁸ the Court has generally recalled the need for providing a ‘fair and equal opportunity’ to opposing states in evidentiary matters. Some authors also argue that the *Tehran Hostages* case⁹⁹ is relevant in respect of IOE as the Court ordered the return of US’ diplomatic archives from Iran.¹⁰⁰ However, the fact is that Iran never formally indicated an intention to use such documents as evidence in an inter-state dispute.¹⁰¹ Thus, the case is irrelevant in assessing IOE perhaps apart from the observations of the Court about the unique significance of diplomatic law which makes its violations arguably particularly serious in a hypothetical balancing exercise.¹⁰²

From all this, it can be concluded that the ICJ’s jurisprudence does not indicate a preference for either an apologist stance of free reign of producing IOE or a utopian vision of gatekeeping IOE altogether. If a coherent approach is to be derived from ICJ case law, it would be of balancing the interests of competing states to meaningfully respect sovereign equality in dispute resolution. Some emergent factors that would be relevant for the inquiry on admissibility are the seriousness of the allegations that the evidence could prove (against which, on balance, a higher standard of proof would be raised), the existing availability of alternative evidence (which goes to the value of the IOE to the case) and, by implication, the possibility of securing alternative evidence by legal means. These factors, among others, would show whether the interest in admitting the evidence outweighs competing interests in excluding it. In the next Section of this paper, I will now discuss the approaches of other international fora in the context of IOE, which upon close inspection support the balancing GPL. I also connect the findings from these studies to the threshold of a GPL arising within the international legal system as proposed by Special Rapporteur Vázquez-Bermúdez.

IV. GPL ARISING WITHIN THE INTERNATIONAL LEGAL SYSTEM

The Special Rapporteur has suggested three routes through which a GPL can arise from within the international legal system, while also acknowledging that these routes are not necessarily mutually exclusive.¹⁰³ The first is through the ‘wide

⁹⁶ *Bosnian Genocide* (n 90) para 208.

⁹⁷ *Nicaragua* (n 58) paras 31 and 59.

⁹⁸ *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* (Merits) [2005] ICJ Rep 168, para 58.

⁹⁹ *United States Diplomatic and Consular Staff in Tehran (US v Iran)* (Jurisdiction) [1980] ICJ Rep 3.

¹⁰⁰ Cherie Blair and Ema Vidak Gojkovic, ‘Wikileaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence’ (2018) 33 ICSID Review 235, 241.

¹⁰¹ Thirlway (n 41) 636.

¹⁰² See generally Jessica Ireton, ‘The Admissibility of Evidence in ICSID Arbitration: Considering the Validity of WikiLeaks Cables as Evidence’ (2015) 30 ICSID Review 231, 234.

¹⁰³ Second Report on General Principles (n 16) 38.

recognition' of a principle in treaties and other international instruments,¹⁰⁴ such as the derivation of the *Martens Clause* as a gap-filling principle in international humanitarian law, as emergent from its wide articulation in treaties.¹⁰⁵ The second is to discover principles that underlie general rules of 'conventional or customary' law. He argues that some Courts have treated the concept of 'due diligence' as one such principle underlying a plethora of different legal regimes like human rights, environmental law, and so forth.¹⁰⁶ Finally, he argues that some principles could be 'inherent' in the 'basic features and fundamental requirements' of the international system; for instance, the requirement of state consent to jurisdiction is considered a necessary consequence of sovereign equality, which is a creation of this system.¹⁰⁷

My present research does not indicate that a balancing principle on IOE has arisen by inference from 'customary' legal regimes. To attempt to prove this, one would first have to meet the burden of identifying varying customary norms that implicate 'balancing' in similar ways as the 'due diligence' standard. This would be an onerous task and one that is beyond the scope of this paper. Instead, as regards my proposal of a potential balancing GPL regarding the admissibility of IOE, I seek recourse to a combination of the first and third routes highlighted above. I begin my analysis with the third route, since here, a GPL would be traced from the 'fundamental requirements' of international law. In other words, it would either derive directly from such requirements or arise from a conjunctive reading of different requirements. In this vein, recall that sovereign equality entitles states *both* to the right to meaningfully present their cases and to be treated as equals in respect of being compliant with international law. To elaborate on the latter point, it is indeed a GPL that a state must not be allowed to benefit from its wrongdoing.¹⁰⁸ Allowing such benefits would advantage the illegally acting states over other states, making room for abuse by powerful states. Yet it is also true that a fundamental requirement of sovereign equality is that every internationally wrongful act *must* entail the 'responsibility' of the state performing that act.¹⁰⁹ As previously discussed, to use the illegalities of one state as a smokescreen to conceal those of another would go against this requirement. Thus, it may often be appropriate that the illegalities of *both* states are articulated in a case, as was the approach of the ICJ in *Corfu Channel*. To this end, states against which IOE is invoked would also reserve the right to challenge the probative weight of such evidence.¹¹⁰

¹⁰⁴ *ibid* 59.

¹⁰⁵ *ibid* 42.

¹⁰⁶ *ibid* 45.

¹⁰⁷ *ibid* 47.

¹⁰⁸ *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Merits) [1997] ICJ Rep 7, para 110.

¹⁰⁹ ARSIWA, art 1.

¹¹⁰ For an account of the general evidentiary cross-questioning at the ICJ, see Keith Highet, 'Evidence, the Court, and the Nicaragua Case' (1987) 81 *American Journal of International Law* 1.

In Section I, when discussing the seemingly indeterminate nature of international law, I mentioned that the same argument can be re-articulated to fall in either branch of Koskenniemi's ascending-descending dichotomy. The foregoing discussion demonstrates this precisely. For example, the case *against* an exclusionary rule can defend sovereignty as a matter of one state's prerogative to present any evidence it deems fit (ascending). However, it could *also* be one of ensuring maximal compliance with international law by providing a full account of *all* illegalities (descending). I unite all these varied points to raise another: it is in the *nature* of sovereign equality to necessitate contestation as to its imports on the facts of each case. That is, automatic preference cannot be given to one of these several features of sovereign equality. Therefore, when faced with IOE in interstate proceedings, the particular context and values at stake ought to be considered in assessing to *what ends* of sovereign equality a need for balancing arises, as I have shown in respect of ICJ case law in Section III. Given these factors, there is a strong case for a balancing GPL with respect to IOE which arises organically from such normative requirements of sovereign equality and other principles.

Having discussed this route for a GPL to arise within the international legal system, I now turn to the final route of 'wide' recognition in international instruments. I concede the lack of relevant treaty provisions which explicitly provide for a balancing test as regards IOE specifically. However, reference can be made to the jurisprudence of international arbitral and criminal tribunals in their interpretations of treaties or instruments providing for their evidentiary discretions. For example, consider the investor-state dispute under the North American Free Trade Agreement in *Methanex v the US* where the tribunal chose to preclude the investor from invoking IOE. The basis for this decision was two-fold. *First*, the tribunal argued that neither party should be allowed to use unfair means against another; and *second*, it noted that the particular evidence would not likely materially affect the outcome of the case, even if admitted.¹¹¹ The reference to this second factor appears to reflect a balancing exercise given its attempt to weigh unfairness in introducing IOE against the limited evidentiary interest in introducing the IOE (as identified by the tribunal). Another tribunal formed following the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ('ICSID') in *EDF v Romania* also excluded IOE. While similarly emphasising unfairness in the usage of IOE, it nonetheless noted that the admissibility of the IOE should be assessed in the 'particular circumstances of the case'.¹¹² A separate ICSID tribunal allowed the partial use of IOE, while excluding portions protected by attorney-client privilege.¹¹³ This, again, contradicts an automatic bar and instead shows careful respect for particular norms (attorney-client privilege) as opposed to others. This is similar to the

¹¹¹ *Methanex v United States* (Final Award) 44 ILM 1345 (19 August 2005) para 56.

¹¹² *EDF v Romania* (Procedural Order 3) ICSID Case No ARB/05/13 (29 August 2008) paras 38, 47.

¹¹³ *Caratube v Kazakhstan* (Award) ICSID Case No ARB/13/13 (27 September 2017) paras 156, 1261.

interpretation I offered in Section III of the ICJ's approach to *Timor-Leste*. Such considerations also reflect in the practice of international commercial arbitral tribunals.¹¹⁴ Thus, the International Bar Association has recently affirmed the discretion of arbitral tribunals to decide the admissibility of IOE on balance.¹¹⁵

Further, the founding instruments of most international criminal tribunals enable a balancing exercise in this regard, weighing the interests of procedural fairness in the trial against the avoidance of impunity.¹¹⁶ In practice, one Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia has explicitly rejected the possibility of an automatic bar against IOE.¹¹⁷ Another Trial Chamber emphasised that automatic exclusion of IOE would hamper the tribunal's moral commitment to deter impunity against international crimes (where IOE does not cause intolerable prejudice to the accused).¹¹⁸ Chambers of the International Criminal Court have also attempted balancing exercises, while arguing that *all* international crimes in its mandate are 'serious' and that the seriousness of the allegations proved by IOE would not be a relevant consideration in balancing.¹¹⁹ This, again, shows the importance of a context-driven inquiry in relation to IOE. Moreover, the European Court of Human Rights has refrained to uphold an automatic bar against IOE, noting that such exclusion does not flow from its corresponding Convention.¹²⁰ This approach takes for granted that the prejudice caused in trials owing to IOE would have to be determined on the facts of each case, similar to the ICJ's approach in *Avena* as discussed in Section III.

Some might question the referencing of these authorities as guidance for a potentially appropriate approach in inter-state litigation, given the involvement of individual or non-state entities in these cases. Yet it is crucial that several factors emphasised in these authorities (such as 'seriousness' of a crime) could apply *equally* if the same subject matter were raised with reference to state responsibility (as evident from the *Bosnian Genocide* case).¹²¹ Further, Special Rapporteur Vázquez-Bermúdez only argues for a 'wide recognition' by states of a principle in international instruments as a first route; an exacting uniformity in such recognition is not required.¹²² Considering this wide support for a context-driven assessment in relation to the first route, especially when read *together* with the case

¹¹⁴ Nathan D O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide* (first published 2012, Informa Law 2019) paras 9.23, 9.127.

¹¹⁵ International Bar Association, *Rules on the Taking of Evidence in International Arbitration* (2020) art 9.3.

¹¹⁶ See generally Statute of the Special Tribunal for Lebanon (2007) Annex, UN Doc S/RES/1757, art 16(5); International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence (2015) UN Doc IT/32/Rev 50, Rule 89(C).

¹¹⁷ *Prosecutor v Kordić and Cerkez* (Oral Session) ICTY-13671-T (2 February 2000).

¹¹⁸ *Prosecutor v Brđjanin* (Decision on the Defence 'Objection to Intercept Evidence') ICTY-99-36-T (3 October 2003) paras 53–54.

¹¹⁹ *Prosecutor v Džilo* (Decision on the Admission of Material from the 'bar table') CC-01/04-01/06-1981 (24 June 2009) para 30.

¹²⁰ *Schenk v Switzerland* App No 10862/84 (ECtHR, 12 July 1988) para 46; *P.G. and J.H v United Kingdom* App No 44787/98 (ECtHR, 25 September 2001) para 76.

¹²¹ *Bosnian Genocide* (n 90) para 173.

¹²² Second Report on General Principles (n 16) 8.

for a GPL through the third route discussed previously, it is certainly arguable that balancing is a requirement in addressing IOE. In the least, it is evident that the case for a balancing test is much more palatable than an entirely apologetic inclusionary or utopian exclusionary view towards IOE. Therefore, subsequent literature on IOE ought to address the balancing approach as a concept worth engaging with, even if future commentators disagree with its, arguably current, existence as a GPL.

V. PRE-EMPTING CRITICISMS OF BALANCING

To reiterate my main argument, I have argued that an automatic exclusion or inclusion of IOE is neither legally tenable nor appropriate in inter-state proceedings. Instead, a GPL has arguably arisen from within the international legal system that requires a balancing of competing sovereign interests on the facts and context of *each* case. The benefit of this approach is that it recognises the multiple dimensions of sovereignty with respect to the presentation of IOE and enables tribunals to ensure that none of these dimensions is marginalized in a case. For example, taking account of the context would mean that the same treatment is not given to evidence proving a violation of transboundary harm obligations in comparison to evidence proving the commission of genocide, an international crime that has attained the status of a peremptory norm.¹²³ Similarly, a brief cross-border shooting may not be as ‘serious’ as a violent invasion of embassy premises, which enjoy the unique status of inviolability in diplomatic law.¹²⁴ Determining the extent to which sovereign equality in the non-use of IOE should be *counterbalanced* by the need to affirm sovereign equality in the use of IOE for certain ends is therefore a subjective exercise. Such a balancing analysis would also encourage higher public reason giving and give greater legitimacy to decisions that account for competing moral stakes meaningfully.¹²⁵

However, such subjectivity necessarily carries several risks. I argued in Section I that a balancing principle could potentially help one seek some refuge from indeterminacy with respect to the admissibility of IOE. Nevertheless, it remains well-known even for other existing balancing tests (for example, in human rights law) that their criteria often presuppose various theories of justice which can often be inconsistent across tribunals.¹²⁶ One is thus brought back to Koskeniemi’s suggestion on being conscious of theories of justice in constructing

¹²³ See generally Jan Wouters and Sten Verhoeven, ‘The Prohibition of Genocide as a Norm of *Jus Cogens* and its Implications for the Enforcement of the Law of Genocide’ (2005) 5 *International Criminal Law Review* 401.

¹²⁴ Ireton (n 102); Jean Salmon, *Manuel De Droit Diplomatique* (Brulyant 1994) 210, 318.

¹²⁵ See generally Kai Möller, ‘Proportionality: Challenging the Critics’ (2012) 10 *International Journal of Constitutional Law* 709; Rudraksh Lakra, ‘Bridge to a Culture of Justification: Guidelines for Designing the Standard of Proportionality in India’ (2023) 8(1) *Cambridge Law Review* (forthcoming).

¹²⁶ Möller (n 125) 715; Mattias Kumm, ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review’ (2010) 4 *Law and Ethics of Human Rights* 142.

arguments as elaborated in Section I. I have portrayed this flexibility as an advantage above in the illustration of differential treatment towards international crimes when compared to other norms; yet apart from that illustration itself being open to debate based on one's own theory of international justice, there could be cases where the exercise becomes even less straightforward. This could, for instance, arise from difficulties in weighing the seriousness of the illegalities in securing IOE against the seriousness of the claims alleged which is supported by that IOE. To offer a further example, consider a situation where a state unlawfully hacks data in the cyber infrastructure of another state to gain evidence for showing that the latter conducted similarly unlawful cyber operations previously.¹²⁷

Much of such a balancing exercise would therefore become vulnerable to criticisms of indeterminacy. It would also invite hesitancy from scholars who are opponents of the pedestal on which adjudication-based developments of international law have been placed.¹²⁸ Considering that such reasonings would not exist in a social or political vacuum, immense caution would have to be exercised in the articulation of sovereign interests in each case. This is especially given the role that the judgments of impartial tribunals have in shaping political relationships between states and peoples. Any omission to articulate relevant moral stakes between sovereign states would be equally open to criticism. Yet in the least, such an exercise would enable a site for debating the various contestations of sovereign equality in the first place rather than cursory and evasive addressal of issues concerning IOE, as has been the practice of the ICJ thus far. I further contend that attempts to articulate and address the interests of all competing states or parties could increase the possibility of their compliance with the adjudicator's findings. Keeping all these considerations in mind, a test of balancing sovereign interests would remain the most persuasive and comprehensive, allowing the fullest avoidance of impunity in inter-state litigations with respect to IOE. In the case of arbitral awards, this could reduce the likelihood of their enforcement being challenged. Ultimately, it is also important to remember that GPLs were accepted as a source by states with the very rationale of performing a gap-filling function to avoid a situation of *non liquet*.¹²⁹ Neither a polar inclusionary nor exclusionary GPL shows any sign of emergence, nor balancing from domestic practices. Hence, only the present iteration of balancing arising from within the international legal system can ensure that international adjudications do not become impaired when faced with IOE.

¹²⁷ On the growing frequency of such unilateral cyberoperations, see Michael N Schmitt, 'Autonomous Cyber Capabilities and the International Law of Sovereignty and Intervention' (2020) 96 *International Law Studies* 549.

¹²⁸ Fuad Zarbiyev, 'On the Judge Centredness of the International Legal Self' (2021) 32 *European Journal of International Law* 1139.

¹²⁹ Hugh Thirlway, *The Sources of International Law* (2nd edn, Oxford University Press 2019) 11–12; Mariana Clara De Andrade, 'Regional Principles of Law in the Works of the International Law Commission' (2021) 86 *Questions of International Law* 23, 40.

VI. CONCLUSION

In this paper, I have argued that a general principle of ‘balancing’ competing interests has arisen in contexts of IOE, requiring international adjudicators to identify, articulate, and attempt to weigh the distinct stakes of all parties seeking to include or exclude the evidence. No GPL addressing IOE could arise by transposition from municipal practices owing to the absence of any general trend in that regard, among other reasons. The balancing GPL has instead emerged from two of the thresholds recently affirmed by Special Rapporteur Vázquez-Bermúdez as satisfying the route of a GPL arising from ‘within’ the international legal system. The first threshold drew by inference from reconciling some of the basic requirements of international law. In demonstrating the second threshold, I embarked upon an inquiry of the approaches taken by multiple international adjudicators from distinct legal regimes. This argument is also supported by reference to case law of the International Court of Justice. Albeit less direct and explicit in supporting balancing, contextually reading its pertinent decisions at least makes it clear that there is no automatic inclusion or exclusion of IOE. While a balancing principle necessarily entrusts adjudicators with the power to identify distinct stakes to balance in each case, this discretion can also be viewed as a responsibility. The obligation of articulating and weighing different stakes will allow states and other parties to demand reason-giving from adjudicators to whom IOE is introduced and will, hopefully, provide a site for reasoned debate between the parties on that count. Such a process could not only strengthen the legitimacy of the final findings but also encourage litigating states to actively participate in the reason-giving exercise. Amidst continuing disagreement and confusion on the topic, it is hoped that the arguments professed here find serious engagement by future litigators and adjudicators concerned with IOE.

Lex Situs v Lex Digitalis: Predictions on the Jurisdiction Problem of Digital Asset Transactions

MATTHEW JOHNSON*

ABSTRACT

Digital assets represent a market which, though still nascent, has grown to a value of \$2.6 trillion USD.¹ This article approaches the market from a private international law perspective to demonstrate firstly that claimants to a digital asset transaction will often struggle in proving that a court has jurisdiction to hear their dispute, and secondly that the most likely solution to this issue is a choice of court clause. As the scholarship on this matter is still burgeoning, the field surrounding digital assets and jurisdiction is generally limited to variations of these first two issues; the literature is characterised by identifying the problem and proposing solutions.² This article takes the field a step further, looking not only at how the solution can fix the problem, but what problems might arise as a result of the solution. The third, and most novel, prediction of this article is that one long-term problem stemming from a choice of court solution will be the curtailment of stay applications on the grounds of *forum (non) conveniens*. Ultimately, the article serves to demonstrate that, although Dickinson is right that ‘there is no need to panic and throw the existing toolbox away’,³ reform of private international law is still necessary to accommodate digital asset disputes in the long-term.

Keywords: digital asset, blockchain, distributed ledger technology, smart contract, jurisdiction, conflict of laws, private international law

* GDL (Oxford Brookes); BA History (Exeter). I am grateful to the reviewers and editors for their assistance. All errors are my own.

¹ Mallika Mitra, ‘The Total Value of the Crypto Market More Than Doubled in One Year. What Happens Next?’ (*Money*, 8 April 2022) <<https://money.com/crypto-market-doubled-value-whats-next/#:~:text=In%202021%2C%20the%20crypto%20market's,nov%20sits%20around%20%242.1%20trillion>> accessed 20 January 2023.

² For the leading text see Andrew Dickinson, ‘Cryptocurrencies and the Conflict of Laws’ in David Fox and Sarah Green (eds), *Cryptocurrencies in Public and Private Law* (Oxford University Press 2019).

³ Dickinson (n 2) para 5.121.

I. INTRODUCTION

A. WHAT ARE DIGITAL ASSETS AND WHAT PROBLEMS DO THEIR TRANSACTIONS RAISE?

Digital assets are information, stored electronically, that is uniquely owned and can be transferred by individuals.⁴ They do not necessarily represent anything in the real world but have monetary value nonetheless, which is determined by the market. At present, they are most common in the form of cryptocurrencies⁵ and NFTs,⁶ but new categories are emerging.⁷ The technology they are founded on is called ‘blockchain’, which is a type of distributed ledger technology. Blockchain is a system of recording information in a way that makes it impossible to change by duplicating and distributing data across all computers on the network.⁸ The data is held in blocks that are recorded and communicated to network-computers (called ‘nodes’⁹) that create a timeline of data history.

The main advantage of this distributed ledger technology is that the data cannot be altered: blockchain provides an immutable way of recording transactions, tracking assets, and transferring ownership, all of which generate trust in the security of digital assets.¹⁰ Digital assets are increasingly traded using ‘smart contracts’, which use this same blockchain technology to automate the performance of digital transactions without requiring any manual engagement from the parties.¹¹ Smart contracts move the enforcement of conventional legal contracts outside the scope of the judiciary and into the realm of ‘enforcement through software’.¹²

⁴ Matthew Vincent, ‘What are Digital Assets and How Does Blockchain Work?’ *Financial Times* (London, 21 October 2021) <www.ft.com/content/2691366f-d381-40cd-a769-6559779151c2> accessed 20 January 2023.

⁵ These are digital currencies where transactions are verified and recorded in a decentralised system. The most popular examples are Bitcoin, Ethereum, and Binance Coin.

⁶ ‘Non-fungible tokens’. These are digital records that represent an immutable digital contract conferring ownership of an asset. The most popular example is digital artwork. See LawtechUK, ‘Smarter Contracts’ (LawtechUK February 2022) 103 <https://resources.lawtechuk.io/files/report_smarter_contracts.pdf> accessed 25 February 2023.

⁷ For example, Central Bank Digital Currencies are being introduced in the UK. These are digital currencies issued by a central bank. See Economic Affairs Committee, *Central Bank Digital Currencies: A Solution in Search of a Problem?* (Cm 131, 2022) ch 1.

⁸ LawtechUK (n 6) 9.

⁹ These are computers on the transaction network. A Bitcoin node, for instance, is a computer in the Bitcoin peer-to-peer network that hosts and synchronises a copy of the blockchain.

¹⁰ LawtechUK (n 6) 9.

¹¹ *ibid* 8.

¹² Shinobi, ‘Yes, Bitcoin is a Smart Contract Platform’ (*Bitcoin Magazine*, 29 November 2021) <<https://bitcoinmagazine.com/technical/why-bitcoin-smart-contract-platform#:~:text=Many%20think%20that%20smart%20contracts,smart%20contract%20platform%20by%20definition.&text=Nov%2029%2C%202021-,Many%20think%20that%20smart%20contracts%20are%20only%20executable%20on%20overly,smart%20contract%20platform%20by%20definition>> accessed 20 January 2023. See also Nick Szabo, ‘Formalizing and Securing Relationships on Public Networks’ (1997) 2 *First Monday* 9.

The immutable and automated nature of digital assets transacted on smart contracts led to the view, first introduced by Lessig, that ‘code is law’; in other words, that blockchain technology is self-enforcing and thus exists outside the boundaries of the law.¹³ However, blockchain’s power of enforcement is limited to performance. As Lehmann highlights, it does not provide any mechanism for remedy or reversing faulty transfers.¹⁴ This is because, as a piece of code, it does not know whether an enforceable legal obligation has been validly created.¹⁵ Therefore, digital asset transactions still fall within the judicial remit when disputes arise.

The problem that this article exposes will transpire in any digital asset dispute, posing an obstacle for any party seeking a judicial remedy for a digital wrong. That problem is jurisdiction. Blockchain technology is borderless: transferring digital assets via smart contracts is an entirely intangible process, involving pseudonymous¹⁶ parties acting on a mechanism with no connection to any particular state.¹⁷ The decentralised and distributed nature of the technology on which these intangible assets are recorded, combined with the permission-less chain,¹⁸ means that digital assets are ‘located everywhere and yet nowhere’.¹⁹

The problem is that the law governing jurisdiction (private international law) is rooted firmly in geography: for a court to have jurisdiction to hear a dispute, it must first be shown that the dispute bears a physical relation to the state in which the court is based.²⁰ As will be discussed, digital assets do not fit neatly into private international law principles, making jurisdiction very difficult for many claimants to satisfy. The Law Commission, in advising that smart contracts are legally enforceable without legislative incorporation, identified two issues as the

¹³ Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books 1999) 6. See also Alexander Saveliev, ‘Contract Law 2.0: “Smart” Contracts as the Beginning of the End of Classic Contract Law’ (2017) 26 *Information and Communications Technology Law* 116, 132.

¹⁴ Matthias Lehmann, ‘Who Owns Bitcoin? Private (International) Law Facing the Blockchain’ (*Oxford Business Law Blog*, 18 October 2019) <www.law.ox.ac.uk/business-law-blog/blog/2019/10/who-owns-bitcoin-private-international-law-facing-blockchain> accessed 20 January 2023.

¹⁵ Giesela Rühl, ‘Smart (Legal) Contracts, or: Which (Contract) Law for Smart Contracts?’ in Bernadetta Cappelletto and Gherardo Carullo (eds), *Blockchain Law and Governance* (Springer 2020) 4.

¹⁶ Parties to a digital transaction rarely use their real names on blockchain systems.

¹⁷ Matthias Lehmann, ‘Who Owns Bitcoin? Private Law Facing the Blockchain’ (2019) 21 *Minnesota Journal of Law, Science & Technology* 93, 111; Clifford Chance, R3, and Singapore Academy of Law, ‘Private International Law Aspects of Smart Derivatives Contracts Utilizing Distributed Ledger Technology’ (ISDA, January 2020) <<https://www.sal.org.sg/sites/default/files/SAL-LawReform-Pdf/2020-08/2020-Private-International-Law-Aspects-of-Smart-Derivatives-Contracts-Utilizing-DLT.pdf>> accessed 25 February 2023.

¹⁸ This means that blockchain networks are openly accessible to any member of the public. Permissioned networks also exist but are not the focus of this article.

¹⁹ Chloë Bell and Joshua Cainer, ‘Decrypting the Situs: Conflicts of Laws Challenges in Cryptoasset Litigation’ (*Outer Temple Chambers*, 20 October 2020) <<https://www.outertemple.com/decrypting-the-situs-conflicts-of-laws-challenges-in-cryptoasset-litigation/>> accessed 20 January 2023. See also Florence Guillaume, ‘Aspects of Private International Law Related to Blockchain Transactions’ in Daniel Krauss, Thierry Obrist and Olivier Hari (eds), *Blockchain, Smart Contracts, Decentralised Autonomous Organisations and the Law* (Edward Elgar Publishing 2019) 70.

²⁰ Adrian Briggs, *Private International Law in the English Courts* (Oxford University Press 2014) para 1.10.

most challenging for their project: first, how to determine the location of a digital asset; and second, how to determine the location of actions that ‘take place’ on a distributed ledger.²¹ The Commission is currently in its pre-consultation stage of a further project, seeking to advise specifically on the issue of digital assets and jurisdiction.²²

This article will suggest that the most likely and sensible solution to this problem is to encourage choice of court clauses for the transaction of digital assets. Doing so will bypass the private international law problems that are inherent in blockchain technology and allow digital disputes to be protected by law. However, by approaching the solution through a broader, more holistic lens, the article reveals that this solution is appropriate only as a short-term measure until more fundamental reform materialises. This is because the choice of court solution will ultimately have a detrimental impact on defendants seeking to stay proceedings on the grounds of *forum (non) conveniens*: enforcing a choice of court clause will not solve the problem of jurisdiction outright, it will only shift it onto the defendants.

B. STRUCTURE AND METHODOLOGY

The article is structured into three substantive sections. Section II details the exact problem facing digital asset transactions and jurisdiction. This will first determine that digital assets are likely to be held as property, before demonstrating that the four suggested ways of ascertaining jurisdiction will be inappropriate in most cases. These are: (a) the *lex situs*;²³ (b) the parties’ domicile; (c) the location of formation or performance; and (d) the locations of actions on the ledger or agents involved. Section III will then illustrate how a choice of court clause is the most likely solution to this problem. Section IV will finally look at the impact that this will have on stay applications on the ground of *forum (non) conveniens*.

With regard to primary research, the article is based predominantly on the common law rules relating to private international law. This is for two reasons. First, the common law rules are more flexible and provide discretion for the courts, making them the focus of most litigation.²⁴ Second, following Brexit, only

²¹ Law Commission, *Smart Legal Contracts* (Law Com No 401, 2021) paras 7.135–7.137.

²² Law Commission, ‘Digital Assets: Which Law, Which Court?’ (*Law Commission*) <<https://www.law-com.gov.uk/project/digital-assets-which-law-which-court/>> accessed 20 January 2023.

²³ ‘The law where the property is situated’. Although the term is sometimes used to mean the whole body of jurisdiction principles, it is used here only to mean the physical location of property that is subject to a dispute.

²⁴ ‘Discretion’, here, refers to the doctrine of *forum (non) conveniens* (‘inappropriate forum’). See Law Commission, ‘Smart Contracts: Call for Evidence’ (Law Commission December 2020) para 7.81 <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2020/12/201216-Smart-contracts-call-for-evidence.pdf>> accessed 24 March 2023.

the Rome I and II Regulations²⁵ and the Hague Convention²⁶ apply in the UK, and the statutory rules are currently in a state of flux—as Green describes, ‘private international law has become a free-for-all’.²⁷ In the interest of practicality and certainty, the common law rules provide a more valuable basis on which the predictions of this article can be based.

Ultimately, the jurisdiction problem facing digital assets is a live issue that is yet to be settled; there is at present no precedentially binding authority on which to rely. What is known, however, is that because of the international nature of this market, private international law will surface in almost every digital asset dispute. It is the first obstacle in any such litigation, and the rules are rapidly changing to accommodate this necessity. It is hoped that this article will serve as an indication of the forethought that is required as this reform unfolds.

II. THE PROBLEM: ‘LOCATION’ ON A LEDGER

The name of the game is location, location, location: location of events, things, persons... we have an inherent imperfection that is beyond the capability of conflicts to redress.²⁸

Digital assets present a ‘formidable’ challenge for private international law.²⁹ As Kozyris indicates in the above quotation, this is because the rules of jurisdiction and applicable law are situated on territorial connecting factors designed for a physical world. Guillaume concurs, arguing ‘only conflict-of-law rules that are independent of any location criterion are able to provide a satisfactory connection’ for on-chain transactions,³⁰ which Lehmann supports by arguing that for such agreements ‘it is impossible to determine the state with the closest connection’.³¹ Section II of this article expands on these concerns, explaining the exact issue faced by the parties to a cross-border digital transaction.

²⁵ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I); Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II). Both were transposed by section 8(1) and schedule 7, para 21(b) of the European Union (Withdrawal) Act 2019.

²⁶ Hague Choice of Court Agreements Convention 2005.

²⁷ Sarah Green, ‘The Future of Legal Practice: The Law Commission: Smart Contracts and Digital Assets’ (*Law Commission*, 25 January 2022) <<https://www.lawcom.gov.uk/the-law-of-england-and-wales-can-accommodate-smart-legal-contracts-concludes-law-commission/>> accessed 25 February 2023. See also Nick Pointon and Natasha Dzameh, ‘Brexit and What it Means for the Conflict of Laws’ (*St John’s Chambers*, 29 March 2021) <<https://www.stjohnschambers.co.uk/wp-content/uploads/2021/03/Brexit-and-what-it-means-for-the-conflict-of-laws-.pdf>> accessed 20 January 2023.

²⁸ Phaedon Kozyris, ‘Conflicts Theory for Dummies: Après le Deluge, Where Are We on Producers Liability?’ (2000) 60 *Louisiana Law Review* 1161, 1164.

²⁹ Guillaume (n 19).

³⁰ This means transactions that occur on a blockchain.

³¹ Lehmann (n 17) 112; Guillaume (n 19) 70.

A. APPLICABLE LAW

Determining how subject matter is held ‘is the natural and necessary starting point for the analysis of any conflicts case’.³² This is because the jurisdiction rules will differ depending on whether digital assets are considered money or property.³³ Although Demchenko considers on-chain assets to be money, and thus governed by the *lex monetae*,³⁴ this is not supported by case law.³⁵ Although there is an increasing tendency to view digital assets as property, Bryan J reveals the difficulty in doing so: ‘they are neither chose in possession nor are they chose in action’.³⁶ This blurs Fry LJ’s once black-letter dichotomy that ‘all personal things are either in possession or action. The law knows no *tertium quid* between the two’.³⁷

Nevertheless, the judicial direction has firmly been towards treating digital assets as property. Bryan J in *AA v Persons Unknown*, despite the ‘*prima facie* difficulties’ outlined above, stated that ‘crypto assets such as Bitcoin are property’.³⁸ Indeed, digital assets meet Lord Wilberforce’s definition of property in *National Provincial Bank*, being definable, identifiable by third parties, capable in their nature of assumption by third parties, and having some degree of permanence.³⁹ This reasoning has been expressly applied in at least seven other cases.⁴⁰ Indeed, Green, the Law Commissioner for Commercial and Common Law, suggests that the Commission’s current position on this question is to decouple possessability from tangibility, enabling digital assets to constitute a third category of property.⁴¹ Having established that digital assets are most likely to be held as property, the article will now discuss the substantive issues this poses for determining their jurisdiction.

³² Peter Hay, Patrick Borchers, and Symeon Symeonides, *Conflict of Laws* (5th edn, West Academic 2010) 147–149.

³³ Lehmann (n 17) 112.

³⁴ ‘The law of the country in whose currency the debt is expressed’. See Dickinson (n 2) para 5.73.

³⁵ Compare Olena Demchenko, ‘Bitcoin: Legal Definition and its Place in Legal Framework’ (2017) 3 *Journal of International Trade, Logistics and Law* 23, 23 with Johan David Michels and Christopher Milard, ‘The New Things: Property Rights in Digital Files?’ (2022) 81 *Cambridge Law Journal* 323.

³⁶ *AA v Persons Unknown* [2019] EWHC 3556 (Comm), [2020] 4 WLR 35 [55].

³⁷ *Colonial Bank v Whinney* (1885) 30 ChD 261, 285 (Fry LJ).

³⁸ *AA* (n 36) [55], [59].

³⁹ *National Provincial Bank v Ainsworth* [1965] 1 AC 1175 (HL) 1248A (Lord Wilberforce).

⁴⁰ *Vorotyntseva v Money-4 Ltd (t/a Nebeus.com)* [2018] EWHC 2596 (Ch); *Robertson v Persons Unknown* (Com Ct, 15 July 2019); *B2C2 Ltd v Quoine Pte Ltd* [2019] SCHC(I) 3; *Ruscoe v Cryptoppia Ltd* [2020] NZHC 728, [2020] 2 NZLR 809; *Ion Sciences Ltd v Persons Unknown* (Com Ct, 21 December 2020); *Fetch.ai Ltd v Persons Unknown* [2021] EWHC 2254 (Comm); *Lavinia Deborah Osbourne v Persons Unknown and Ozone Networks* [2022] EWHC 1021 (Comm).

⁴¹ Green (n 27).

B. APPLYING THE PRINCIPLES

The traditional principle for determining jurisdiction for property subject to a dispute is the *lex situs*, which dictates that the dispute should be governed by the law of the place in which the property is situated.⁴² This applies to tangible movable property,⁴³ tangible immovable property,⁴⁴ and intangible property of all forms, including debts,⁴⁵ shares,⁴⁶ and intellectual property.⁴⁷ This article will now discuss why neither this conventional approach, nor the three other suggested ways of locating the jurisdiction of a digital asset transaction, are appropriate, calling into question Lord Clarke's assumption that 'all property, whether tangible or intangible, has a *situs* for legal purposes'.⁴⁸

(i) *Lex Situs*

The general reason why jurisdiction cannot be based on the location of the asset has already been outlined: blockchain technology does not operate in a territorial or bordered way. There are, however, specific reasons why the *lex situs* rule relating to other kinds of intangible property (debts, shares, intellectual property, as listed at n 45–47) do not apply by analogy.

First, digital assets are not analogous to debt. This is because they do not represent rights against any particular person: as Ng highlights, 'there is no debtor or obligor'.⁴⁹ The difference is further exposed by the fact that there is no third-party intermediary (such as a bank) in blockchain transactions, which are decentralised. Rather than a debtor or obligor relationship, Bell and Cainer argue that the transfer of digital assets is more akin to moving property between safety deposit boxes.⁵⁰

Second, digital assets are not analogous to shares. The *lex situs* of a share is determined either by the location of the corporation issuing it or where the share register is located (there is no definitive authority as to which).⁵¹ This analogy is equally inapposite, as there is no corporation that 'issues' a digital asset, meaning

⁴² Lord Collins and Jonathan Harris (eds), *Dicey, Morris & Collins on the Conflict of Laws* (15th edn, Sweet & Maxwell 2017) para 22-025.

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ *ibid* para 22-026.

⁴⁶ *ibid* para 22-044.

⁴⁷ *ibid* para 22-051.

⁴⁸ *Taurus Petroleum Ltd v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq* [2017] UKSC 64, [2017] 3 AC 690 [29] (Lord Clarke).

⁴⁹ Michael Ng, 'Choice of Law for Property Issues Regarding Bitcoin under English Law' (2019) 15 *Journal of Private International Law* 315, 327.

⁵⁰ Bell and Cainer (n 19) 15.

⁵¹ Compare *Macmillan Inc v Bishopgate Investment Trust plc (No 3)* [1996] 1 WLR 387 (CA) with *Re Harvard Securities Ltd (In Liquidation)* [1998] 2 BCC 567 (Ch).

there is no entity that agrees to take on any rights or obligations.⁵² Similarly, there is no register as such, but rather transactions are recorded on a distributed ledger which creates authentic copies for each party, a system which Ng defines as ‘markedly different from having a branch and main registers’.⁵³

Third, digital assets are not analogous to intellectual property. These are exclusive rights (in the form of patents, trademarks, and copyright) conferred by a state that operates only within that state’s territory.⁵⁴ Digital assets do not resemble this structure at all; there is no legal system conferring monopoly protection over an asset transferred on a blockchain.⁵⁵

Evidently, the traditional *lex situs* principle that governs other kinds of intangible property does not apply by analogy to digital assets, meaning jurisdiction cannot be ascertained by any artificial ‘location’ that might be assigned to the asset itself. This is confirmed by Dickinson, who asked how one ‘ascribes a location to a thing which exists only in law... and which may be communicated instantaneously across the globe?’.⁵⁶

(ii) *Defendant’s Domicile*

Traditionally, where parties have not included a choice-of-court agreement, the applicable jurisdiction can be determined by the defendant’s domicile.⁵⁷ The first practical issue with this is the pseudonymous⁵⁸ nature of blockchain transactions, which means the identity and location of the defendant will often not be readily available. This was noted by Bryan J, stating that ‘because [the defendants] are persons unknown it is not as yet known what jurisdiction they are in’.⁵⁹ Given that pseudonymity is a large attraction of blockchain technology, in most cases, the identity and jurisdiction of the defendant will not be known, meaning domicile will generally be unhelpful on its own to determine the jurisdiction of a digital dispute.

Nevertheless, Butcher J in *Ion Sciences* determined that the jurisdiction ‘of a cryptoasset is the place where the person or company who owns it is domiciled’.⁶⁰ On top of the practical shortfalls already discussed, this is logically unsound. The judgment received judicial criticism from Falk J in *Tulip Trading*,⁶¹ who summarily dismissed a service out of jurisdiction application in rejection of Butcher J’s

⁵² Ng (n 49) 328.

⁵³ *ibid* 329.

⁵⁴ Collins and Harris (n 42) para 22-051.

⁵⁵ Ng (n 49) 331.

⁵⁶ Dickinson (n 2) para 5.08.

⁵⁷ This was provided by article 4 of Brussels I, Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, but following Brexit this is now a principle of the common law. See Law Commission, *Call for Evidence* (n 24) para 7.14.

⁵⁸ Parties to a digital transaction rarely use their real names on blockchain systems.

⁵⁹ *AA* (n 36) [73].

⁶⁰ *Ion Sciences* (n 40) [13]. See also *Fetch.ai* (n 40); *Sally Jayne Davidz v Persons Unknown and Huobi* [2022] EWHC 280 (QB).

⁶¹ *Tulip Trading v Bitcoin* [2022] EWHC 667 (Ch).

reasoning. Falk J referred to Dickinson's analysis in finding that Butcher J had misinterpreted 'residency' to mean 'domicile'.⁶² This is an important distinction because residency is taken to mean 'central management and control', a concept that directly contradicts the fundamental attribute of blockchain transactions: they are decentralised and distributed.⁶³ The Digital Law Association (DLA) make this very criticism, arguing that Butcher J 'disregards the distributed nature of DLT [distributed ledger technology]...which is problematic for multi-signatories, autonomous or anonymous parties to a contract'.⁶⁴ To tie down a digital asset transaction to one central location would undermine a core feature that makes the market so unique.

Hence, the domicile cannot be adopted as the means to determine jurisdiction. It would rarely be of any utility, as most parties contract in a pseudonymous way, meaning equitable instruments such as interim injunctions to reveal identity would have to become a mainstay of these disputes.⁶⁵ It would also defeat the decentralised and distributed appeal of on-chain transactions by imputing a centralised, singular location. Domicile, therefore, provides neither a practical nor logical solution to the jurisdiction problem.

(iii) Location of Formation or Performance

The Law Commission raised (and then rejected) the suggestion to apply the principle that jurisdiction to hear a dispute may be based on the fact that a contract was formed within a specific country.⁶⁶ The issue for digital asset transactions is that they are increasingly based on smart contracts, where the contract is formed by the autonomous interactions of two or more computer programs rather than individuals manually forming an agreement.⁶⁷ There are three reasons why it would be difficult to assert jurisdiction using formation or performance.

First, the coded nature of transactions means that the parties are not themselves involved in the formation or performance, which can lead to arbitrary results. If, for instance, a person receiving a digital asset is on holiday at the relevant time, it seems illogical to hold the holiday destination as the jurisdiction.⁶⁸ This criticism reflects Lord Sumption's comments in *Brownlie*, warning of the 'serious practical difficulties' of such a rule, as well as Lord Leggatt's in *Nile Plaza*,

⁶² *ibid* [144]. See also Dickinson (n 2) para 5.108.

⁶³ *Tulip Trading* (n 61) [149].

⁶⁴ Law Commission, 'Smart Legal Contracts: Responses to Call for Evidence' (Law Commission December 2020) 226 <<https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2021/12/211208-Smart-Contracts-Compiled-Responses-redacted-final.pdf>> accessed 24 March 2023.

⁶⁵ Bell and Cainer (n 19) 9.

⁶⁶ CPR 6B PD 6B 3.1(6)(a); Law Commission (n 21) para 7.18. See also *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1969] 1 WLR 377 (CA).

⁶⁷ Law Commission (n 24) para 7.23.

⁶⁸ *ibid* para 7.70.

who suggested that ‘the bare fact that one of the parties was in England when the contract was made is... a tenuous connection with the jurisdiction.’⁶⁹

Second, communication of the transaction does not go to the participants as individuals, but rather each of the nodes⁷⁰ on the network, which means jurisdiction could be grounded in a very large number of countries without any being of convenience.⁷¹

Third, the performance of a digital asset transaction does not occur in any physical location and thus does not avoid the issue of arbitrarily treating an intangible process as if it were physical. The DLA note that for the purchase of digital art, the ownership exists only in the blockchain technology and the art itself, the NFT can only ever be accessed digitally, it is never physically delivered to the buyer.⁷² As Wang argues, the place of download could not be considered the place of performance, neither could the place of the receiving server because they are only fragments of the digital product.⁷³

It is clear that the location of the formation or performance of a transaction for digital assets does not provide a solution to the issue of jurisdiction. To do so would not only be practically very arduous, but it would also create many jurisdictions that bear no logical connection to the dispute in question.

(iv) Location of Actions on the Ledger or Agents Involved

Finally, the Law Commission also raised (and again rejected) the suggestion that the location of the nodes or agents participating in the ledger could be used to determine jurisdiction.⁷⁴ There are three reasons why this would be unhelpful.

First, as Phillips details, the location of nodes, the computers that engage in the ‘actions’, have no relation to the location of the parties, nor anything substantively involved in the transaction.⁷⁵ Nodes do not signify a real connection with any jurisdiction, as they are spread in various locations across the globe, operating across many borders.⁷⁶

Second, there is a practical difficulty in being able to identify that a specific node was responsible for a transaction over any other node, meaning location would *de facto* be found anywhere that a blockchain node is located, regardless of its interaction with the transaction.⁷⁷

⁶⁹ *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, [2018] 1 WLR 192 [16] (Lord Sumption); *FS Cairo (Nile Plaza) v Lady Brownlie* [2021] UKSC 45, [2021] 3 WLR 1011 [211]–[213] (Lord Leggatt).

⁷⁰ These are computers on the transaction network. See n 10.

⁷¹ Law Commission (n 24) para 7.70.

⁷² Law Commission (n 64) 225.

⁷³ Faye Fangfei Wang, ‘Obstacles and Solutions to Internet Jurisdiction: A Comparative Analysis of the EU and US Laws’ (2008) 4 *Journal of International Commercial Law and Technology* 233, 235.

⁷⁴ Law Commission (n 24) para 7.82.

⁷⁵ Law Commission (n 64) 62.

⁷⁶ *ibid* 91.

⁷⁷ *ibid*.

Third, the decentralised nature of blockchain technology means that there are no agents involved in the transactions on which jurisdiction could be based. Allen & Overy's response to the Law Commission firmly held that 'two computer programs who autonomously reach an agreement could not be said to have acted as the parties' agents', a view that was confirmed in the Commission's final report.⁷⁸

Section II of this article has therefore demonstrated the jurisdiction problem facing digital asset transactions. Parties will struggle to situate disputes in relation to the digital property itself, the domicile of the intended defendant, the location of formation or performance of the agreement, or any actions on the ledger or agents involved. Section III will respond to this analysis with the most likely and pragmatic solution.

III. THE SOLUTION: *ELECTIVE SITUS*

The most likely solution to this problem is to encourage a choice of court clause in any cross-border digital asset transaction. This is the conclusion reached by the Law Commission, which predicts that 'such a choice is likely to provide parties with clarity as to the content of their obligations, and the consequences of any wrongdoing'.⁷⁹

There are concerns, however, if such a choice of court clause is even possible for contracts that take place on-chain. These concerns can be broadly divided into two categories. First, the notion that a choice of court cannot be expressed via code. Second, the notion that the existence of such an express clause is counter to the fundamental advantage of these transactions: flexibility. These concerns are rebutted in turn.

A. A CODED CHOICE?

Rühl and DLA Piper assume that clauses expressing jurisdiction 'can hardly be represented in algorithmic fashion', making them 'incompatible with smart contracts'.⁸⁰ The basis for this assumption is that the choice must be legible to the parties, though there is reason to challenge this.

In *L'Estrange*, Scrutton J expressed that 'it is wholly immaterial whether [a party] has read the document or not', in relation to a signed agreement, and in *Schwartz*, it was similarly held that illiteracy was no justification for avoiding a contractual obligation.⁸¹ More recently, and more directly persuasive, is the case of *Pugliese*.⁸² There, a contract formed in the English language contained an exclusive

⁷⁸ Law Commission (n 64) 48; Law Commission (n 21) para 7.115.

⁷⁹ Law Commission (n 21) para 7.77.

⁸⁰ Rühl (n 15) 12; Law Commission (n 64) 241.

⁸¹ *L'Estrange v Graucob* [1934] 2 KB 394 (KB) 403 (Scrutton J); *Barclays Bank Plc v Schwartz* The Times, 2 August 1995 (CA).

⁸² *Coys of Kensington Automobiles Ltd v Pugliese* [2011] EWHC 655 (QB), [2011] 2 All ER (Comm) 664.

jurisdiction clause which the defendant, an Italian, claimed she could not interpret. It was held that this was not relevant, and the court gave effect to the choice of court clause. By analogy, the suggestion that because code is not easily interpretable means that jurisdiction clauses cannot be incorporated into smart contracts is not necessarily absolute. This is corroborated by Allen & Overy, who ‘do not see that an inability to understand the code should be a bar to the code being the source of a contractual obligation’.⁸³

There are, however, limits to the analogy. First, in *L'Estrange*, the contract was formed upon the signing of the document. This distinguishes on-chain contracting, where there are no agents involved: it is the computers that reach an agreement. Consequently, freedom of contract is not necessarily upheld by applying the *L'Estrange* line of case law to smart contracts. Second, even if the legibility of the contract is not of concern, it is unclear whether the statutory protections provided by the Unfair Contract Terms Act 1977 and the Consumer Rights Act 2015 will be satisfied by smart contracts. Binding terms must be fair or reasonable, which will be difficult to decipher from an entirely coded contract.

These limits may be resolved by a particular kind of contract. A Ricardian contract is a contract for a transaction that takes place using blockchain technology but where the terms are readable both by the contracting parties and the machines designed to automate performance.⁸⁴ Lowe and Kerrigan argue that structuring digital transactions in this way ‘can flexibly allow for separate jurisdictions conditional upon events, actions or triggers’, meaning not only is the clause legible to the parties, it also forms part of the algorithmic constitution that Rühl and DLA Piper suggest is not possible.⁸⁵ The result is that parties will know the body of law that applies to their contract, and so can easily determine the validity of any term in their agreement.⁸⁶ Therefore, not only can a choice of court clause be incorporated into ‘on chain’ contracts in a pragmatic way, but parties will also know the terms that bind them, making unfair terms less challenging to decipher.⁸⁷

B. FLEXIBILITY

The second concern is that including a choice of law clause reduces the flexibility of transactions using blockchain technology. The Financial Markets Law

⁸³ Law Commission (n 64) 48.

⁸⁴ See ‘How are Ricardian Contracts Different from Smart Contracts?’ (*Bybit Learn*, 3 December 2021) <<https://learn.bybit.com/defi/how-are-ricardian-contracts-different-from-smart-contracts/>> accessed 20 January 2023.

⁸⁵ Law Commission (n 64) 497. cf Rühl (n 15) 12; Law Commission (n 64) 241.

⁸⁶ Rühl (n 15) 11.

⁸⁷ cf Symeon Symeonides, *Codifying Choice of law Around the World: An International Comparative Analysis* (Oxford University Press 2014) ch 1.

Committee, for instance, worry that a choice of law rule ‘will be time consuming and costly to apply’.⁸⁸ This concern is overstated.

This is because the mechanism for adopting a choice of court clause has been assumed to mean that parties will be orally discussing the most optimal court to hear any future disputes. This is not an accurate depiction of how a digital choice of court clause would work. As Lehmann and Clifford Chance argue, the clause could simply be embedded as a central choice of law, framed as a ‘law of the platform’; a uniform choice that all parties agree will govern any on-ledger transactions.⁸⁹ The additional requirements for this would simply be for parties to ‘opt-in’ to a pre-determined general rule that governs the jurisdiction for digital asset transactions. Such a method of ascertaining jurisdiction has been coined the ‘*lex digitalis*’;⁹⁰ the traditional mechanism of agreement need not apply to such contracts and so party-flexibility can be maintained.⁹¹

In fact, the opposite problem has been raised: allowing parties unfettered choice of governing law may prove undesirable for national authorities and regulators.⁹² A response would be to restrict the number of jurisdictions available for parties to ‘opt into’, limiting the options to a set number of forums depending on the circumstances of the transaction or to a choice approved by regulators.⁹³

Therefore, it is possible to express a choice of court clause in a transaction that takes place on blockchain technology in a way that only minimally encroaches on the flexibility of contracting parties. In exchange for this small loss of flexibility, parties gain security and certainty. In the short-term at least, it is highly likely that these clauses will be encouraged to resolve the jurisdiction problem facing digital asset transactions in a pragmatic and logical way.

IV. BEYOND THE SOLUTION: DIGITAL ASSETS AND THE *FORUM NON CONVENIENS* PROBLEM

The solution of elective *situs*, although useful, is no panacea. The literature surrounding *elective situs* concentrates on the logical and practical difficulties of the solution, discussed in Section III, in narrow terms. The question that defines the field is: ‘how can the solution fix the problem?’. The lacuna that this leaves behind is an appreciation of the wider implications. It is in considering the impact of a

⁸⁸ Financial Markets Law Committee, ‘Distributed Ledger Technology and Governing Law: Issues of Legal Uncertainty’ (Financial Markets Law Committee March 2018) para 6.22 <http://fmcl.org/wp-content/uploads/2018/05/dlt_paper.pdf> accessed 25 February 2023.

⁸⁹ Lehmann (n 17) 113; Clifford Chance (n 17) 28. cf Maisie Ooi, *Shares and Other Securities in the Conflict of Laws* (Oxford University Press 2003) para 7.80.

⁹⁰ See also Aaron Wright and Primavera De Filippi, ‘Decentralized Blockchain Technology and the Rise of *Lex Cryptographia*’ (SSRN 2015) 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2580664> accessed 25 February 2023.

⁹¹ Lehmann (n 17) 94.

⁹² Clifford Chance (n 17) 30.

⁹³ Clifford Chance (n 17) 30; Guillaume (n 19); Financial Markets Law Committee (n 88) 16.

choice of court solution that this article extends existing scholarship's understanding of digital assets and the jurisdiction problem. One question that remains both unasked and unanswered is: 'what problem does the solution raise?'

The answer that this article provides is that stay applications in favour of alternative jurisdictions will necessarily curtail. This is because the choice of court clause will invariably be upheld by courts in the face of tenuous and strained connections to alternative jurisdictions. In conventional disputes based on real-world transactions, choice of court clauses are not necessarily determinative; defendants can apply for the dispute to be heard in an alternative jurisdiction.⁹⁴ Comparatively, defendants to a digital asset dispute will struggle to stay proceedings because they will face the same problems outlined in Section II. The choice of court solution does not abolish the jurisdiction problem, it merely shifts it onto the defendants.

The doctrine underlying claims to hear a dispute outside of the expressed jurisdiction is called *forum (non) conveniens*, meaning '(in)convenient forum'.⁹⁵ Such claims must pass the two-stage test refined by Lord Goff in *Spiliada*.⁹⁶ The first stage requires defendants to prove that there is an available forum 'which is clearly or distinctly more appropriate', which Lord Sumption explained in *Brownlie* requires a 'plausible evidential basis'.⁹⁷ Although the second stage asks claimants to prove whether justice requires that a stay should not be granted, applications are unlikely to reach this point.⁹⁸ This is because the 'plausible evidential bases' on which these applications must be placed are the very same factors that are discussed at Section II.B.(i) to II.B.(iv). Just as without a choice of court clause a claimant will often struggle to prove jurisdiction to hear a dispute, with a choice of court clause a defendant will often struggle to stay one.

If choice of court clauses are implemented in this market, it will ultimately become a balancing exercise for judges when hearing stay applications. The judicial impartiality of this balancing exercise, however, is complicated by the new and complex technicalities of blockchain technology. Giving effect to an express choice of court is a simpler route to take when the alternative is to grapple with the logical disconnection between on-chain digital transfers and location-centric private international law principles. As Chesterman reminds us, attempting to apply rules designed for the 20th century to the technology of the 21st is a laboursome task.⁹⁹ Although simplicity is partly a strength of the choice of court solution, it could turn out to be a weakness too; it tempts judges to follow it at the expense of defendants'

⁹⁴ CPR 11.

⁹⁵ Eleanor Yuen, 'Available Forum in the *Spiliada* Test: The Ambiguity in Meaning and Practice' (2014) 5 *Journal of the Philosophy of International Law* 72, 72.

⁹⁶ *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (HL) 477E (Lord Goff).

⁹⁷ *ibid* 477E; *Brownlie* (n 69) [7] (Lord Sumption).

⁹⁸ *Spiliada* (n 96) 478C.

⁹⁹ Simon Chesterman, 'Move Fast and Break Things: Law, Technology, and the Problem of Speed' (2021) 33 *Singapore Academy of Law Journal* 5, 8.

right to challenge jurisdiction. If the solution predicted by the article is taken up, jurisdiction could cease to be a point of litigation at all in digital asset disputes.

V. CONCLUSION

Private international law has long been asked to do the impossible and to reconcile the ‘national’ with the ‘global’, yet the surreal nature of that task has been exposed, as never before, by cyberspace.¹⁰⁰

This article has made three fundamental predictions. First, that claimants to a digital asset transaction will struggle to prove jurisdiction for a court to hear their dispute. The problems are intrinsic to the mechanism of blockchain technology: in a system designed for the borderless transfer of intangible data, rules fixated on territory and location do not apply. Taking the four most relevant connecting factors in turn, the article has demonstrated that often none of them will be available to claimants.

Second, the most likely and logical solution to this problem is a choice of court clause. This is so in response to the two main concerns regarding the solution, having demonstrated that it is not only possible in a coded contract but also that its limitation on party-flexibility can be kept minimal.

Third, the impact of this solution will necessarily reduce a defendant’s ability to stay proceedings in favour of alternative jurisdictions. This is because the choice of court solution does not confront the problem of jurisdiction head-on, it merely bypasses it, redirecting the burden of digital jurisdiction onto defending parties. It is in this final prediction that the article contributes most to the field, demonstrating that the simple solutions to this complicated issue can be deceiving and require thorough consideration if they are to be implemented permanently.

There is certainly a need to bring digital transactions within the protection of the law, bringing the market into the now trite maxim that ‘where there is a wrong there is a remedy’. But it must be remembered that a dispute is a two-party engagement: just as the law should equip claimants with the ability to bring claims, it should also equip defendants with the ability to properly defend them.

Ultimately, applying private international law to digital assets is a live and dynamic issue. At the time of writing, the Law Commission are in the pre-consultation stage of its project on digital assets and the jurisdiction problem, which is expected to provide a framework for adapting the law to incorporate digital transactions.¹⁰¹ Similarly, Sir Geoffrey Vos MR and the Deputy Head of Civil Justice have recently created a sub-committee of the Civil Procedure Rules Committee to explore amending the grounds on which jurisdiction is based, with a vision to lift

¹⁰⁰ Uta Kohl, ‘Conflict of Laws and the Internet’ in Roger Brownsword, Eloise Scotford, and Karen Yeung (eds), *The Oxford Handbook of Law, Regulation and Technology* (Oxford University Press 2017) 289.

¹⁰¹ Law Commission (n 22).

the very obstacles outlined by Section II.¹⁰² Further still, in its legal statement, the UK Jurisdiction Taskforce quoted Mance LJ in expressing that the law:

may require redefinition or modification, or new categories may have to be recognised accompanied by new rules..., if this is necessary to achieve the overall aim of identifying the most appropriate law.¹⁰³

Until this reform agenda materialises, however, it is hoped that this article will serve to broaden the understanding of digital asset transactions and the jurisdiction problem. Although a choice of court clause provides the most simple and logical solution, it is no panacea. The benefits of a choice of court clause swing heavily in favour of claimants; if it is to remain a long-term and sustainable solution, it must be partnered with accompanying reform. One immediate suggestion is to create a new *forum (non) conveniens* test specific to digital asset cases to reduce the threshold from 'clearly or distinctly more appropriate' to simply 'more appropriate'. Doing so will help balance the scales of procedural fairness by equipping defendants with the means to properly defend digital asset claims made against them.

¹⁰² Sir Geoffrey Vos MR, 'Keynote Speech' (LawtechUK Launch of Smarter Contracts Report, London, 24 February 2022) <www.judiciary.uk/wp-content/uploads/2022/02/Speech-MR-to-Smarter-Contracts-Report-Launch-Lawtech-UK-UKJT-Blockchain-Smart-Contracts.pdf> accessed 20 January 2023.

¹⁰³ UK Jurisdiction Taskforce, 'Legal Statement on Cryptoassets and Smart Contracts' (The LawTech Delivery Panel November 2019) 24 <<https://resources.lawtechuk.io/files/4.%20Cryptoasset%20and%20Smart%20Contract%20Statement.pdf>> accessed 19 March 2023; *Raiffeisen Zentralbank Österreich v Five Star Trading* [2001] EWCA Civ 68, [2001] QB 825 [27] (Mance LJ).

Brexit, Big Tech, and Competition Law: The Case for a New Economic *Magna Carta* Fit for The Digital Age

ISHMAEL LIWANDA*

I. INTRODUCTION

By March 2020, the term ‘Covid’ had achieved a quick and near-ubiquitous addition into humanity’s collective lexicon.¹ The onset of the COVID-19 pandemic helped accelerate the digitalisation of much of our societies. Propelled by a pandemic-induced wave of technology adoption, billions relied on large technology giants like Amazon, Google, and Microsoft to maintain our economies, social lives and for many, entire livelihoods. Without the technology companies that brought us the digital age, the economic fallout resulting from the pandemic would have been much more severe.²

Yet, this rose-tinted characterisation of Big Tech masks the growing and increasingly global unease surrounding their seemingly unbridled encroachments into our lives. Concerns over the ever-growing size and scale of the technology Goliaths has led to increased scrutiny from regulators. The challenges posed by misinformation, increased political polarisation, and the decimation of small and medium sized businesses, in part due to the growing dominance of Big Tech companies—namely, but not exclusively, Microsoft, Amazon, Google, Meta, and Apple, (‘MAGMA’)—has resulted in a myriad of initiatives, both legal and political, to regulate the digital giants. For instance, in the USA, a report published by a House Judiciary Committee recommended a series of wide-ranging reforms, such as the structural separation of the biggest technology companies.³ The European Commission (‘Commission’) has taken a similarly stringent approach, with it

* LLM student at the London School of Economics and Political Science, LLB from the University of Bristol. E-mail: iliwanda@lse.ac.uk. I am grateful to the anonymous reviewers for their comments on earlier drafts of this article. Any errors that remain are my own.

¹ Ishmael Liwanda, ‘From one crisis to another? Economic responses to the Coronavirus pandemic’ (*The Radius*, 14 April 2020) <<https://theradius.eu/from-one-crisis-to-another-economic-responses-to-the-coronavirus-pandemic/>> accessed 28 February 2022.

² Shira Ovide, ‘How Big Tech Won the Pandemic’ *The New York Times* (12 October 2021) <www.nytimes.com/2021/04/30/technology/big-tech-pandemic.html> accessed 28 February 2022.

³ US Congress Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary, ‘Investigation into Digital Markets’ (2020) 378.

introducing a set of far-reaching regulations to change the way Big Tech companies like MAGMA are regulated through the Digital Markets Act (DMA).⁴

In light of Brexit, the UK, primarily through the Competition and Markets Authority (CMA), is formulating a new regime to revamp its regulatory landscape as it relates to digital competition. As a consequence of Brexit, the UK is no longer subject to the EU supremacy principle,⁵ and can embark on its own competition/antitrust policy. This presents a brilliant opportunity for the UK to lead the regulation of competition in digital markets. This will only be achieved if it constructs a regime that promotes the most effective forms of competition in digital markets.

This article will explore some of the proposed changes to the UK and the new EU competition regimes. It will argue that through the adoption of a modified consumer welfare standard—one that is informed by dynamic capabilities literature—it is possible and necessary to make the consumer welfare standard the guiding principle informing competition regulation in the digital sector. This piece will begin by addressing neo-Brandeisian calls for a more purposive competition law. It will then offer an analysis of the economics of competition in the digital sector, followed by an introduction to dynamic capabilities frameworks developed in strategic management literature. Through analysing the DMA and proposed changes to UK competition regulation in digital markets, it will demonstrate how literature on dynamic capabilities can enhance competition analysis and regulation, and help make antitrust fit for the digital world.

A. RESISTING ‘HIPSTER’ ANTITRUST: A PROLOGUE

The digitalisation of our economies has resulted in spectacular benefits to billions around the world. This was exemplified by how quickly and effectively we were able to move much of our daily lives online during the onset of the COVID-19 pandemic. Digital markets are dynamic, with products and services (hereinafter, ‘products’) changing constantly. The pace of innovation in the digital sector can be electric. For instance, it took the popular social media app Instagram just eight weeks to acquire over a million users three months after launching in 2011.⁶ This dynamism and pace of development acts as a double-edged sword. On the one hand, consumers stand to benefit from an ever-increasing array of products. However, regulators struggle to formulate and create rules for markets that are constantly changing.

⁴ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (hereinafter, ‘DMA’).

⁵ European Communities Act 1972, s 2(4); *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 AC 603 (HL) 658–659.

⁶ Big 3 Media, ‘A Brief History of Instagram And Its Rise To Popularity’ (*Big 3 Media*, 21 May 2021) <www.big3.sg/blog/a-brief-history-of-instagram-and-its-rise-to-popularity> accessed 28 February 2022.

Numerous commentators have expressed concerns with existing regulatory regimes for digital competition. Khan for example, has argued that regulators lack the necessary toolkit to address perceived harms arising as a result of Big Tech's dominance.⁷ She is correct in her assertions. Digital markets present a unique challenge for regulators and competition law more generally. A small number of firms enjoy extreme and largely unfettered levels of power and influence over the lives of billions. Meta's platforms boast over 3.6 billion monthly active users.⁸ Alphabet and Apple run a duopoly in the UK mobile operating systems and app store markets.⁹ Google has garnered a 90% market share in search advertising.¹⁰ The enormous size of these technology Goliaths has caused many to believe that they are harming both competition and innovation in digital markets. With dominance, often comes the ability (and incentives) to abuse it. Google, for example, was fined by the Commission for abusing its dominant position by favouring its own search results over its competitors.¹¹ Amazon has in the past been accused of using data from business users to create clone products, as well as manipulating search results to promote its own products and undermine its rivals.¹² Concerns over the enormity of Big Tech companies, as well as some of their business practices, have led to a rejuvenation of age old debates surrounding the very purpose of competition law.

This is because the harms many antitrust commentators are concerned with go beyond the immediate impact of large digital platforms on competition. It has been argued that the rise of companies like Facebook, Amazon and Uber have increased misinformation and the polarisation of our polities,¹³ decimated small

⁷ Lina M Khan, 'Amazon's Antitrust Paradox' (2017) 126 *Yale Law Journal* 710.

⁸ Felix Richter, 'Meta Reaches 3.6 Billion People Each Month' (*Statista*, 29 October 2021) <www.statista.com/chart/2183/facebooks-mobile-users/> accessed 28 February 2022.

⁹ Competition and Markets Authority (CMA), 'Apple and Google duopoly limits competition and choice' (*Gov.uk*, 14 December 2021) <www.gov.uk/government/news/apple-and-google-duopoly-limits-competition-and-choice> accessed 28 February 2022.

¹⁰ CMA, 'Online Platforms and Digital Advertising: Market Study Final Report' (Competition and Markets Authority 2020) <https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf> accessed 23 March 2023.

¹¹ *Google Search (Shopping)* (Case COMP/AT.39740) Commission Decision 2018/C 9/08 [2017] OJ C9/11.

¹² Aditya Karla and Steven Stecklow, 'Amazon copied products and rigged search results to promote its own brands, documents show' *Reuters* (13 October 2021) <www.reuters.com/investigates/special-report/amazon-india-rigging/> accessed 1 March 2022.

¹³ Paul M Barrett, Justin Hendrix, and J Grant Sims, 'Fueling the Fire: How Social Media Intensifies U.S. Political Polarization — And What Can Be Done About It' (NYU Stern Center for Business and Human Rights 2021) <https://static1.squarespace.com/static/5b6df958f8370af3217d4178/t/613a4d4cc86b9d3810cb35aa/1631210832122/NYU+CBHR+Fueling+The+Fire_FINAL+ONLINE+REVISED+Sep7.pdf> accessed 23 March 2023.

businesses,¹⁴ and popularised precarious employer-worker relationships.¹⁵ For critics like Pitofsky,¹⁶ the dominance of large technology companies exemplifies the failings of competition law's focus on consumer welfare, an approach largely credited to the Chicago School. The promotion of the consumer welfare standard has become one of the main goals of competition law. For example, the CMA is obligated to 'promote competition, both within and outside the [UK], for the benefit of consumers'.¹⁷ Consumer welfare, as conceptualised by proponents of the Chicago School, is predominantly price-centric.¹⁸ Robert Bork, one of the Chicago School's most celebrated thinkers, defined consumer welfare as the sum of producer and consumer welfare. Bork's more economic, 'total welfare' approach to competition law analysis has been highly influential in the US and beyond.¹⁹ For the past two decades, both the UK and the EU have both adopted a more economic approach to competition analysis. This is exemplified by the Commission's publication of the Priorities Paper in 2009,²⁰ where it called for a 'more economic approach'²¹ to the application of abuse of dominance proceedings under article 102 of the Treaty on the Functioning of the European Union.²²

B. THE CONSUMER WELFARE STANDARD: JUST ABOUT PRICES?

While the more economic approach to competition law gained popularity throughout the 1990s and early 2000s, it would be an exaggeration to call it a 'consensus'. Khan, other neo-Brandeisians, and increasingly regulators are sceptical of the price-centric paradigm of consumer welfare. They argue that competition law's current focus on consumer welfare—particularly (short-term) price and output effects of competition—undermines effective antitrust enforcement because it delays any form of intervention in markets until market power is

¹⁴ Stacy Mitchell and Ron Knox, 'Fact Sheet: How Amazon Exploits and Undermines Small Businesses, and Why Breaking It Up Would Revive American Entrepreneurship' (*Institute for Local Self-Reliance*, 16 June 2021) <<https://ilsr.org/fact-sheet-how-breaking-up-amazon-can-empower-small-business/>> accessed 18 April 2022.

¹⁵ Amanda Peticca-Harris, Nadia deGama, and MN Ravishankar, 'Postcapitalist Precarious Work and Those in the 'Drivers' Seat: Exploring the Motivations and Lived Experiences of Uber Drivers in Canada' (2020) 27 *Organization* 36.

¹⁶ Robert Pitofsky, 'The Political Content of Antitrust' (1979) 127 *University of Pennsylvania Law Review* 1051; Robert Pitofsky, *How the Chicago School Overshot the Mark: The effect of Conservative Economic Analysis on U.S. Antitrust* (Oxford University Press 2008) 1, 6.

¹⁷ Enterprise and Regulatory Reform Act 2013, s 25.

¹⁸ Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (Free Press 1993).

¹⁹ Richard Whish and David Bailey, *Competition Law* (10th edn, Oxford University Press 2020) 20–21.

²⁰ Commission, 'Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' COM (2008) 832 final.

²¹ Wouter PJ Wils, 'The Judgment of the EU General Court in Intel and the So-Called 'More Economic Approach' to Abuse of Dominance' (2014) 37 *World Competition* 405, 406.

²² Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2008] OJ C115/47.

actively being exercised, largely ignoring whether and how it is being acquired.²³ It fails to consider the wider societal effects of increased concentration, especially in digital markets, and on quality, innovation, and choice.²⁴ Neo-Brandeisians argue that competition law's focus on consumer welfare has rendered antitrust law and policy too restricted in scope, and has been unsuccessful in keeping markets open and competition free and fair.²⁵ A predominantly Chicago School approach to competition analysis presents, neo-Brandeisians contend, an 'impoverished understanding of corporate power'.²⁶ The neo-Brandeisian class calls for a recentring of the consumer welfare standard and competition law more generally to protecting the competitive process.²⁷ This entails a focus on addressing perceived defects of market structures to prevent competitive harms.²⁸

Though renewed concern over market structures could potentially provide beneficial insights for competition analysis, the neo-Brandeisian attack goes beyond the protection of the competitive process. They argue for the expansion of the goals of competition law, moving away from a predominantly consumer welfare-based approach, and towards a more purposive regime;²⁹ an application of competition law incorporating concerns such as the link between economic concentration and the accumulation of political power,³⁰ or fair wages for workers.³¹ However, neo-Brandeisian critiques of the current consumer welfare approach, in favour of a more purposive—and arguably political—competition law, are misguided. Firstly, it characterises the consumer welfare standard incorrectly as being squarely or predominantly concerned with price effects of conduct by dominant firms.³² Secondly, it significantly underscores the successes that competition law's current consumer welfare paradigm has had over the past 20 years.³³

In economic theory, consumer welfare is a measurement of the level of consumer surplus in a given market.³⁴ Consumer surplus refers to the difference

²³ Khan (n 7), 737.

²⁴ *ibid.*

²⁵ Lina M Khan and Sandeep Vaheesan, 'Market Power and Inequality: The Antitrust Counterrevolution and its Discontents' (2017) 11 *Harvard Law & Policy Review* 235; Lina M Khan, 'The New Brandeis Movement: America's Antimonopoly Debate' (2018) 9 *Journal of European Competition Law & Practice* 131, 131–132.

²⁶ Sandeep Vaheesan, 'The Twilight of the Technocrats' Monopoly on Antitrust?' (2018) 127 *Yale Journal Forum* 980, 990.

²⁷ Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports 2018).

²⁸ Khan (n 7), 737; Tim Wu, 'The "Protection of the Competitive Process" Standard' (2018) Columbia Public Law Research Paper No 14-612 <https://scholarship.law.columbia.edu/faculty_scholarship/2290> accessed 23 January 2022.

²⁹ Khan (n 7) 739–740.

³⁰ *ibid.*

³¹ Hiba Hafiz, 'Labour's Antitrust Paradox' (2020) 86 *University of Chicago Law Review* 381.

³² Stefan Thomas, 'Normative Goals in Merger Control: Why Merger Control Should Not Attempt to Achieve 'Better' Outcomes than Competition' (SSRN 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3513098> accessed 23 January 2022.

³³ *ibid.*

³⁴ Pieter Kalbfleisch, 'Aiming for Alliance: Competition Law and Consumer Welfare' (2011) 2 *Journal of European Competition Law & Practice* 108, 111.

between the price customers would be willing to pay for a given quantity, and the actual price paid for the quantity.³⁵ The greater the delta, the larger the level of consumer surplus. Competition amongst firms tends to increase the delta. This is because competition tends to drive down prices. However, as is sometimes misunderstood by neo-Brandeisians,³⁶ consumer welfare is not, even exclusively or overwhelmingly, concerned with price effects. For instance, the aforementioned delta can grow if consumers' willingness to pay rises. This could be due to innovations in a product increasing its utility, thus making it more desirable for customers to purchase them.

The explosion of the smartphone market illustrates this. Over the past two decades, smartphones have enjoyed an exponential increase in their complexity and functionality, becoming a near necessity for the digital age.³⁷ Consequently, some consumers have been seemingly willing to pay more for smartphones. For instance, Apple's first iPhone sold for \$499 in 2007.³⁸ A recent study found that some consumers in the US were willing to pay up to \$2,400 for the latest iPhone.³⁹ Therefore, price increases are not the only way through which consumer welfare can be or is measured by competition regulators. This is acknowledged under EU and UK competition law. In the context of merger review, a concentration can be blocked if it is found to cause a significant impediment to effective competition or a substantial lessening of competition respectively.⁴⁰ In *Microsoft/LinkedIn*, the Commission considered data theories of harm arising from the merger.⁴¹ When deciding to block a merger by Sabre and Farelogix, the CMA considered the impact of innovation and loss of competition in its analysis.⁴² The parties unsuccessfully attempted to appeal the decision on jurisdictional grounds.⁴³ This shows that the consumer welfare standard can and does have the capacity to take into considerations factors beyond price effects.

Moreover, neo-Brandesian critiques on the consumer welfare standard fail to properly acknowledge the successes that the economic approach to competition analysis has had over the past two decades. By putting the consumer at the heart

³⁵ *ibid.*

³⁶ Khan (n 7).

³⁷ Simon O'Dea, 'Number of smartphone subscriptions worldwide from 2016 to 2027' (*Statista*, 23 February 2022) <www.statista.com/statistics/330695/number-of-smartphone-users-worldwide> accessed 28 February 2022.

³⁸ BBC News, 'How Apple's iPhone has changed through the years' (*BBC News*, 28 June 2019) <www.bbc.co.uk/news/newsbeat-47056309> accessed 28 February 2022.

³⁹ Simon-Kucher & Partners, 'Simon-Kucher & Partners Study Reveals Consumers Willing to Pay Up to \$2,400 for New iPhone' (*Simon-Kucher*, 9 September 2019) <www.simon-kucher.com/en-gb/about/media-center/simon-kucher-partners-study-reveals-consumers-willing-pay-2400-new-iphone> accessed 2 March 2022.

⁴⁰ TFEU (n 22), art 2(2); Enterprise Act 2002, ss 22, 35 (completed mergers); ss 33, 36 (anticipated mergers).

⁴¹ *Microsoft/LinkedIn* (Case COMP/M.8124) Commission Decision [2016] OJ C388/04, paras 176–177.

⁴² CMA, 'Anticipated acquisition by Sabre Corporation of Farelogix, Inc.: Final Report' (CMA 9 April 2020) 6 <https://assets.publishing.service.gov.uk/media/5e8f17e4d3bf7f4120cb1881/Final_Report_-_Sabre_Farelogix.pdf> accessed 23 March 2023.

⁴³ *Sabre Corporation v Competition and Markets Authority* [2021] CAT 11.

of competition analysis,⁴⁴ competition law and policy has been largely triumphant in developing both economic and legal frameworks for analysing competition, protecting consumers while providing businesses much needed and appreciated certainty and clarity over what conduct is lawful and expected of them.⁴⁵ It has provided regulators with the political independence to formulate policy that encourages competition for the benefit of consumers, restricting and resisting the pernicious effects of the over-politicization of competition law that will be discussed below.

Take, for example, the pre-Brexit EU merger decisions *Bayer/Monsanto* and *Siemens/Alstom*.⁴⁶ *Bayer* was a Commission merger decision concerning a German chemical company's proposed acquisition of the American agrochemical company Monsanto.⁴⁷ Third parties attempted to petition the Commission to block the merger, citing concerns over climate change, food safety and environmental degradation.⁴⁸ Though the Commission did not yield to the aforesaid concerns, the intense public scrutiny surrounding *Bayer* demonstrates the popularity and potency that the movement against the economic approach to competition analysis, in favour of the incorporation of normative and consideration goals in competition law, has both in the political and academic space.

Normativity extends beyond generally desirable social goals like climate change mitigation or food safety. In *Siemens*, the Commission's decision to prohibit the merger garnered criticism from German and French governments.⁴⁹ They contended that the Commission failed to adequately consider the wider industrial interests of the bloc, especially in competing against highly subsidised Chinese

⁴⁴ Warwick Lightfoot, 'Putting consumer welfare at the heart of competition policy and market regulation' (*Policy Exchange*, 18 October 2019) <<https://policyexchange.org.uk/putting-consumer-welfare-at-the-heart-of-competition-policy-and-market-regulation/>> accessed 2 March 2022.

⁴⁵ Thomas (n 32).

⁴⁶ *Bayer/Monsanto* (Case COMP/M.8084) Commission Decision [2018] OJ C459/19; *Siemens/Alstom* (Case COMP/M.8677) Commission Decision [2019] OJ C300/05.

⁴⁷ Drew Harwell, 'Bayer agrees to buy Monsanto in \$66 billion deal that could reshape agriculture' *The Washington Post* (14 September 2016) <www.washingtonpost.com/business/economy/bayer-agrees-to-buy-monsanto-in-66-billion-deal-that-could-reshape-agriculture/2016/09/14/4599de48-7aa6-11e6-ac8e-cf8e0dd91dc7_story.html> accessed 2 March 2022.

⁴⁸ European Commission, 'Mergers: Commission opens in-depth investigation into proposed acquisition of Monsanto by Bayer' (*European Commission*, 22 August 2017) <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_2762> accessed 24 March 2022; Carlo Motta, 'The EU clears Bayer-Monsanto merger amid wide competition and environmental concerns' *The European Sting* (27 March 2018) <<https://europeansting.com/2018/03/27/the-eu-clears-bayer-monsanto-merger-amid-wide-competition-and-environmental-concerns/>> accessed 2 March 2022; Zlata Rodionova, 'Thousands protest against seed giant Monsanto ahead of Bayer merger' *The Independent* (23 May 2016) <www.independent.co.uk/news/business/news/thousands-protest-against-evil-seed-giant-monsanto-ahead-of-bayer-merger-a7043196.html> accessed 2 March 2022.

⁴⁹ French Government, 'The European Commission's decision on the Alstom-Siemens merger throws the need to revise competition law into sharp focus' (*Gouvernement.fr*, 8 February 2019) <www.gouvernement.fr/en/the-european-commission-s-decision-on-the-alstom-siemens-merger-throws-the-need-to-revise> accessed 3 March 2022; Thomas (n 32) 8–9; Leigh Thomas, 'Germany step up pressure over Alstom-Siemens deal' *Reuters* (21 January 2019) <www.reuters.com/article/us-alstom-m-a-siemens-idUSKCN1PF0PK> accessed 2 March 2022.

train production.⁵⁰ The French, German and Polish governments subsequently co-authored an initiative to reform EU merger policy. This was instigated with a view to make the Commission consider the EU industrial policy when applying competition law.⁵¹ The proposal entailed the establishment of a ‘Competitiveness Council’ that was to guide the Commission’s merger enforcement ‘strategy’. The said strategy would be shaped at ‘a political level... in agreement with the respective Presidency’.⁵² Though these proposals again never progressed beyond the realm of political deliberation and rhetoric, they are indicative of the perniciousness of good faith attempts to bring modern antitrust within the ambit of politics. More importantly, the failures of both the activists in *Bayer* and the German and French governments in *Siemens* highlight a particular strength of the political agnosticism that the existing competition regime affords to competition regulators. It empowers them to make decisions largely free from political considerations, to engage in objective assessments of the impact of a merger or conduct on competition in defined markets. It enables competition analysis to be focused on promoting competition, and not protecting special interests.⁵³

C. PROTECTING THE PROCESS OF COMPETITION? A HIGHWAY TO HELL

It is often said that the road to hell is paved with good intentions.⁵⁴ The maxim applies to neo-Brandeisian attempts to shift the focus of competition policy from the consumer welfare paradigm to a focus on the competitive process.⁵⁵ They argue that, because of competition law’s apparent fixation on price effects, a greater focus on market structures and the protection of the process of competition will aid in addressing the inadequacies of the consumer welfare paradigm.⁵⁶ Though admirable is the suggestion to rectify perceived issues with the existing consumer welfare standard, such an approach to competition law is bound to cloud competition analysis or open it up to (greater) political interference.

For neo-Brandeisians, a paradigm shift in antitrust’s focus from consumer welfare to the protection of the competitive process, *inter alia*, would entail the examination of the arena wherein competition takes place. This would require the adoption of a framework incorporating the notion that a company’s ‘power and the potential anticompetitive nature of that power’⁵⁷ cannot be properly discerned without an analysis of the ‘structure of a business and the structural role it plays in

⁵⁰ Peter Altmaier, Bruno Le Maire, and Jadwiga Emilewicz, ‘Modernising EU Competition Policy’ (Bundesministerium für Wirtschaft und Klimaschutz 4 July 2019) <www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf?__blob=publicationFile> accessed 3 March 2022.

⁵¹ Thomas (n 32) 7.

⁵² Altmaier, Le Maire, and Emilewicz (n 50) 3.

⁵³ Thomas (n 32); Bork (n 18).

⁵⁴ Henry G Bohn, *A Hand-Book of Proverbs* (London 1855) 514.

⁵⁵ Wu (n 27) 138.

⁵⁶ *ibid.*

⁵⁷ Khan (n 7) 717.

markets'.⁵⁸ By protecting the competitive process, neo-Brandeisians argue, regulators and judges would not be unnecessarily chained to 'achieve welfare outcomes that [they] are too ill-equipped to measure'.⁵⁹ A focus on the competitive process would empower competition regulators and enforcers to protect the 'competitive process that... rewards firms with better products'.⁶⁰

Such proposals are flawed for several reasons. Firstly, they assume that competition, for its own sake, in all contexts, is inherently valuable and thus must be protected. Take Amazon for example. Though having greater competition in the e-commerce space, or the emergence of a bona fide rival to Amazon may be favourable from a normative perspective, it is not necessarily the most efficient, or feasible economic outcome. Amazon is not just an e-commerce company, but acts as a large digital platform ecosystem, operating as an intermediary, connecting businesses and consumers,⁶¹ while competing with business users, equipped with one of the world's most sophisticated logistics networks.⁶² The promotion of rivalrous competition, whereby the 'competitive process' is protected with the aim for merchants to, at some point, compete with Amazon, would require a 'duplication' of fixed costs that would be uneconomical.⁶³ Yet, under the neo-Brandeisian axiom of protecting the competitive process, such an erroneous policy would be deemed reasonable, irrespective of its unfeasibility.

Secondly, such proposals assume that such a focus on the process of competition would be easier to measure, and less fraught with difficulty, than the existing consumer welfare paradigm. Liberal, market-based economies are underpinned by a baseline freedom to engage in enterprise unimpeded. Restrictions on free enterprise are tolerated in so far as they are justified to achieve a negotiated, distributive justice.⁶⁴ Therefore, in the formulation of any policy, there must be a balancing act between freedoms, such that of unimpeded enterprise, with others, like the prevention of abusive conduct by dominant undertakings. Yet, it is not clear how conflicting freedoms would be balanced under a neo-Brandeisian framework.⁶⁵ Making the protection of the competitive process the central focus of

⁵⁸ *ibid.*

⁵⁹ Tim Wu, 'After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice' (2018) Columbia Public Law Research Paper No 14-608 <https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3294&context=faculty_scholarship> accessed 2 March 2022.

⁶⁰ *ibid.*

⁶¹ Benjamin Edelman, 'Mastering the Intermediaries' (*Harvard Business Review*, June 2014) <<https://hbr.org/2014/06/mastering-the-intermediaries>> accessed 1 April 2022; Karen Webster, 'Say Hello To The New Retail Intermediary' (*PYMNTS.COM*, 17 July 2017) <www.pymnts.com/news/retail/2017/ecommerce-giant-amazon-replaces-walmart-as-the-new-intermediary-of-retail/> accessed 3 March 2022.

⁶² Brian Connolly, 'How the Amazon Supply Chain Works' (*Jungle Scout*, 25 March 2021) <www.junglescout.com/blog/amazon-supply-chain/> accessed 3 March 2022.

⁶³ Nicholas Petit and Phillip Hanspach, 'The European Union's Big Policy Bet Against the Tech Giants' (*Oxford Business Law Blog*, 3 December 2021) <www.law.ox.ac.uk/business-law-blog/blog/2021/12/european-unions-big-policy-bet-against-tech-giants> accessed 3 March 2022.

⁶⁴ Herbert Hovenkamp, 'Distributive Justice and the Antitrust Laws' (1982) 51 *George Washington Law Review* 1.

⁶⁵ Stefan Thomas (n 32) 16–17.

competition policy does not answer difficult questions such as whether the impact of competition on consumers is more important than—as was the case in *Siemens*—an economy’s industrial policy.

The lack of a sufficiently elaborated mechanism for balancing conflicting interests in the neo-Brandeisian approach makes it vulnerable to over-politicisation.⁶⁶ It is no secret that political interests permeate throughout competition law and policy. The economic approach and consumer welfare paradigm are a demonstration of the triumph and influence of neoliberal thought in law and economics in the last couple of decades.⁶⁷ The consumer welfare paradigm limits the influence of politics and special interests from competition law. It enables regulators in cases like the Commission in *Bayer* and *Siemens* to largely insulate themselves from the pressures of governments and activists, and hone in on an assessment of the impact of a merger on consumers.⁶⁸

This insulation assists regulators in avoiding difficult and distracting political and normative questions that would flow from the adoption of a more purposive, neo-Brandeisian analysis of antitrust focused on protecting the amorphous concept of the ‘process of competition’. Which stakeholder interests would be considered worth incorporating into this new paradigm and which ones would not? Surely environmental or health concerns, as well as labour rights, and matters of national and economic security ought to be important considerations to consider when engaging in competition analysis.⁶⁹ The possibilities for conflicts are endless. The path to the realisation of neo-Brandeisian competition is meandering and uncertain. The highway to hell is, on the other hand, guaranteed. Political interests would find it easier to influence the application of competition law in all markets. Certainty, a crucial component of well-functioning markets, would be thrown out of the window. Yet such risks are downplayed by the neo-Brandeisians, holding onto the argument that the consumer welfare standard is simply not fit for purpose.

The road to hell may be laden with good intentions, but that does not mean that the path is without usefulness. Many of the neo-Brandeisian critiques of the consumer welfare standard are justified and valid, especially in the realm of digital markets. However, their solutions, such as the blind protection of the competitive process, underlie a misunderstanding of the nature of competition in digital markets.

⁶⁶ *ibid* 21–22.

⁶⁷ Hubert Buch-Hansen and Angela Wigger, ‘Revisiting 50 years of market-making: The neoliberal transformation of European competition policy’ (2010) 17 *Review of International Political Economy* 20.

⁶⁸ *Bayer/Monsanto* (n 46); *Siemens/Alstom* (n 46).

⁶⁹ Thomas (n 32); Ioannis Lianos and Dmitry Katalevsky, ‘Merger Activity in the Factors of Production Segments of the Food Value Chain: - A Critical Assessment of the Bayer/Monsanto merger’ (2017) Centre for Law, Economics and Society Policy Paper Series: 2017/1 <https://discovery.ucl.ac.uk/id/eprint/10045082/1/Lianos_cles-policy-paper-1-2017.pdf> accessed 4 March 2022.

II. RECONCEPTUALISING THE COMPETITION ECONOMICS OF DIGITAL PLATFORM ECOSYSTEMS

Much of contemporary neo-Brandeisian literature focuses on digital markets to highlight the severe limitations of a consumer welfare approach. For example, Khan analyses the USA's antitrust framework, which, like the UK and EU regimes, relies predominantly on the price-centric, consumer welfare standard in competition analysis.⁷⁰ Others have analysed digital markets more generally to lay bare the chasm between the competition dynamics that exist in digital markets and the application of antitrust laws in said markets.⁷¹

Neo-Brandeisians, among others, are correct in that competition law and policy needs, in some respects, a more robust understanding of competition in digital markets. It may in fact be true that the legal and economic tools of yesteryear are proving to be unsatisfactory companions in the journey to understand and deal with novel issues presented by Big Tech and digital markets more generally. But that does not mean we are completely lacking in tools to deal with the digital sector. There exists a large and growing body of economic and legal literature on digital markets, especially in relation to MAGMA. This section will present an analysis of competition in digital markets, with a focus on the role of dynamic competition, and how dynamic capabilities frameworks can better equip competition authorities with the factual toolkits they need to analyse competition in ever-changing, digital markets.

A. THE ECONOMICS OF DIGITAL MARKETS: INTRODUCING DIGITAL PLATFORM ECOSYSTEMS

There has been considerable literature and research on the economics of digital markets. It is now well-known that digital markets are characterised by several features which coalesce to accentuate the unique competition dynamics present in the digital sector. For instance, both the Furman and Crémer Reports on digital markets,⁷² commissioned by the UK and EU respectively, note that the presence of strong network effects and extreme returns to scale mean that such markets are often winner-take-all.⁷³ Firms are in fierce competition *for* the market,

⁷⁰ Khan (n 7).

⁷¹ John M Newman, 'Antitrust in Digital Markets' (2019) 72 *Vanderbilt Law Review* 1497.

⁷² Digital Competition Expert Panel, 'Unlocking Digital Competition: Report of the Digital Competition Expert Panel' (Digital Competition Expert Panel 2019) (henceforth, 'Furman Report'); Jacques Crémer Yves-Alexandre de Montjoye Heike Schweitzer, 'Competition Policy for the Digital Era' (European Commission 2019) (henceforth, 'Crémer Report') 24.

⁷³ Antonio Robles Martin-Laborda, 'Merger Control and Online Platforms: The Relevance of Network Effects' (2017) 1 *Market and Competition Law Review* 69.

as opposed to a mere segment of it. This is the case for many technology start-ups and companies.⁷⁴

To attain the spectacular profits and market power that result from strong network effects and economies of scale, firms must de facto own a market.⁷⁵ Google for example enjoys an estimated 92% of the search engine market in both the United Kingdom and internationally.⁷⁶ This near total domination of the search engine market provides Google with the requisite financial firepower for developing and expanding its ecosystem. For companies in the digital sectors, winning the competition for the market means more customers and opportunities for expansion.⁷⁷

Usually, winning competition for the market enables digital platforms to enjoy strong network effects—which refer to the increased utility users accrue from using a platform or product as more users join the platform. Once these are gained, digital platforms can unlock the competitive advantages that can be acquired from large datasets. Data is a ‘key ingredient’ to products such as AI, machine learning or other smart services.⁷⁸ They are critical for the operation of complex logistics networks or personalised/targeted marketing. Owning and being able to turn data into a competitive advantage can help cement a digital firm’s dominance in a market.⁷⁹

It is thus the coalescence of strong network effects, extreme returns to scale and the role of data that can create formidable business models in which consumers have a low proclivity to switching services.⁸⁰ Even in situations where users would be better off using a new platform, they would have little to no individual incentive to migrate away from an incumbent platform. Whether they choose to migrate depends on their expectations that others will follow.⁸¹ Network effects, coupled with the competitive advantages of having access to large volumes of data, can make it very difficult for new market entrants to dislodge.⁸²

⁷⁴ Elena Argentesi, and others, ‘Ex-post Assessment of Merger Control Decisions in Digital Markets’ (Lear 2019) 10 <www.learlab.com/publication/ex-post-assessment-of-merger-control-decisions-in-digital-markets/> accessed 3 March 2022.

⁷⁵ Çağlagül Koz, ‘Searching for a New Theory of Harm for Startup Acquisitions by Digital Ecosystems: A Review of the EU Merger Control Regime’ (2018/19) MIPLC Master Thesis Series <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3702200> accessed 23 March 2023.

⁷⁶ StatCounter, ‘Search Engine Market Share Worldwide’ (*StatCounter*) <<https://gs.statcounter.com/search-engine-market-share>> accessed 16 April 2022.

⁷⁷ Çağlagül Koz (n 75) 9, 24; Argentesi and others (n 74).

⁷⁸ Crémer Report (n 72) 24.

⁷⁹ Crémer Report (n 72), 24; Khan (n 7); Newman (n 71) 1501.

⁸⁰ Newman (n 71) 1507–1508.

⁸¹ Crémer Report (n 72) 36.

⁸² Lina M Khan, ‘Sources of Tech Platform Power’ (2018) 2 *Georgia Law Technology Review* 325, 329.

B. A CRASH COURSE ON THE IMPORTANCE OF DIGITAL PLATFORM ECOSYSTEMS

In digital markets, it does increasingly seem like the firms best placed to enjoy the opportunity created by the fusion of network effects, economies of scale and data are digital platform ecosystems. However, the conceptualisation of Big Tech companies as platform ecosystems remain an underexplored, yet crucial component of attaining a proper understanding of the competition dynamics of digital markets.⁸³ The ecosystem model is used by all MAGMA companies and forms a critical component of their business models.

The primary reason behind the popularity of the ecosystem model among MAGMA companies is that it helps them capitalise on the psychological dynamics of consumers in digital markets. The internet is a vast domain, buzzing with more information than the average user can ever reasonably process.⁸⁴ The presence of information overload means that there is strong demand for digital portals,⁸⁵ and companies that filter through the vast array of information available on the internet, reducing the cognitive burden of access information and services online.⁸⁶ Firms who provide the ‘lowest-cognitive-burden’ digital portal services have been the most successful.⁸⁷

And just as there exists a cognitive burden among users in filtering through information on the internet, cognitive burdens affect the propensity for users to choose and switch between different portals.⁸⁸ This phenomenon thus gives digital platforms who achieve market dominance a competitive advantage amplified by users’ propensities to switch between platforms.⁸⁹ This aversion to switching creates strong incentives for digital platforms to attract as many users as possible in the shortest time possible, as this gives them the best chance of achieving the extreme returns to scale present in digital markets.

Therefore, as digital platforms grow, they create various portals through which they can capture potential users, as well as keep current users within their ecosystem.⁹⁰ Take Alphabet Inc. for example. It is more than an internet search

⁸³ Çağlağül Koz (n 75); Yong Lim, ‘Tech Wars: Return of the Conglomerate – Throwback or Dawn of a New Series for Competition in the Digital Era?’ (2020) 19 *Journal of Korean Law* 47; Furman Report (n 76) para 1.106.

⁸⁴ Ellen P Goodman, ‘Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets’ (2004) 19 *Berkeley Technology Law Journal* 1389, 1467; Adam Candeub, ‘Behavioural Economics, Internet Search, and Antitrust’ (2014) 9 *I/S: A Journal of Law and Policy for the Information Society* 407, 411.

⁸⁵ Çağlağül Koz (n 75) 19.

⁸⁶ Mark R Patterson, *Antitrust Law In The New Economy: Google Yelp, LIBOR, And The Control of Information* 37 (Harvard University Press 2018); Khan (n 82) 326.

⁸⁷ Newman (n 71) 1506.

⁸⁸ Newman (n 71) 1507; Candeub (n 84), 410.

⁸⁹ Candeub (n 84); Paul T Moura, ‘The Sticky Case of Sticky Data: An Examination of the Rationale, Legality, and Implementation of a Right to Data Portability Under European Competition Law’ (MSc Dissertation, London School of Economics 2014).

⁹⁰ Newman (n 71), 1509.

company. It owns Google Search, the popular video streaming platform YouTube, has a navigation service, Google Maps, and has recently acquired the electronics and fitness company Fitbit.⁹¹ Alphabet's various arms provide it with multiple portals to entice and retain users within their ecosystem. The more services Alphabet can provide to its users, the less they need to venture out to other platforms to access services, and the greater the cognitive burden they get from attempting to do so. This helps further entrench its leading position in the internet search market. These portals provide Alphabet with access to a vast array of users, enabling it to extract a range of personal data at scale. This aids Alphabet in improving its services at a pace and scale that its rivals are unable to match. Ecosystems provide digital platforms with a proven business model to fully realise the extreme returns to scale that the convergence of data, network effects and multi-sided market structures effectively guarantee.

C. OPENING COMPETITION ECONOMICS' 'BLACK BOX': INTRODUCING THE THEORY OF THE (INNOVATING) FIRM

The proliferation of the ecosystem model in the digital sector has resulted in digital conglomerates that have built near impenetrable business models, making it very difficult for firms to directly compete with them. Smaller firms looking to compete with a company like Amazon directly would have to contend with a digital Goliath armed with strong competitive capabilities in several areas. The formulation of competition policy with such outcomes would result in severely ineffective antitrust regulation and enforcement. Consequently, the creation of a regulatory framework that promotes effective competition in digital markets requires a rethink of how firms compete and innovate, especially in the digital sector.

Unfortunately, contemporary competition analysis, whether applied through a Chicago School or neo-Brandeisian lens, is heavily influenced by and reliant on industrial economics.⁹² The industrial economic model relies primarily upon static competition analysis.⁹³ This entails a set of firms competing for economic profits (rents).⁹⁴ Under a static competition model, firms compete for

⁹¹ Tim Bradshaw, 'Google Takes on Apple with \$2.1bn deal to buy Fitbit' *Financial Times* (1 November 2019) <www.ft.com/content/f6a710b4-fca5-11e9-a354-36acbbb0d9b6> accessed 4 March 2022; Inbal Orpaz, 'Google Confirms Acquisition of Israeli Navigation App Waze' *Haaretz* (11 June 2013) <www.haaretz.com/israel-news/business/.premium-google-confirms-billion-waze-acquisition-1.5277715> accessed 4 March 2022; Andrew Ross Sorkin and Jeremy W Peters, 'Google to Acquire YouTube for \$1.65 Billion' *The New York Times* (9 October 2006) <www.nytimes.com/2006/10/09/business/09cnd-deal.html> accessed 4 March 2022.

⁹² Oliver Budzinski, 'Modern Industrial Economics and Competition Policy: Open Problems and Possible Limits' in Josef Drexl, Wolfgang Kerber, and Rupprecht Podszun (eds) *Competition Policy and the Economic Approach: Foundations and Limitations* (Edward Elgar Publishing 2011).

⁹³ Nicholas Petit and David J Teece, 'Innovating Big Tech Firms and Competition Policy: Favoring Dynamic over Static Competition' (2021) 30 *Industrial and Corporate Change* 1168, 1173.

⁹⁴ *ibid* 1170.

existing rents.⁹⁵ Firms are assumed to be largely homogenous in their product offering. To compete, they supply near-perfect substitutes, and rivalry in such markets consists of undertakings engaging in, for example, price decreases and cost-cutting strategies.⁹⁶

The static competition model fails to provide a useful framework to analyse competition in digital markets. The existence of strong network effects, extreme returns to scale and data as a competitive advantage incentivises competition for the market. To capture the supernormal profits that make digital markets so lucrative, firms must dominate their respective markets. Competition is for *future* rents. The promise of future supernormal profits is what attracts human, financial, and technological capital into digital markets.⁹⁷ Take for instance Uber, the ride-hailing company who, long before it was able to turn a profit, received over \$23 billion in funding,⁹⁸ primarily on the expectation that it would be able to dominate the nearly \$50 billion taxi industry in the US alone.⁹⁹ It is through understanding the economic rationales behind this seemingly irrational pursuit of the promise of future rents can we truly understand the digital sector. And through the use of dynamic competition analysis do we begin to dissect the logic and mechanics of future rent seeking in digital markets.

The dynamic competition model characterises competition for future rents as one whereby innovation and the development of new products, processes, and services as being the main way firms attain and maintain long-term competitive advantages.¹⁰⁰ In order to acquire these long-term competitive advantages, firms must develop dynamic capabilities. In management literature, dynamic capabilities refer to 'higher-level' actions that equip firms with the requisite competences to engage in 'high-payoff' activities.¹⁰¹ This contrasts with ordinary capabilities, which entail the performance of 'administrative, operational and governance-related functions' that are required to keep enterprises performing basic tasks.¹⁰²

The development of dynamic capabilities by enterprises to compete in digital markets is necessarily an evolutionary, long-term process.¹⁰³ To compete in

⁹⁵ *ibid.*

⁹⁶ *ibid.*

⁹⁷ Devin Reilly, D Daniel Sokol and David Toniatti, 'The Importance of Exit via Acquisition to Venture Capital, Entrepreneurship, and Innovation' (2023) 32 *Minnesota Journal of International Law* 160.

⁹⁸ Craft, 'Uber Funding Rounds, Valuation and Investors' (*Craft*) <<https://craft.co/uber/funding-rounds>> accessed 29 March 2022.

⁹⁹ Elena Mazareanu, 'Size of the Taxi and Limousine Services Market in the U.S. between 2018 and 2021' (*Statista*, 13 April 2022) <www.statista.com/statistics/1174077/taxi-limousine-services-market-size-us/#statisticContainer> accessed 29 March 2022.

¹⁰⁰ Petit and Teece (n 93) 1170.

¹⁰¹ David J Teece, 'The Foundations of Enterprise Performance: Dynamic and Ordinary Capabilities in an (Economic) Theory of Firms' (2014) 28 *Academy of Management Perspectives* 328.

¹⁰² *ibid.*

¹⁰³ Petit and Teece (n 93).

digital markets, companies typically engage in the Schumpeterian, innovative process of ‘creative destruction’,¹⁰⁴ launching new products, services, and processes into their respective markets to win the race for future rents.¹⁰⁵ As Petit and Teece note, this is achieved through a variety of methods such as product differentiation, integration, or diversification.¹⁰⁶ Such processes are usually developed ‘organically’.¹⁰⁷ In digital markets, enterprises orchestrate assets such as data to provide value to end users in platform ecosystem models. This is not an easy process. To achieve this, companies must cope with high levels of uncertainty, combining and managing existing firm resources to develop, maintain or extend their competitive advantage(s). This requires ‘managerial acumen’ and entrepreneurial ability.¹⁰⁸ Competitive advantages are gained by firms’ abilities to creatively integrate existing technology, data science and commercial ingenuity.¹⁰⁹

Static competition analysis fails to account for presence of the above factors in digital competition. Such an analysis ignores the crucial role that ‘managers, organisational arrangements, and complex contracting’ play in dynamically competitive markets.¹¹⁰ Digital competition, analysed through the lens of dynamic capabilities frameworks and drawing on insights from management literature, can enrich competition law with the analytical tools necessary to understand competition in digital markets. Particularly, dynamic capabilities analyses provide a strong case for a shift toward long-term consumer welfare, due to competition in digital markets primarily being for future rents,¹¹¹ as well as incorporating firm heterogeneity into competition analysis.

Time is an important factor in the dynamically competitive environments that typify digital markets. The development of dynamic capabilities takes time, and therefore competition analysis needs to account for this. The recognition of firm heterogeneity necessitates a dive into economics’ ‘black box’.¹¹² Enterprises, especially in digital markets must be viewed as ‘repositories’ of dynamic capabilities, and their behaviour assessed accordingly.¹¹³ Therefore, a firm’s research and development capabilities, labour force and other inputs that are business-specific should be central when analysing a firms’ dynamic capabilities in any dynamic competition analysis.¹¹⁴ By adopting a long-term consumer welfare paradigm that acknowledges firm heterogeneity in digital markets, it provides a useful starting point to begin to separate short-term conduct that is rational from an ‘income

¹⁰⁴ Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (Routledge, 1994) 82–83; Thomas McCraw, *Prophet of Innovation: Joseph Schumpeter and Creative Destruction* (Harvard University Press 2007) 7.

¹⁰⁵ Petit and Teece (n 93) 1170.

¹⁰⁶ *ibid.*

¹⁰⁷ Petit and Teece (n 93) 1184; David J Teece, ‘Explicating Dynamic Capabilities: The nature and Micro-Foundations of (Sustainable) Enterprise Performance’ (2007) 28 *Strategic Management Journal* 1319.

¹⁰⁸ Petit and Teece (n 93), 1179, 1170.

¹⁰⁹ *ibid* 1180.

¹¹⁰ *ibid* 1176.

¹¹¹ *ibid* 1181–1182.

¹¹² *ibid* 1176.

¹¹³ *ibid* 1184.

¹¹⁴ *ibid.*

statement' perspective,¹¹⁵ from actions which are rational from a medium- to long-term, innovation-focused viewpoint.¹¹⁶

It is acknowledged that an important limitation of this proposition is that there is currently a lack of reliable economic literature on the subject.¹¹⁷ As a consequence of the dominance of industrial economics in antitrust analysis in both Europe and North America, we lack the economic toolkit to distinguish between conduct that can be justified from the standpoint of innovation, but not from a short-term price perspective.¹¹⁸ However, there exists a wealth of literature on dynamic capabilities from the field of strategic management that could serve as a useful starting point for the development of more robust economic models.¹¹⁹ For instance, Kuuluvainen demonstrated how dynamic capabilities frameworks can be used to accurately model and predict the development of enterprises in the manufacturing sector.¹²⁰ This highlights the potential that such frameworks have in providing competition regulators with a useful toolkit for analysing individual companies' specific capabilities, and coming to reliable conclusions regarding their competitive potentials.

Moreover, the lack of economic literature on dynamic capabilities presents an exciting opportunity in competition law and economics to develop new frameworks for modelling dynamic competition. In any case, competition regulators are not completely alien to dynamic capabilities. The CMA has used dynamic competition theories of harm to analyse potential competition concerns arising in the *Sabre/Farelogix* and *Facebook/Giphy* mergers.¹²¹ Given that competition authorities globally are currently proposing and refining policies to radically alter the regulation of the largest digital platform ecosystems, Big Tech companies offer us a brilliant opportunity to develop dynamic competition theory and make competition law and analysis fit for the digital age.

III. COMPETITION REGULATION POST-BREXIT: AN EMBRACE OF EX ANTE

Competition authorities in Europe and beyond have begun to examine the negative impact of MAGMA companies on their economies, alongside wider issues surrounding digitalisation. Regulators are concerned about the trend of increased and durable market dominance by a small number of companies. The Furman

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ *ibid* 1170.

¹¹⁸ *ibid.*

¹¹⁹ *ibid* 1168ff.

¹²⁰ Arto Kuuluvainen, 'How to Concretize Dynamic Capabilities? Theory and Examples' (2012) 5 *Journal of Strategic Management* 381, 386–389.

¹²¹ CMA (n 42); CMA, 'Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc.: Final report on the case remitted to the CMA by the Competition Appeal Tribunal' (CMA November 2021) <https://assets.publishing.service.gov.uk/media/635017428fa8f53463dcb9f2/Final_Report_Meta.GIPHY.pdf> accessed 23 March 2023.

Report,¹²² for instance, highlighted concerns surrounding concentration in the digital sector. Case in point being the online search market, where Google has enjoyed durable dominance. The Commission found that Google has consistently held a high market share in the EU online search market since 2008.¹²³ Competition authorities are concerned with the effects of this durable dominance and lack of effective competition on both end consumers and business users.

Regulators are also concerned with the imposition of unfair terms and restrictions on business users.¹²⁴ This also includes the use of business user data by large digital platforms to gain an unfair competitive advantage over said users in the markets in which both business users and the platform in question compete in.¹²⁵ As aforementioned, Amazon has been accused of using third-party seller data to compete with said companies.¹²⁶ Apple recently faced legal action over the 30% commission it charges all developers that sell products on its app store.¹²⁷ In *Google Shopping*,¹²⁸ the Commission fined Google €2.4 billion for using its dominant position in online search to showcase its shopping comparison service more favourably than its competitors.

Google Shopping epitomises the need for a revamp of competition regulation in both the UK and the EU. Though the Commission was able to use the EU's existing competition toolkit to penalise Google, the investigation took seven years to complete,¹²⁹ and had to wait a further four years before being able to enforce the decision, due to Google appealing the Commission's decision.¹³⁰ One of the most frustrating challenges for regulators in digital markets is the sheer length of time it takes to execute enforcement actions in such markets. To address this chasm, both the Commission and the UK Government are preparing to introduce new regimes that will attempt to regulate MAGMA companies ex ante. This is in hope that their initiatives will lead to quicker and more effective competition regulation, and a move away from the case-specific finding of anticompetitive conduct that has characterised much of UK and EU competition law.¹³¹

¹²² Furman Report (n 76).

¹²³ *Google Search (Shopping)* (n 11) paras 273–282.

¹²⁴ *ibid* para 48.

¹²⁵ *ibid* para 47.

¹²⁶ Karla and Stecklow (n 12).

¹²⁷ Andrew Ross Sorkin and others 'Why Apple Didn't Lose in the Epic Games Ruling' *The New York Times* (13 September 2021) <www.nytimes.com/2021/09/13/business/dealbook/apple-epic-fortnite-lawsuit.html> accessed 2 March 2022; *Epic Games, Inc v Apple Inc*, 493 F Supp 3d 817 (ND Cal 2020).

¹²⁸ Javier Espinoza, 'EU wins €2.4bn Google Shopping case' *Financial Times* (10 November 2021) <<https://on.ft.com/3D2DWfD>> accessed 6 March 2022; *Google Search (Shopping)* (n 11).

¹²⁹ Espinoza (n 128).

¹³⁰ General Court of the European Union, 'Press Release No 197/21' (General Court of the European Union 10 November 2021) <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-11/cp210197en.pdf>> accessed 6 March 2022.

¹³¹ Pablo Ibáñez Colomo, 'The Draft Digital Markets Act: A Legal and Institutional Analysis' (2021) 12 *Journal of European Competition Law & Practice* 561, 565.

A. AN OVERVIEW OF THE NEW EU AND PROPOSED UK EX ANTE REGIMES

The introduction of the Digital Markets Unit (DMU) and the DMA represent significant shakeups of the UK and EU competition law regimes, which, hitherto the UK's formal exit from the EU, were aligned. The UK, drawing on insights from the Furman and Penrose Reports,¹³² as well as advice from the Digital Markets Taskforce,¹³³ has opted to establish a dedicated regulator for digital markets, the DMU. Its purpose is to promote competition and competitive outcomes for the benefit of consumers, through addressing both the sources of market power and economic harms stemming from the largest digital platforms' exercise of that market power.¹³⁴

The EU on the other hand, with the entering into force of the DMA on 1 November 2022, has chosen against the establishment of a specialist digital markets regulator. Instead, the Commission will preside over the new regime. The DMA sets out a series of wide-ranging obligations on the largest digital platforms, with the purpose of ensuring 'fair economic outcomes' and 'contestability' in the EU digital markets, addressing the concerns highlighted earlier in this section.¹³⁵

(i) *Strategic Market Status, Gatekeepers, and Core Platform Services*

Both the UK and EU regimes will impose far-reaching obligations on the largest digital platforms. This is in pursuit of addressing, in the view of the competition authorities, aforementioned competitive harms, as well as promoting competition or competitive outcomes. However, they differ in how they define firms as being sufficiently large and having sufficiently substantial market power to be subject to their respective regimes.

The DMA adopts a more formulaic approach in defining large digital platforms. DMA duties will only apply to firms designated as 'gatekeepers'.¹³⁶ These are enterprises whose activities have a significant impact on the internal market,¹³⁷

¹³² John Penrose, 'Power to the People: Independent Report on Competition Policy (United Kingdom Government 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961665/penrose-report-final.pdf> accessed 23 March 2023.

¹³³ CMA, 'A New Pro-Competition Regime for Digital Markets: Advice of the Digital Markets Taskforce (CMA 2020) <https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_Advice.pdf> accessed 23 March 2023.

¹³⁴ United Kingdom Department for Digital, Culture, Media & Sport (DCMS) and Department for Business, Energy & Industrial Strategy (BEIS) 'A New Pro-Competition Regime for Digital Markets' (United Kingdom Government 2021) 14 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1003913/Digital_Competition_Consultation_v2.pdf> accessed 23 March 2023.

¹³⁵ DMA Recital 5; DMA Recital 7.

¹³⁶ DMA, arts 1(2), 5.

¹³⁷ *ibid* arts 2(1), 3(1)(a).

operate a core platform service (CPS) that serves as an important gateway for business users to reach end consumers,¹³⁸ as well as enjoying an entrenched and durable position in its operations.¹³⁹ Obligations for gatekeepers apply only to parts of the undertaking that provide the said CPS.¹⁴⁰ Article 2(2) DMA provides a definite set of activities considered to be CPS, ranging from online social networking sites to cloud computing services.¹⁴¹

Under the DMA, undertakings providing CPSs will be deemed as gatekeepers primarily through a set of three criteria stipulated in article 3(1), whereby specific thresholds must be met before an undertaking is assigned gatekeeper status. For example, gatekeepers must have a significant impact on the single market, measured by an annual European Economic Area turnover of equal to or over €7.5 billion in the last three financial years.¹⁴² If an undertaking does not meet the thresholds in article 3(2), but does meet the criteria set in article 3(1), they can nonetheless be held to be gatekeepers providing CPSs after a market investigation by the Commission.¹⁴³ However, if a firm is held to be gatekeeper through this method, DMA obligations will apply on to some of the undertaking's activities.¹⁴⁴

The DMA is significant because it departs from contemporary competition law in two key aspects. Firstly, it embraces a set of objectives other than the protection of 'undistorted competition'.¹⁴⁵ The Commission, in exercising its newfound DMA powers, will not be exclusively focused on nor constrained by the need to protect undistorted competition.¹⁴⁶ Secondly, it eliminates the need to demonstrate the anticompetitive effect of a practice on a case-by-case basis.¹⁴⁷ This should, in theory at least, allow for speedier and faster decision-making and adjudication by the Commission regarding CPSs performed by gatekeepers, addressing some key criticisms of competition law in addressing economic harms caused by large digital platforms.

In contrast, the DMU's proposed designation system for large platform companies is simpler, but therefore, more uncertain. The UK regime under the DMU will only apply to firms who have 'strategic market status' (SMS) vis-à-vis a particular activity they carry out.¹⁴⁸ When deciding whether a firm is to be a SMS-designated firm, the proposed test focuses on whether a firm has substantial and entrenched market power in at least one digital activity,¹⁴⁹ which provides them with a 'strategic position'.¹⁵⁰ Rather than draft more specific rules around SMS

¹³⁸ *ibid* art 3(1)(b).

¹³⁹ *ibid* art 3(1)(c).

¹⁴⁰ *ibid* art 1(2).

¹⁴¹ *ibid* arts 2(2)(c), 2(2)(i).

¹⁴² *ibid* art 3(2)(a).

¹⁴³ *ibid* arts 3(8), 17(1).

¹⁴⁴ *ibid*.

¹⁴⁵ *ibid* Recital 11.

¹⁴⁶ Ibáñez Colomo (n 131) 3.

¹⁴⁷ *ibid*.

¹⁴⁸ DCMS and BEIS (n 134), 28; CMA (n 133).

¹⁴⁹ CMA (n 133) 21–22.

¹⁵⁰ *ibid* 8.

designation, the UK's approach with the DMU has been to empower it with wide discretion when designating firms with strategic market status. This is in recognition of the reality that no two large digital platforms are the same. As the world continues to digitalise and more digital companies enter the fore of competition law, provisions such as the SMS designation criteria exhibit the necessary flexibility for the DMU to make assessments as to whether a firm should be given SMS designation.

(ii) Obligations on Digital Platforms

Once digital platforms have been designated with SMS, or are deemed to be gatekeepers providing a CPS, they will be subject to various obligations. As we wait to receive more clarity regarding specific rules which MAGMA companies will likely be subject to under UK competition law, this sub-section will focus primarily on the DMA.

Articles 5 to 7 of the DMA are where the bulk of the duties MAGMA companies will likely be subject to. The obligations stipulated in the aforesaid articles will apply as a matter of principle to all parts of a CPS identified in article 3(9). However, it must be noted that, when the CPS provider is found not have 'an entrenched and durable position in its operations',¹⁵¹ and it is not foreseeable that the situation will change 'in the near future',¹⁵² such obligations will be adjusted.¹⁵³ article 5 deals with duties that do not require further specification or implementation, as they are viewed as being 'self-executing'.¹⁵⁴ The provisions in article 5 are mandatory and unqualified; they apply to all gatekeeper conduct, irrespective of any efficiencies that can be evidenced in their defence.¹⁵⁵ For instance, most-favoured nation clauses (MFNs), which ensure that business users sell their products on digital platforms at better or equal terms than other platforms,¹⁵⁶ will likely be banned for companies deemed to provide CPSs. This is despite the fact that MFNs are widely used and are by many in the digital sector as being standard practice.¹⁵⁷

Article 6 stipulates wide-ranging obligations that would need further specification. The Commission would, at least theoretically, have the ability to engage in a fundamental restructuring of a gatekeeping digital platform that falls within

¹⁵¹ DMA art 3(1)(c).

¹⁵² *ibid.*

¹⁵³ *ibid* art 17(4).

¹⁵⁴ DMA, Recital 15; Rupprecht Podszun, Phillip Bongartz, and Sarah Langenstein, 'The Digital Markets Act: Moving from Competition Law to Regulation for Large Gatekeepers' (2021) 2 *Journal of European Consumer and Market Law* 60, 64.

¹⁵⁵ Ibáñez Colomo (n 131) 564.

¹⁵⁶ Ibáñez Colomo (n 131) 564; Gönenç Gürkaynak and others, 'Most-Favored-Nation Clauses in Commercial Contracts: Legal and Economic Analysis and Proposal for a Guideline' (2016) 42 *European Journal of Law and Economics* 129, 130.

¹⁵⁷ Avantika Chowdhury, 'Most Favoured Nation Clauses: In Need of an Effects-Based Approach' (2021) 1 *Concurrences* 20.

the ambit of the provision.¹⁵⁸ The Commission could impose obligations on undertakings to enable other players to establish their own application stores.¹⁵⁹ This would drastically alter the nature of competition in, for instance, the mobile application store market, where Apple and Google hold a duopoly in most markets worldwide.¹⁶⁰ The ability for the Commission to target and alter the ‘core monetisation strategies’ of the largest technology platforms demonstrates the potency of the regime.¹⁶¹

Turning to UK competition law, the DMU will be equipped with the power to administer pro-competitive interventions (‘PCIs’).¹⁶² These will serve as a speedier alternative to market investigations, whereby the DMU will focus on investigating a competition concern regarding a designated activity through a firm-specific lens.¹⁶³ This, in theory will reduce the time for remedies to be proposed and implemented. Remedies could be, for example, structural in nature (that is, the splitting up on-site and off-site data) or behavioural, such as prohibiting behaviour like self-preferencing.¹⁶⁴ This will allow the DMU to respond to fast-changing markets in a speedier manner than market investigations. The legal test before PCIs can be implemented will be whether there an adverse effect on competition. This is in line with the current legal test for market investigations.¹⁶⁵

While the DMA focuses on developing general rules applicable to all Big Tech Companies, the DMU will develop firm-specific rules for each SMS-designated firm to adhere to.¹⁶⁶ All SMS-designated firms will be subject to legally binding, high-level principles or codes of conduct, specifying the behaviour expected of them.¹⁶⁷ These will then be supplemented with firm-specific codes for SMS-designated firms to abide by.¹⁶⁸ Therefore, for example, the obligations placed on Amazon, the large e-commerce platform, will differ from those imposed on Apple or Google.

Finally, both the DMU and the Commission through the DMA have incorporated forms of dialogue in their approach to regulating digital platforms. Article 8(3) DMA leaves open the possibility of regulatory dialogue for some obligations. Gatekeepers would be able to discuss measures taken by the Commission, ensuring that there is effective and cooperative compliance by large digital platforms.¹⁶⁹

¹⁵⁸ Ibáñez Colomo (n 131) 564.

¹⁵⁹ DMA, art 6(4).

¹⁶⁰ Greg Sterling, ‘US market becoming a smartphone duopoly: Apple, Samsung dominate, while others are left behind.’ (*MarTech*, 23 July 2018) <<https://martech.org/us-market-becoming-a-smartphone-duopoly/>> accessed 7 March 2022.

¹⁶¹ Ibáñez Colomo (n 131) 564.

¹⁶² DCMS and BEIS, ‘Response to the CMA’s Market Study into Online Platforms and Digital Advertising’ (United Kingdom Government 2020); CMA (n 133) 34.

¹⁶³ CMA (n 133) 34.

¹⁶⁴ *ibid* 43.

¹⁶⁵ Enterprise Act 2002, s 134.

¹⁶⁶ CMA (n 133) 35; DCMS and BEIS (n 134) 27.

¹⁶⁷ *ibid*.

¹⁶⁸ *ibid*.

¹⁶⁹ Commission, ‘Impact Assessment Report’ SWD (2020) 363 final, paras 200, 210.

Similarly, the Digital Markets Taskforce recommended that the DMU adopt a ‘participative approach’ to the regulation of SMS-designated firms.¹⁷⁰ The DMU will consult not only SMS-designated firms, but all relevant stakeholders, especially in matters concerning a small number of stakeholders.

B. THE DMA AND DMU: DIFFERENT REGIMES, SIMILAR PROBLEMS

It is important to contextualise the DMA and DMU. Both initiatives are being formulated and refined under a climate of intense unease and apprehension over the level of concentration in digital markets, and its impact on business users, consumers, and the competitive landscape overall. UK and EU competition law, with their traditional emphasis on encouraging competition for the benefit of consumers, offers regulators an effective tool, when used correctly, to reinvigorate digital markets with much needed competition. Or so it is argued. However, both regimes, though ambitious in their attempts to rewrite the rules regarding competition regulation, have excessively broad mandates. The DMU and the Commission via DMA will deal with issues ranging from the protection of privacy in some form, along with encouraging innovation and helping shape fairer competitive outcomes.

Bowman and others, for instance, in analysing the DMU, note that it suffers from a lack of clearly defined goals and objectives, limits to its powers and effective oversight.¹⁷¹ For example, though the DMU was established to promote competition in digital markets for the benefit of consumers, its mandate now spans from data protection to the prevention of market power leveraging and self-preferencing. As Ibáñez Colomo notes, several DMA provisions are in essence ‘codification[s] of competition law investigations’.¹⁷² The DMA contains provisions specifically tackling self-preferencing, perceived abuses of business user data and the monopolisation of application stores, all referencing ongoing or past investigations such as *Google Shopping* or the Commission’s recent investigation into Amazon over its alleged exploitation of business user data.¹⁷³

With both regulators being given vast powers and discretion to regulate digital platforms, the insights offered in section III of this piece are of the essence. If antitrust regulators are given impossibly broad mandates, plagued by a lack of an overarching ‘regulatory idea’,¹⁷⁴ their success is bound to be limited, if not corrupted by the inclusion of a range of factors beyond consumer welfare. As

¹⁷⁰ CMA (n 142), 48.

¹⁷¹ Sam Bowman, Sam Dumitriu, and Aria Babu, ‘Conflicting Missions: The Risks of the Digital Markets Unit to Competition and Innovation’ (The Entrepreneurs Network and the International Center for Law & Economics 2021) 11 <<https://static1.squarespace.com/static/58ed40453a04116f46e8d99b/t/626c18397b27ec05bccb8e17/1651251266381/Conflicting+Missions.pdf>> accessed 23 March 2023.

¹⁷² Ibáñez Colomo (n 131) 565.

¹⁷³ *ibid.*

¹⁷⁴ Podszun, Bongartz, and Langenstein (n 164) 61.

explained in section IV, dynamic capabilities frameworks provide us with an opportunity to better situate and understand the competitive dynamics of digital markets and regulate accordingly. Drawing upon insights garnered from literature on dynamic capabilities, the next sub-sections shall demonstrate how a more expansionist approach to competition regulation inhibits promotion of the most *effective* forms of competition/competitive pressure in digital markets, and how that can be remedied.

C. THE DMA AND DMU: PROMOTING INEFFECTIVE COMPETITION?

(i) *Promotion of Inter-platform Competition*

One increasingly important aspect of competition in digital markets which, hitherto, has been inadequately examined, is the role inter-platform competition has in helping create a more competitive landscape in the digital sector. In 2021, *The Economist* published an article highlighting an interesting phenomenon in digital markets; the largest digital platforms entering other platforms' 'home' markets.¹⁷⁵ Apple, though primarily generating revenue from the sale of its hardware and software, as well as commissions stemming from its App Store purchases, has begun to venture into music and video streaming, and podcasts, competing with other large platforms like Spotify, Netflix, and Amazon.¹⁷⁶ Such competitive pressures have aided the slowdown in the level of concentration in many markets where MAGMA compete in. In the 11 largest tech markets analysed by *The Economist*, MAGMA saw the increase of their market share slow down significantly in inter-app store, business software and online advertising markets.¹⁷⁷

In many ways this is not all too surprising. It is the *coalescence* of network effects, extreme returns of scale and data-related competitive advantages that helped give rise to large technology companies like MAGMA, as well as aid the durability and longevity of their market power. Building on from the Apple example, suppose Apple attempted to venture, organically, into the e-commerce market, attempting to build a platform to rival Amazon. The Commission could, for instance, in exercising its newfound powers, or the DMU through a PCI, prohibit such conduct, citing concerns over Apple's leveraging of its dominance in one market to gain power in another market.¹⁷⁸ Such a policy would be detrimental as it would reduce an effective form of competitive pressure. Furthermore, it would force MAGMA to focus on defending their home markets, making it even harder for smaller firms to compete.

¹⁷⁵ The Economist, 'The new rules of competition in the technology industry' *The Economist* (27 February 2021) <www.economist.com/leaders/2021/02/27/the-rules-of-the-tech-game-are-changing> accessed 4 March 2022.

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid.*

¹⁷⁸ Petit and Hanspach (n 63).

Any firm looking to meaningfully compete with a company the size of Amazon would need large pools of capital, strong, pre-existing network effects, and large datasets to create an offering compelling enough to entice users away from the platform. However, if UK or EU regulators chose to block such a move, this would prevent effective competition likely to exert meaningful competitive pressure on Amazon.¹⁷⁹ In any case, both regimes fail to provide a framework for balancing conflicting interests, such as policy goals to increase the competitive potential of business users and the need to promote effective competition. This adds further uncertainty to already opaque regimes.¹⁸⁰ They offer limited to no grounds of appeal for regulatory decisions. For new regimes equipping regulators with far-reaching powers to impact the evolution of digital competition, the issue of inter-platform competition showcases the deficiencies plaguing regimes that lack clear, overarching regulatory ideas or goals, as well as regulations that operate on the basis that all forms of adjacent entry by incumbent firms are undesirable unless proven otherwise.

(ii) Data Protection and Data-Powered Contestability

Both the Commission and CMA take the view that data represents a significant competitive advantage in digital markets. The DMU will, through PCIs, impose data portability requirements on SMS firms. The DMA gives us an idea of how such PCIs will look like.¹⁸¹ Article 6 DMA imposes various data portability requirements on gatekeepers in relation to their CPS. Gatekeepers are to enable ‘effective portability’ business and end user generated data.¹⁸² This includes providing ‘continuous and real-time access’ to the data,¹⁸³ in an attempt to promote competitive pressure from non-MAGMA firms. Additionally, where compliant with European General Data Protection Regulation (GDPR) requirements,¹⁸⁴ gatekeepers must provide business users or any third parties authorised by them, without cost, ‘effective, high-quality and real-time access and use of aggregated and non-aggregated data’.¹⁸⁵ This is so long as the data is generated vis-à-vis the gatekeeper’s CPS.¹⁸⁶

¹⁷⁹ Bowman, Dumitriu, and Babu (n 171).

¹⁸⁰ *ibid.*

¹⁸¹ Ibáñez Colomo (n 131).

¹⁸² DMA, art 6(9).

¹⁸³ *ibid.*

¹⁸⁴ Regulation 2016/679 of the European Parliament and of the Council of April 27, 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 L119/1; 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 (United Kingdom General Data Protection Regulation) (Text with EEA relevance).

¹⁸⁵ *ibid* art 6(10).

¹⁸⁶ *ibid*

The article 6 requirements are onerous, but it is unclear whether they will meaningfully assist increasing the competitive potential of business users.¹⁸⁷ Though the provisions do, somewhat, address a key issue—accentuated data-related competitive advantages enjoyed by incumbent digital platforms—the DMA, nor arguably competition law, can help with addressing the strong network effects that MAGMA firms possess. Nicholas and Weinberg’s study highlights why this is the case.¹⁸⁸ They interviewed potential competitors to Facebook, and assessed the impact of Facebook’s data portability initiative, whereby it agreed to share end user data to rivals, so long as the individuals consented to the transfer. The start-up firms in question found that a lot of the data was not useful without context.¹⁸⁹ For example, Facebook competitors had comment data transferred from Facebook onto their platform. However, it was of little use without context.¹⁹⁰ It was not readily decipherable whether a comment in question was in relation to cats or dogs, for instance, and whether the specific user’s comment data was representative of other users.

Limited access to useful data by competitor firms was not necessarily because of Facebook refusing to increase portability.¹⁹¹ Rather, it stemmed from competitors lacking a sufficiently large userbase to draw meaningful insights from the data they did have.¹⁹² A structural feature of digital markets—network effects and the competitive advantages stemming from large userbases—inhibited competitor firms’ ability to develop products to meaningfully compete with Facebook.¹⁹³ Consequently, the likes of Facebook, equipped with vast amounts of data, will be able to further develop its product quality, which will help increase the durability of the dominance it already enjoys in digital markets.¹⁹⁴ Given the above analysis, it is doubtful that data portability will have the effect that both the Commission and the CMA envision it to have.

(iii) Getting Rivalrous Competition Right: Promoting Complements-Based Competition

The preceding sub-subsections evidence how structural features of digital markets inhibit competitors lacking the market dominance of MAGMA firms from offering effective competitive pressure on the digital giants. Though the aforesaid

¹⁸⁷ Petit and Teece (n 93); Petit and Hanspach (n 62).

¹⁸⁸ Gabriel Nicholas and Michael Weinberg, ‘Data Portability and Platform Competition: Is User Data Exported From Facebook Actually Useful to Competitors’ (Engelberg Center on Innovation Law and Policy 2019) <www.law.nyu.edu/centers/engelberg/pubs/2019-11-06-Data-Portability-And-Platform-Competition> accessed 18 February 2022.

¹⁸⁹ *ibid* 14.

¹⁹⁰ *ibid*.

¹⁹¹ *ibid* 16.

¹⁹² *ibid*.

¹⁹³ Crémer Report (n 72); Furman Report (n 72).

¹⁹⁴ Petit and Teece (n 93); Petit and Hanspach (n 63); Khan (n 7); Newman (n 71).

structural features create strong barriers to entry, they can be overcome. By analysing digital competition using dynamic capabilities frameworks, the most effective forms of competitive pressures can be promoted through competition law.

One such form of competitive pressure identified in management literature is complements-based competition.¹⁹⁵ The DMA, for example, primarily seeks to promote a form of rivalrous competition whereby competitor firms attempt to gain market share in the core markets of MAGMA firms. The promotion of such forms of competitive rivalry in competition law and policy are unlikely to result in effective and durable competitive pressure on the most dominant platform ecosystems.¹⁹⁶ However, insights from management literature suggest that competitive pressure from complements is more effective and durable.¹⁹⁷

Complementary goods are products which are often bought and used together.¹⁹⁸ For instance, gaming consoles are frequently purchased alongside video games and gaming controllers. This is in contrast to substitute goods, whereby increased demand for a substitute means less demand for the primary product. Insights from management literature suggest that complements, in the face of seemingly impenetrable incumbents, over time, can shift value or rents from the incumbent toward its own business. Complements-based competition is effective because complementor firms gain market power over longer time horizons than conventional, substitutes-based competition, and are less likely to be seen as threats by incumbents.¹⁹⁹ Complementors often add value to an ecosystem, for example, by enhancing end user experiences.²⁰⁰ If a complementor's technological capabilities and organisational learnings are strong, it can exploit opportunities that arise as a platform ecosystem develops and matures.²⁰¹ Over time it can imbed itself into the incumbent's ecosystem, becoming hard to remove and occasionally, begin to shift value from the incumbent ecosystem onto itself.²⁰² Incumbents find it more difficult to dislodge complementors because, by the time they pose a serious enough competitive threat, they are often an integral part of the incumbent's ecosystem and are thus more likely to be tolerated.²⁰³

TikTok, the popular social media application, exemplifies of the potency of complements-based competition in the face of de facto untouchable incumbents.²⁰⁴

¹⁹⁵ Hal R Varian, *Intermediate Microeconomics: A Modern Approach* (9th edn, WW Norton & Company 2020) 40.

¹⁹⁶ Petit and Teece (n 93).

¹⁹⁷ Ron Adner and Marvin Lieberman, 'Disruption Through Complements' (2021) 6 *Strategy Science* 91.

¹⁹⁸ Varian (n 195).

¹⁹⁹ Adner and Lieberman (n 197), 94.

²⁰⁰ *ibid.*

²⁰¹ Barbara Levitt and James G March, 'Organizational Learning' (1988) 14 *Annual Review of Sociology* 319; Constance E Helfat and others, *Dynamic Capabilities: Understanding Strategic Change in Organisations* (Blackwell Publishing 2007).

²⁰² Adner and Lieberman (n 197) 97–99.

²⁰³ *ibid.*

²⁰⁴ The Economist, 'TikTok's rapid growth shows the potency of video' *The Economist* (7 October 2021) <www.economist.com/graphic-detail/2021/10/07/tiktoks-rapid-growth-shows-the-potency-of-video>.

TikTok, in its earliest iteration began as a content creation application, often used by users of larger platforms like Instagram or Facebook to create short videos with music.²⁰⁵ TikTok initially enhanced the experience of Facebook and Instagram users. Over time, arguably as a result of its impressive entrepreneurial capabilities, it was able to develop a product and algorithm capable of competing with larger incumbents such as Instagram.²⁰⁶ Between 2018 and 2020, TikTok, in all senses of the word, went viral; its global userbase increased by over 1000%.²⁰⁷ TikTok's global popularity is testament to the potential that complements-based competitive pressures have to revitalise digital competition.

This has several implications for competition law and policy. The shift to ex ante regulation by the EU and UK, if executed with a clear objective to promote complements-based competition, could serve as the catalyst of a much-needed wave of effective and durable competition in digital markets. To achieve this, there must be an embrace of dynamic capabilities frameworks, with regulators developing analytical tools to examine the entrepreneurial capabilities of both competitor firms and complementor companies operating within incumbents' ecosystems.

Provisions such as those relating to data portability and interoperability in the DMA would be most impactful if they were drafted and implemented with complementor firms in mind. Complementors, over time, can grow within an ecosystem, develop expertise and market knowledge, making them formidable challengers to incumbent platforms.²⁰⁸ Furthermore, the DMU's approach of subjecting SMS firms to a code of conduct could best ensure that regulations are tailored to reflect the competition dynamics of each digital platform.²⁰⁹ By focusing on drafting competition regimes that promote the most effective forms of competitive pressure on Big Tech companies, the DMU and Commission, over time, would develop invaluable institutional expertise on the complex competitive dynamics of MAGMA firms. As our economies continue to digitalise, such expertise would prove to become an invaluable asset for regulators in analysing the competition law issues of tomorrow.

²⁰⁵ Catherine Shu, 'Tik Tok, WeChat and the growing divide between the US and China' (*TechCrunch*, 22 September 2020) <<https://techcrunch.com/2020/09/22/tiktok-wechat-and-the-growing-digital-divide-between-the-u-s-and-china/>> accessed 6 March 2022.

²⁰⁶ Ben Smith, 'How TikTok Reads Your Mind' *The New York Times* (5 December 2021) <www.nytimes.com/2021/12/05/business/media/tiktok-algorithm.html>; Christina Newberry, 'How the TikTok Algorithm Works in 2022 (and How to Work With It)' (*Hootsuite*, 11 February 2022) <<https://blog.hootsuite.com/tiktok-algorithm>> accessed 7 March 2022.

²⁰⁷ Brian Dean, 'TikTok User Statistics (2022)' (*Backlinko*) <<https://backlinko.com/tiktok-users>> accessed 7 March 2022.

²⁰⁸ Adner and Lieberman (n 197), 97-98.

²⁰⁹ CMA (n 133), 35; DCMS and BEIS (n 134), 27.

IV. DYNAMIC COMPETITION POLICY: RECONCILING INNOVATION AND DATA PROTECTION

The preceding section not only highlights issues associated with the policy direction of the Commission through the DMA and the DMU, but also touches upon how regulation seeking to promote rivalrous, substitute-based competition can and will come into conflict with other important legislative initiatives, such as the GDPR. The promotion of substitutes-based competition and contestability, through greater access to user data for business users, seems to be diametrically opposed with more normative goals surrounding data protection. Data, when coupled with other structural features of digital markets, can be indispensable for firms needing to innovate and develop new products to remain competitive in the fast-moving digital sector. Data protection, on the other hand, is concerned with addressing power asymmetries between personal users and platforms,²¹⁰ as well as putting individuals in control of the data that they control.

Proposals to increase the competitive potential of business users, for example through data portability and interoperability requirements, present issues from a data protection and privacy perspective. Although the UK is planning a shakeup of its existing data protection regime,²¹¹ the imposition of a regime that places restrictions on the flow and processing of data necessarily hinders innovation, especially in the digital sector.²¹² After the introduction of the GDPR in the EU, innovation in AI and other digital technologies slowed,²¹³ with start-ups in Europe feeling the brunt of decreased investor confidence as evidenced in a decline of funding from venture capital firms.²¹⁴

Despite concerns over the impact of regulation such as the GDPR on competition and innovation,²¹⁵ there is agreement that data protection is an important

²¹⁰ Francisco Costa-Cabral and Orla Lynskey, 'Family Ties: The Intersection Between Data Protection and Competition Law' (2017) 54 *Common Market Law Review* 11, 18–19.

²¹¹ Department for Digital, Culture, Media & Sport 'Data: A New Direction' (Department for Digital, Culture, Media, and Sport 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1022315/Data_Reform_Consultation_Document__Accessible_.pdf> accessed 22 April 2022.

²¹² David Rand, 'The first unintended consequences of GDPR' (*Hewlett Packard Enterprise*, 26 February 2019) <www.hpe.com/us/en/insights/articles/the-first-unintended-consequences-of-gdpr-1902.html> accessed 12 April 2022; Jian Jia, Ginger Zhe Jin, and Liad Wagman, 'The Short-Run Effects of GDPR on Technology Venture Investment' (2018) NBER Working Paper 25248 <www.nber.org/system/files/working_papers/w25248/w25248.pdf> accessed 12 April 2022. See also George Leopold, 'GDPR Seen Slowing AI Innovation' (*Enterprise AI*, 9 April 2018) <www.enterpriseai.news/2018/04/09/gdpr-seen-slowing-ai-innovation/> accessed 12 April 2022.

²¹³ Leopold (n 212).

²¹⁴ Jia, Jin, and Wagman (n 212), 4.

²¹⁵ Damien Geradin, Theano Karanikioti, and Dimitrios Katsifis, 'GDPR Myopia: How a Well-Intended Regulation Ended up Favouring Large Online Platforms - the Case of Ad Tech' (2021) 17 *European Competition Journal* 47.

aspect of digital regulation.²¹⁶ Though it may seem that the promotion of competition and increased data protection are inherently at odds with each other, this need not be the case. Although data protection and competition law are distinct with differing goals, they do have for our purposes an important common objective: consumer welfare.²¹⁷ Both laws are concerned with individual welfare, albeit with competition law being concerned with individuals in their capacity as ‘aggregate consumers’.²¹⁸ This presents an opportunity for both areas of law to be applied in a ‘coherent and mutually enforcing manner’.²¹⁹ This is particularly important if we are to formulate a consumer welfare standard that accounts for the important role that data plays in the digital sector.

Though, in the past, the Commission and the European Court of Justice took the view that data protection was not a concern for competition law,²²⁰ there has been a welcome paradigm shift on their part. Consumer welfare is not merely concerned with prices, but also choice, quality, and innovation.²²¹ As Costa-Cabral and Lynskey contend, the common goals of competition and data protection law presents the potential for data protection law to operate as a ‘normative yardstick’ for competition law in digital markets.²²² This would aid competition analysis by providing a framework for analysing non-price (quality) effects of potentially anti-competitive conduct, especially when data is involved.

Such frameworks will be crucial in the development of a consumer welfare standard that will guide regulators in analysing competition issues in the digital age. This is not only in regard to, for instance, evaluating the impact of anti-competitive conduct on data protection from a quality control perspective, but also in relation to constructing a competition regime that internalises the protection of individual data as a baseline for competition in digital markets. Although there is some truth in the argument that regulations like the GDPR disincentivise competition and innovation and favour incumbents, as they are the ones that have the capital and institutional expertise to cope and comply with such regulations, smaller firms, from a dynamic capabilities perspective, could also compete within this paradigm.

If such complements-based competition is promoted, firms who develop within an incumbent’s ecosystem will develop and mature in a manner compliant

²¹⁶ UNCTAD, ‘Data Protection and Privacy Legislation Worldwide’ (*UNCTAD*) <<https://unctad.org/page/data-protection-and-privacy-legislation-worldwide>> accessed 20 April 2022; Graham Greenleaf, ‘Global Data Privacy Laws 2019: 132 National Laws & Many Bills’ (2019) 157 *Privacy Laws & Business International Report* 14.

²¹⁷ Costa-Cabral and Lynskey (n 210) 21.

²¹⁸ *ibid.*

²¹⁹ *ibid.* 31.

²²⁰ *Google/DoubleClick* (Case COMP/M.4731) Commission Decision [2008] OJ C184/10; *Facebook/WhatsApp* (Case COMP/M.7217) Commission Decision [2014] OJ C417/4; Case C-238/05 *Asnef-Equifax v Ausbank* [2006] ECR I-11125, para 63.

²²¹ Case C-209/10, *Post Danmark I*, EU:C:2012:172, para 22.

²²² Costa-Cabral and Lynskey (n 210), 29.

with data protection. Not only would this approach promote and likely foster innovation that is compliant with data protection obligations, but such competitive pressures would also be more durable and long lasting. By the time complementors in a platform ecosystem would have become large enough to compete with an incumbent, the complementor would have grown within the incumbent's ecosystem, making the complementor likely to be comfortable with stringent, but necessary obligations such as the GDPR.

An embrace of the above approach to foster competition and innovation that is data protection compliant would lead to the development of a competition regime whereby innovation can only take place within the context whereby the data protection and privacy rights of users are respected.²²³ A limitation of this approach is that a trade-off must be made between faster innovation and greater data protection regulations. If the goal of the UK or EU is to foster ethical innovation, one that respects users' access and control over their data, then the approach argued for in this section is favourable. The dynamic capabilities paradigm, and in particular the insights gained from complements- and platform-based competition, offers regulators with an alternative framework to develop competition law for the digital age.

V. CONCLUSION

This article, through an analysis of the EU's Digital Markets Act and the UK's Digital Markets Unit, has endeavoured to demonstrate the potential of a modified consumer welfare standard in promoting effective competition in digital markets. While antitrust reforms cannot be entirely divorced from the wider social and political scepticism surrounding Big Tech, caution must be exercised when amending competition laws. Rather than acquiescing to dominant and popular political demands for a more purposive and expansionist competition law, it is imperative, for the promotion of effective and durable competitive pressure on Big Tech companies, that amendments to existing competition regimes are grounded in economic theory and informed by literature on dynamic capabilities.

What is clear is that digital markets are anything but static. They are chaotic canvases, cacophonous and discordant kaleidoscopes of companies, technologies and consumer preferences that seem to be in a perpetual state of flux. They leave us spectators, both experts and laypeople, in suspense as to what will happen next. Today's devilish disruptor may very well be tomorrow's Myspace. Nevertheless, amidst the chaos, this piece has sought to argue what we do know is that the digital sector is dynamic. The promise of monopoly-esque dominance, the ability and near necessity to leverage existing market power from the largest players requires a rethink of the economics of digital markets on our part. Part of this re-examination entails the development of a framework that properly accounts for this

²²³ Luciano Floridi, 'Soft Ethics and the Governance of the Digital' (2018) 31 *Philosophy and Technology* 1.

dynamism. And it is in literature on dynamic capabilities, this article has contended, that a useful starting point can be found.

Though the notion of dynamic competition is not new, it has largely been ignored by mainstream competition economists and regulators. This, however, presents an exciting opportunity for academics, regulators and interested parties to open the ‘black box’ of the firm and develop theories and frameworks to aid competition authorities in analysing digital competition and regulate—both *ex ante* and *ex post*—accordingly. As Justice Thurgood Marshall so sagaciously remarked, antitrust laws are the ‘...Magna Carta of free enterprise’.²²⁴ Though the current political circumstances in which antitrust finds itself are important, in designing a regime that does not pander to amorphous, ever-changing political and special interests, we can enable competition law to do what it does best: fostering free and fair markets, which operate first and foremost for the benefit of consumers, thereby creating a regime fit for the digital age.

²²⁴ *United States v Topco Assocs, Inc* 405 US 596, 610 (1972).

Data-Driven Mergers: Is it Time to Reform EU Merger Control?

JEAN WEI LEE (KIT)*

ABSTRACT

In today's digital economy, a growing number of mergers notified to the European Commission involve the combination of large datasets. This article contributes to the current debate on how data-related concerns should be integrated into EU merger review. In analysing the most relevant data-driven mergers, Section II highlights the anti-competitive effects of big data combinations and addresses the fallacy of relying exclusively on conventional antitrust concepts to assess the data-related theories of harm. Section III advances a series of adaptations and frameworks aimed at facilitating a more comprehensive and refined analysis of the competitive effects of data in merger review. In particular, it argues that the Commission should recognise a separate market for data, shift its focus from market definitions and financial thresholds to the theories of harm, and adopt flexible, forward-facing analyses throughout the merger review. Finally, Section IV asserts that the economic and non-economic privacy-related issues arising from data-driven mergers should be incorporated into merger assessments, and proposes two viable ways of achieving this. This article hopes to demonstrate that although the existing EU Merger Regulation ('EUMR') and merger control frameworks are sufficiently flexible to address the novel issues arising from data concentrations, there is an urgent need for competition authorities to modify the way in which they apply the current EU merger control regime to data-driven mergers.

Keywords: EU merger control, data-driven mergers

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I. INTRODUCTION

We live in the age of big data. The ‘competitive strength’ of an entity is becoming increasingly reliant on the data it has at its disposal.¹ Indeed, data has been described as ‘the lifblood of online platforms and digital businesses’ and the ‘new oil of the internet’.² Yet, even as more entities leverage data and technology to adapt to rapid market changes competition authorities have still been applying traditional, pre-internet ownership models to determine the role of big data as a source of market power.³ As a result, the issues facing the Commission in their assessments of data-driven mergers are often well covered, but the outcomes are frequently criticised.

Beyond the commercial value of data, the emergence of personal data as the ‘new currency’ has reinvigorated the development of privacy and consumer protection laws.⁴ Contrastingly, antitrust authorities have sought to maintain strict boundaries between privacy and competition laws, consistently arguing that ‘any privacy-related concerns flowing from the increased data concentration... do not fall within the scope of EU competition law but within the scope of EU data protection rules’.⁵ Whilst some have commended the Commission’s regulatory restraint, others have criticised this approach for disregarding the consumer-protection function inherent in competition law.

It is recognised that the existing EU merger regulation (‘EUMR’) and merger control frameworks are sufficiently flexible to address the novel challenges arising from big data.⁶ Nonetheless, this article seeks to demonstrate that there is an urgent need for competition authorities to modify the approach in which the current EU merger control regime is applied to data-driven mergers.

Section II examines the existing landscape on which a significant anti-competitive ‘data advantage’ may be established. It evaluates the most relevant data-driven mergers to highlight the potential data-related anti-competitive effects and analyse, retrospectively, the fallacies of relying exclusively on conventional antitrust concepts to review these mergers. Section II submits that the Commission

¹ Inge Graef, *EU Competition Law, Data Protection and Online Platforms* (Wolters Kluwer 2016) 125; Thomas Stuart, ‘Too Little Too Late?’ (2021) 17 *European Competition Journal* 407, 407.

² Marixenia Davilla, ‘Is Big Data a Different Kind of Animal? The Treatment of Big Data Under the EU Competition Rules’ (2017) 8(6) *Journal of European Competition Law & Practice* 370; Meglena Kuneva, ‘Keynote Speech’ (Roundtable on Online Data Collection, Targeting and Profiling, Brussels, 31 March 2009) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_09_156> accessed 18 February 2022.

³ Sophie Chesterton, ‘Apple’s Acquisition of Shazam and the Elusive “Data Advantage”’ (2019) 40 *European Competition Law Review* 102.

⁴ Kuneva (n 2).

⁵ *Facebook/WhatsApp* (Case COMP/M.7217) Commission Decision C(2014) 7239 final (3 October 2014) para 164.

⁶ Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1.

has often overlooked the underlying motive for data-driven mergers—data—resulting in a skewed, unrealistic assessment of the merger’s overall impact.

Section III advances a series of frameworks focused on facilitating a more refined and comprehensive analysis of the competitive effects of data in merger review. It argues that the Commission should shift its focus from market definitions and financial thresholds to the theories of harm. In particular, to properly assess the potential anti-competitive effects of data, the Section posits that the Commission should recognise a separate market for data and adopt forward-facing analyses throughout the merger review. The Section considers the relationship between the newly enforced EU Digital Markets Act (“DMA”)⁷ and the EUMR. It commends the DMA for enabling and encouraging competition authorities to review a greater number of digital acquisitions. However, as there are no clear and objective criteria for competition authorities to identify problematic data-driven mergers, the Commission should not overlook the significance of data and should integrate data-related theories of harm into its reviews.

Section IV challenges the Commission’s reliance on consumer and data protection laws to address privacy-related concerns. It highlights that such rules are unequipped to deal with mergers and the monopolistic powers that stem from data concentrations, and proposes two viable ways of incorporating privacy-related issues into merger review. Crucially, this article asserts that the economic and non-economic implications of data privacy on both consumer welfare and the relevant markets should be considered in all merger assessments involving big data.

II. THE COMPETITIVE STRENGTH OF BIG DATA

Section II seeks to demonstrate that a more comprehensive and refined analysis of data in merger review is required. In evaluating the most relevant data-driven mergers, the Section highlights the potential anti-competitive effects of data, and analyses, retrospectively, the fallacies of relying exclusively on conventional anti-trust concepts to assess these mergers.

Section II argues that the lack of scrutiny of data-related theories of harm largely stems from the fallacies of applying narrow, market-by-market assessments and the traditional market foreclosure test. Such reliance has often led to the erroneous conclusion that the datasets collected by digital platforms were fungible.⁸ For instance, in approving *Google/DoubleClick* and *Facebook/WhatsApp*, the Commission assumed that unless there is an overlap between the merging parties’ markets,

⁷ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1.

⁸ Martin Moore and Damian Tambini, *Digital Dominance: The Power of Google, Amazon, Facebook and Apple* (Oxford University Press 2018) 8.

personal data ‘should not prevent or set hurdles for a merger/takeover’.⁹ It is submitted that overlooking the potential anti-competitive effects of data combinations is a short-sighted approach that fails to properly consider the underlying motive for data-driven mergers—that is, data.

A. RECENT DATA-DRIVEN MERGERS: HIGHLIGHTS

(i) *Facebook/WhatsApp*:¹⁰ *Overlooking the Competitive Significance of Data?*

From a data privacy perspective, Facebook’s acquisition of WhatsApp remains highly controversial. Following WhatsApp’s privacy policy changes in 2016 to share WhatsApp user data with Facebook, Italian antitrust authorities fined WhatsApp €3m for data sharing (2017),¹¹ the Commission sanctioned Facebook €100m under article 14(1) EUMR for providing misleading information (2017),¹² Ireland fined WhatsApp €225m for transparency failings (2021),¹³ and Germany banned Facebook from processing WhatsApp data (2021).¹⁴ These scenarios beg the question: did the Commission utilise the best tools when reviewing the merger? Specifically, what were the harmful data-related effects of *Facebook/WhatsApp*, and could they have been better addressed pre-merger?

Before unconditionally clearing the merger after a Phase I review, the Commission focused on the consumer communication services (‘CCS’), social networking services (‘SNS’) and online advertising services (‘OAS’) markets. It neither divided the former two markets further by their intended uses nor,¹⁵ unfortunately, did it recognise a separate market for the ‘provision of data/data analytics services’.¹⁶

In the CCS market, where the main horizontal overlap occurred,¹⁷ the Commission rightly noted that the market shares Facebook would acquire post-transaction was not necessarily ‘indicative of market power’.¹⁸ This follows *Cisco & Messagenet*, where the CCS sector was characterised by ‘frequent market entry’ and ‘short innovation cycles’; hence, market shares may be ‘ephemeral’ and have ‘no

⁹ *ibid* 9.

¹⁰ *Facebook/WhatsApp* (n 5).

¹¹ Competition Policy International (CPI), ‘Italy: Regulator Fines Whatsapp €3m For Data Sharing’ (*CPI*, 6 May 2018) <www.competitionpolicyinternational.com/italy-regulator-fines-whatsapp-e3m-for-data-sharing/> accessed 23 February 2022.

¹² *Facebook/WhatsApp* (Case M.8228) Commission Decision 2017/C 286/06 [2017] OJ C286/6.

¹³ ‘WhatsApp Issued Second-Largest GDPR Fine of €225m’ *BBC* (2 September 2021) <www.bbc.com/news/technology-58422465> accessed 25 March 2023.

¹⁴ Douglas Busvinem, ‘German Regulator Bans Facebook from processing WhatsApp User Data’ *Reuters* (Berlin, 11 May 2021) <<https://www.reuters.com/business/legal/german-regulator-bans-facebook-processing-whatsapp-user-data-2021-05-11/>> accessed 24 March 2023.

¹⁵ For example, WhatsApp offers a ‘more personal and targeted’ experience than Facebook: *Facebook/WhatsApp* (M.7217) (n 5) para 60.

¹⁶ *Facebook/WhatsApp* (M.7217) (n 5) para 72.

¹⁷ *ibid* para 96.

¹⁸ *ibid* para 99.

lasting damage to competition'.¹⁹ The Commission also held that the network effects that raise barriers to market entry/expansion were 'unlikely to be substantially strengthened' as 60-70% of active Facebook Messenger users already used WhatsApp.²⁰ Similarly, regarding the SNS market, as most active WhatsApp users were already Facebook users, the Commission opined, 'competition is unlikely to be negatively affected by the merger'.²¹

In finding WhatsApp user data not exclusive to WhatsApp, the Commission deemed WhatsApp's datasets insufficiently 'unique' and 'essential' to confer Facebook a significant competitive advantage. This article, however, disagrees with the Commission's reliance on the traditional market foreclosure test to assess data-driven mergers. The multi-sided nature of digital platforms enables the collection of large volumes of data through multiple channels (for example, Facebook can gather data from both platform users and businesses that sell through it). Thus, even if data is not explicitly shared for commercial purposes, data in one tech company rarely resides in that company alone.²² Data sharing and multi-homing make it almost impossible for datasets to satisfy the 'unique' asset threshold, rendering efforts to assess the competitive significance of data using the conventional foreclosure test futile. It is therefore unnerving that the Commission did not further investigate why Facebook was willing to pay a staggering \$19bn for WhatsApp if the merger would have had such 'insubstantial' benefits.²³ That *Facebook/WhatsApp* involved almost 1.3bn Facebook users and 600m WhatsApp users reinforces the submission that the Commission's scrutiny (or rather, the lack thereof) of the merger's potential data-related effects failed to reflect the transaction's significance on the digital markets.

To its credit, the Commission did identify two data-related theories of harm that may arise from Facebook's attempts to consolidate dominance in the OAS market: introducing targeted advertising on WhatsApp and leveraging WhatsApp user data to improve Facebook's targeted advertising.²⁴ The Commission (too easily) dismissed these theories on three grounds, each of which will now be challenged.

First, the Commission erroneously believed that WhatsApp would not share its user data with Facebook as this would necessitate changes to its privacy policy. It presumed that such changes would risk WhatsApp users switching to alternative privacy-friendly CCS apps, and naively relied on Facebook's and WhatsApp's promises that users' privacy would not be compromised post-merger. This paper asserts that the Commission appears to have overlooked the spillover effects be-

¹⁹ Case T-79/12 *Cisco Systems Inc and Messagenet SpA v Commission* EU:T:2013:635, paras 64–74.

²⁰ *Facebook/WhatsApp* (M.7217) (n 5) para 140.

²¹ *ibid* para 151.

²² Chesterton (n 3).

²³ Stuart (n 1).

²⁴ *Facebook/WhatsApp* (M.7217) (n 5) para 168.

tween the CCS and OAS markets. It had failed to recognise that the potential revenues generated from online advertising services may outweigh the financial losses from users leaving WhatsApp. Sections II and III, thus, argue that the Commission should have defined a separate market for data. This would have enabled it to holistically consider how Facebook might commercialise the combined datasets (and hence, assess the indirect network effects of data) and the plausible ‘intangible, non-economic injuries’²⁵ (in *Facebook/WhatsApp* privacy degradation) that emanate from data concentrations.

Secondly, the Commission argued that even if Facebook leveraged WhatsApp’s datasets, ‘there will continue to be a large amount of Internet user data that are valuable for advertising purposes and that are not within Facebook’s exclusive control’.²⁶ As discussed, this reasoning too easily dismisses the exclusionary effects of data. It neither considers the cross-side network effects of data nor how the acquired datasets might be used to exploit consumers (see Section IV).²⁷

Thirdly, the Commission asserted that ‘[a]ny 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 EU competition law but within the scope of EU data protection rules’.²⁸ Whilst this ‘justification’ maintains the privacy-antitrust boundary, it disregards how privacy reduction degraded the quality of WhatsApp for users, highlighting how the privacy-as-a-quality competition parameter is being trivialised.²⁹

By 2016, WhatsApp deteriorated users’ privacy. This contradiction to the Commission’s conclusion demonstrates the fallacies of applying the market foreclosure test, relying on the merging entities’ promises at face value, and marginalising privacy-related concerns. Instead, the Commission should have scrutinised the facts presented by the parties, the potential indirect network effects of data, and the merger’s impact on consumer welfare by defining a market for data.

(ii) *Microsoft/LinkedIn: Privacy as a Competition Parameter*

Unlike *Facebook/WhatsApp*, the Commission enhanced its data-antitrust analysis in *Microsoft/LinkedIn* by recognising privacy as an important competition parameter and examining the data-related theories of harm.³⁰ Its data-related assessments focussed on the online advertising services (‘OAS’), customer relationship management software (CRM) and professional social network (‘PSN’) markets. Regarding the OAS and CRM markets, the Commission applied the traditional market foreclosure test and (unsurprisingly) dismissed all concerns as

²⁵ Stuart (n 1).

²⁶ *Facebook/WhatsApp* (M.7217) (n 5) para 189.

²⁷ Anca Chirita, ‘Data-driven Mergers Under EU Competition Law’ in John Linarelli and Orkun Akseli (eds), *The Future of Commercial Law: Ways Forward for Harmonisation* (Hart Publishing 2019).

²⁸ *Facebook/WhatsApp* (M.7217) (n 5).

²⁹ Stuart (n 1).

³⁰ *Microsoft/LinkedIn* (Case COMP/M.8124) Commission Decision C(2016) 8404 final (20 January 2017).

'large amounts of internet user data... [will] not [be] within Microsoft's exclusive control', and LinkedIn's database was not 'essential' to compete.³¹

The Commission's main concern was the potential foreclosure of the PSN market.³² It found that if Microsoft pre-installed LinkedIn on its Windows PC products and/or integrated LinkedIn into Microsoft Office, this would significantly enhance LinkedIn's visibility, raising barriers to market entry/expansion which, unlike in *Microsoft/Yahoo!*, were unlikely to be sufficiently mitigated by multi-homing or new market entrants as users tend to use apps readily available on their PC or software.³³ *Microsoft/LinkedIn* was, thereby, subjected to behavioural commitments.

Despite acknowledging data as a significant source of market power, this paper asserts that the Commission did not adequately consider the indirect network effects of data. For instance, it casually dismissed some of the PSN respondents' concerns regarding the competitive value of the *combined datasets*, namely that LinkedIn could leverage data to 'map a user's network and recommend with a high degree of precision new relevant LinkedIn connections, thereby increasing the size of LinkedIn's network and user activity'.³⁴

Ironically, however, the Commission noted that even where there is no intention or technical possibility to combine the datasets, 'pre-merger[,] the two companies were competing with each other *on the basis of the data they controlled* ... this competition would be *eliminated* by the merger'.³⁵ Whilst this is a welcomed change,³⁶ the Commission neither explained its somewhat uncharacteristic perspective nor did it define or 'refer to the underlying basis for its definition of a hypothetical market for data',³⁷ contributing to the nebulous understanding of data's significance in merger review.

Nevertheless, the Commission's inclination to integrate privacy considerations into its substantive assessment is positive progress. Regarding the PSN market, the Commission explicitly identified privacy as an important competition parameter.³⁸ Whilst it rightly did not indicate any preferential treatment towards privacy-friendly PSN competitors (preferential treatment is unwarranted as privacy is not the only competition parameter), the Commission could have elaborated on the competitive effects of privacy. In particular, what is the connection between LinkedIn's market power and the anti-competitive level of data collected, or privacy protection users received?

³¹ *ibid* para 276.

³² Chirita (n 27).

³³ *Microsoft/LinkedIn* (n 30) paras 340, 343–344, 347.

³⁴ *ibid* para 324.

³⁵ *ibid* para 179.

³⁶ Stuart (n 1).

³⁷ Moore and Tambini (n 8).

³⁸ *Microsoft/LinkedIn* (n 30) para 350.

Regarding the OAS market, the Commission dismissed all privacy-related concerns as the GDPR would ‘strengthen... existing rights and empower individuals with more control over their personal data’.³⁹ This, however, overlooks the fact that users rarely read privacy policies (see Section IV). Notably, the non-consideration of users’ privacy-related behaviour juxtaposes the Commission’s emphasis on users’ behavioural inertia towards pre-installed products on PCs/software. By adopting a cautionary, yet flexible approach, the Commission distanced itself from the polarised debate on regulating big data. Whilst this Section recognises the deficiency of empirical evidence vis-à-vis privacy in *Microsoft/LinkedIn* (hence, aggressive antitrust enforcement risked stifling *Microsoft/LinkedIn*’s pro-competitive efficiencies), the Commission’s lack of clarification contributed to the privacy-antitrust obscurity.

(iii) *Google/Fitbit: The Interconnected Digital Ecosystem*

The competitive significance of Google’s seemingly innocent acquisition of fitness tracker start-up Fitbit cannot be overlooked. Fitbit’s unique ability to collect a large range of highly-sensitive data—biometric data such as health, and even emotions—24 hours a day presented Google with a lucrative opportunity to leverage data to consolidate dominance and potentially expand into new markets. Given the wide variety of datasets involved, it is submitted that indirect network effects (alongside privacy) should have been the Commission’s focal point. Regrettably, such examinations were minimal.

This Section thus views *Google/Fitbit* as a missed golden opportunity for the Commission to apply the Cr mer Report’s recommendation to assess acquisitions by ‘gatekeeper platforms’ of start-ups active in complementary markets using an ‘ecosystem’ approach.⁴⁰ The Report recognised the need to ‘rethink’ traditional theories of harm where ‘the acquirer operates a multiproduct platform... that benefits from strong positive network effects’; that is, where the potential anti-competitive effects extend beyond foreclosure effects to the ‘strengthening... of the dominance of the ecosystem’.⁴¹ Indeed, with every device or user a big tech company acquires, its ‘vertically integrated [ecosystem]... can realise growth through network effects and obtain unprecedented access to user data’.⁴²

With the great number of markets involved in *Google/Fitbit*, the Commission, as per Cr mer’s recommendation, should have adopted broad market assessments to capture network effects. Instead, the Commission defined markets in

³⁹ *ibid* para 178.

⁴⁰ *Google/Fitbit* (Case COMP/M.9660) Commission Decision C(2020) 9105 final (17 December 2020); Jay Modrall, ‘*Google/Fitbit* – The EU Commission Misses a Step’ (*Kluwer Competition Law Blog*, 17 June 2021) <<http://competitionlawblog.kluwercompetitionlaw.com/2021/06/17/google-fitbit-the-eu-commission-miss-es-a-step/>> accessed 25 February 2022.

⁴¹ Jacques Cr mer, Yves-Alexandre de Montjoye, and Heike Schweitzer, *Competition Policy for the Digital Era* (European Commission 2019) 121.

⁴² European Commission, ‘Preliminary Report – Sector Inquiry into Consumer Internet of Things’ SWD (2021) 144 final, 7.

ways that minimised direct overlaps and applied its traditional, narrow, market-by-market assessment. Moreover, it accepted, in this author's opinion, sub-par behavioural remedies that were rejected by the Australian Competition & Consumer Commission ('ACCC') and criticised by the Competition and Markets Authority ('CMA') Chief Executive, Andrea Coscelli.⁴³

Whilst ten markets were identified, the Commission focused on three (classical) theories of harm. First, Google, being in control of Fitbit's web API, might restrict Fitbit's rivals to Fitbit user data, hindering the growth of the digital healthcare space.⁴⁴ Secondly, Google might degrade the interoperability of competing wrist-worn wearable devices with Android phones.⁴⁵ Thirdly, the combined datasets may significantly enhance Google's targeted advertising services, strengthening its dominance in the online advertising services market.⁴⁶ This may raise barriers to market entry/expansion and lead to market foreclosure.

It is, however, argued that the Commission's assessments are incomplete. Whilst it noted that the combined datasets might confer Google a unique/irreplacable competitive advantage in the online advertising services market, it neither explained nor quantified this advantage.⁴⁷ Moreover, dismissing data-related concerns in digital healthcare, the Commission merely highlighted the availability of other healthcare-related data sources without discussing their substitutability with the 91 metrics recorded by Fitbit.⁴⁸ Additionally, albeit recognising that Google Android might foreclose Fitbit's rivals, it did not discuss Google's data-driven incentives to foreclose. Crucially, the Commission seems to have disregarded the broader network effects. For example, it neither considered Google leveraging its 'very prominent' datasets to establish hegemony in the nascent digital healthcare sector,⁴⁹ nor whether, as the ACCC feared, *Google/Fitbit* might extend the current Google Android/Apple smartphone duopoly to the wrist-worn wearable space.⁵⁰

To a certain degree, Google's behavioural commitments alleviated some of these concerns. Google agreed that it would not: restrict web API users to Fitbit data,⁵¹ use Fitbit user data for Google Ads,⁵² and degrade Android's API's interoperability with Fitbit's competitors.⁵³ However, these remedies do not adequately address the data-related indirect network effects. They even permit Google to discriminate in favour of Fitbit, provided that Google discriminates equally against

⁴³ Andrea Coscelli, 'Ahead of the Curve' (Bannerman Competition Lecture, 9 February 2021) <www.gov.uk/government/speeches/andrea-coscelli-ahead-of-the-curve-bannerman-competition-lecture> accessed 25 February 2022.

⁴⁴ *Google/Fitbit* (n 40) chs 9.3.5, 9.4.2.

⁴⁵ *ibid* ch 9.4.3.

⁴⁶ *ibid* ch 9.3.

⁴⁷ Modrall (n 40).

⁴⁸ *ibid*.

⁴⁹ *ibid*.

⁵⁰ *ibid*.

⁵¹ *Google/Fitbit* (n 40) ch 10.4.2.2.

⁵² *ibid* ch 10.4.2.1.

⁵³ *ibid* ch 10.4.2.3.

all Android app developers (which includes Fitbit's competitors), becoming the first non-discrimination remedy that permits self-preferencing.⁵⁴

Finally, *Google/Fitbit's* indifference to privacy is alarming. The Commission reiterated: privacy concerns are 'not within the remit of merger control and there are regulatory tools better placed to address them'.⁵⁵ Contrastingly, the ACCC alleged that Google's 'assurances on data privacy are not believable'.⁵⁶ Some have attributed the Commission's lack of concern to the Digital Markets Act, which was introduced two days after clearing *Google/Fitbit*.⁵⁷ This paper, however, recognises that such proposition overlooks the fact that the Act cannot block anti-competitive mergers.

(iv) Google/DoubleClick: Dangers of the Indirect Network Effects of Data

The \$3.1bn acquisition of DoubleClick, a leading provider of 'ad serving' tools, transformed Google, an internet search engine and provider of online advertising space, into an advertising powerhouse. It is submitted that *Google/DoubleClick* is one of the earliest antitrust decisions that exemplifies the fallacy of applying the traditional market foreclosure test to assess the value of data.⁵⁸ In its Phase II investigation, the Commission considered whether the combination of Google's datasets on users' search behaviour and DoubleClick's datasets on users' web-browsing behaviour could confer Google a unique data advantage that would enable it to significantly improve its ad targeting services and raise the barriers to market entry/expansion.

Dismissing this issue without any real evaluation, the Commission noted that DoubleClick's data was 'relatively narrow in scope' and 'non-rivalrous' (DoubleClick's data was 'already available to a number of Google's competitors').⁵⁹ It is, however, submitted that this focus on substitutability and the traditional market foreclosure test overlooks the competitive strength of data. For instance, the analytics derived from DoubleClick's data 'can be seen to have facilitated Google Search's ability to give an "illegal advantage to its own comparison-shopping service"'.⁶⁰

This article also supports the former Federal Trade Commission ('FTC') Commissioner Harbour's dissent on *Google/DoubleClick*. She asserted that a more

⁵⁴ Modrall (n 40).

⁵⁵ European Commission, 'Mergers: Commission Clears Acquisition of Fitbit by Google, Subject to Conditions' (IP/20/2484, European Commission 17 December 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484> accessed 26 February 2022.

⁵⁶ Fergus Hunter, 'It is a stretch: ACCC's Sims Questions Google Assurances over Fitbit data' *The Sydney Morning Herald* (19 November 2019) <www.smh.com.au/politics/federal/it-is-a-stretch-accs-sims-questions-google-assurances-over-fitbit-data-20191119-p53by8.html> accessed 24 January 2022.

⁵⁷ Thibault Larger, 'EU Gives Google a Christmas Gift, Clears Fitbit Deal' (*Político*, 5 January 2021) <www.politico.eu/article/eu-gives-google-a-christmas-gift-clears-fitbit-deal/> accessed 26 February 2022.

⁵⁸ *Google/DoubleClick* (Case COMP/M.4731) Commission Decision C(2008) 927 final (11 March 2008).

⁵⁹ *ibid* para 26.

⁶⁰ Case T-612/17 *Google Search (Shopping)* EU:T:2021:763. See also Stuart (n 1).

thorough and forward-thinking analysis should have been conducted, especially vis-à-vis post-merger intentions and the effects of the combined datasets: ‘...the combination of Google and DoubleClick likely will affect the evolution of the entire online advertising market—especially in light of... network effects... The majority’s analysis skims too quickly over these points. Network effects deserve greater attention’.⁶¹

The Commission’s privacy-related response is unsatisfactory. Consistent with the FTC’s decision, the Commission reiterated the clear-cut separation between antitrust and data protection regulation.⁶² Whilst some have argued that data accrual has ‘undoubtedly increased social welfare’,⁶³ there is, nonetheless, the potential of such accrual to inflict consumer harm through enhanced tracking and targeted advertisements. As the European Consumers’ Association (‘BEUC’) warned the Commission: ‘A combined Google/DoubleClick will be a data collection colossus... Post-merger, Google will have the ability and incentive to engage in significantly more intrusive user tracking and profiling than exists today’.⁶⁴

Whilst *Google/DoubleClick* may have arisen ‘too early for data experts to be articulate about the monetisation of data’,⁶⁵ by attributing privacy concerns to data protection regulators, the Commission appears to have disclaimed responsibility (see Section IV).

(v) *Microsoft/Yahoo!: Search Business—Data: The Path to Innovation?*

The acquisition of Yahoo!’s internet search and search advertising businesses by Microsoft, owner of internet general search Bing and online advertising interface adCenter, was a unique opportunity for the Commission to evaluate a transaction involving a complex two-sided market.⁶⁶

In Europe, Google was dominant in the universal search market with 90–100% shares, followed by Microsoft (20–30%) and Yahoo! Search (10–20%).⁶⁷ Contrastingly, Yahoo!’s and Microsoft’s combined market shares in the search and search advertising markets were below 10%. The Commission, thus, had to balance between increasing the concentration from three to two players in the internet

⁶¹ *Google/DoubleClick* FTC File No 071-0170 (2007) Dissenting Statement of Commissioner Pamela Jones Harbour, 4 <www.ftc.gov/sites/default/files/documents/public_statements/statement-matter-google/doubleclick/071220harbour_0.pdf> accessed 24 January 2022.

⁶² *Google/DoubleClick* (n 58) para 368.

⁶³ Daniel L Rubinfeld and Michal S Gal, ‘Access Barriers to Big Data’ (2017) 59 *Arizona Law Review* 339, 381.

⁶⁴ Letter from the BEUC to the Commission (18 December 2007) <www.europarl.europa.eu/cms-data/183971/20080130ATT20137EN.pdf> accessed 24 January 2022.

⁶⁵ Chirita (n 27).

⁶⁶ *Microsoft/Yahoo! Search Business* (Case COMP/M.5727) Commission Decision C(2010) 1077 (18 February 2010).

⁶⁷ *ibid* para 103.

search market characterised by innovation and high barriers to entry, and increasing competition on Google.⁶⁸ Accepting Microsoft's argument that access to Yahoo!'s user search requests would improve the accuracy of its search engine's results, the Commission favoured the merger's pro-competitive effects, in that it would increase competition against Google, and unconditionally cleared the transaction. This decision highlights the importance of also considering pro-competitive effects of data combinations.⁶⁹ However, one could question whether Yahoo! Search provides better services than before; primarily, whether any significant innovation has taken place.⁷⁰ Hence, this article cautions against assuming that the merged entity will continue to invest in innovation post-transaction and emphasises the need for greater empirical evidence on data effects (see Section III).

Competition law strives to protect aggregate consumer welfare. However, the Commission has consistently dismissed the 'theoretical' post-merger possibility of targeted advertising (*Facebook/WhatsApp*) and degradation of product quality (*Microsoft/Yahoo!*) without evaluating the potential consumer harm. The most plausible explanation for this bifurcation is that resolving issues on product quality and targeted advertising 'is primarily the mission of consumer law'.⁷¹ I, however, contend that exclusive reliance on consumer protection law erroneously assumes that consumer law is equipped to deal with monopolistic power and mergers, and ignores the consumer-protection function inherent in competition law (see Section IV).

B. CONCLUSION

From merely acknowledging the potential anti-competitive effects of merged datasets in *Google/DoubleClick* (2008) to incorporating privacy into merger review in *Microsoft/LinkedIn* (2016) and engaging with the theories of harm arising from the indirect network effects of data in *Google/Fitbit* (2020), competition authorities are increasingly recognising the role of big data as a source of market power. However, as highlighted above, the Commission's approach may still be criticised on numerous fronts.

First, it is submitted that the Commission seems to lack a sense of urgency in addressing data-related theories of harm; it has often, somewhat naively, overlooked the competitive strength of big data. Ever since *Google/DoubleClick*, it became clear that the traditional market foreclosure test cannot adequately evince the competitive significance of data combinations as it is almost impossible for datasets to be 'unique' and 'essential'. Dismissing the potential data-related harm

⁶⁸ Teresa Vecchi, Jerome Vidal, and Viveca Fallenius, 'The Microsoft/Yahoo! Search Business case' (*Commission Competition Policy Newsletter*, 2010) <https://ec.europa.eu/competition/publications/cpn/2010_2_8.pdf> accessed 24 February 2022.

⁶⁹ Hanna Stakheyeva and Fevzi Toksoy, 'Merger Control in the Big Data World: to Be or Not to Be Revisited?' (2017) 38 *European Competition Law Review* 265.

⁷⁰ Chirita (n 27).

⁷¹ *ibid.*

based on the conventional exclusivity test, the Commission has repeatedly disregarded the network effects of data on the different sides of a multi-sided platform. For instance, in *Facebook/WhatsApp*, the Commission appears to have overlooked the spill-over effects between the online advertising services and consumer communications services markets. The lack of consideration (or non-consideration) of network effects also underlines the fallacy of adopting narrow, market-by-market assessments. Yet, it is observed that the Commission remains unwilling to develop in step with rapid market changes and, as evidenced by *Google/Fitbit*, continues to rely on these two conventional antitrust approaches—the traditional market foreclosure test and narrow market assessments.

The Commission's data assessments require refinement, especially to evaluate the indirect network effects of data. Continued reliance on the above-mentioned conventional concepts risks approving anti-competitive mergers. To remedy this, the Commission should define a separate market for data to *holistically* consider all sides of a multi-sided platform when assessing the potential anti-competitive and exploitive effects of combined datasets (see Section III).

As a final note, the Commission is well-positioned to address the privacy-related theories of harm. Unfortunately, it rarely chooses to do so, leaving the privacy aspects of data-driven mergers obscure. It is asserted that neither consumer nor data protection laws are equipped to deal with monopolistic power and mergers; thus, there is a need to develop clear privacy-antitrust frameworks (see Section IV).

III. NEED TO RE-ASSESS THE EUMR

A number of lessons can be drawn from Section II. When analysing data-driven mergers, the Commission has to tread cautiously between unnecessarily lowering the applicable legal standard and restricting commercial freedom. Section III recognises that the existing EUMR and merger control frameworks are sufficiently flexible to address the novel challenges arising from big data. As Schmidt notes, there is no self-contained digital sector 'with unique market characteristics that lends itself to specific regulation'.⁷²

Nonetheless, Section III argues that there is an urgent need for the Commission to modify the way it applies the EUMR to data-driven mergers. It is submitted that less emphasis should be placed on market definitions and financial thresholds, and more importance be attributed to data-related theories of harm. Given the dynamic nature of digital markets, forward-facing analyses should be adopted throughout the merger review; however, in the absence of empirical evidence, the Section cautions against assuming that entities will be incentivised to innovate post-merger. Finally, this Section evaluates the relationship between the

⁷² Hedvig Schmidt, 'Taming the Shrew: Is There a Need for a New Market Power Definition for the Digital Economy' in Björn Lundqvist and Michal Gal (eds), *Competition Law for the Digital Economy* (Edward Elgar Publishing 2019).

EUMR and the DMA, which entered into force in November 2022. The DMA should be commended as it facilitates the review of a greater number of digital acquisitions. However, as there are no clear and objective criteria for competition authorities to identify problematic data-driven mergers, my submission remains that the Commission should not overlook the significance of data and should include data-related theories of harm in its reviews. Data privacy and protection concerns are evaluated independently in Section IV.

A. MARKET DEFINITIONS: A STEP TOWARDS HOLISTIC MERGER ASSESSMENTS

Defining the relevant markets is the essential first step for antitrust enforcement in many jurisdictions, including the EU and the US. It aims to identify the competitive constraints on an entity's behaviour to increase prices or reduce output or quality, and requires the determination of both the relevant geographical and product markets.⁷³

(i) *Geographical Market*

The Commission often adopts a conservative approach here. Whilst admitting that the scope of data-driven markets could be global, it often defines it as EEA-wide or national instead.⁷⁴ Section III recognises that this approach is logical for most digital markets. For instance, given language barriers, cultural differences and national preferences, the boundary for the online search advertising market is (rightly) national in scope.⁷⁵ However, in digital markets where 'yesterday is already history',⁷⁶ a forward-facing approach should also be considered. As the expansion of a business in the digital economy is often driven by dynamic innovation and facilitated by the non-necessity of physical infrastructure, there are virtually no geographical boundaries for doing business.⁷⁷ Hence, it is submitted that the Commission should also embrace an industry-broad view by considering other geographical markets, including the potential expansion locations post-transaction.⁷⁸

⁷³ Richard Whish and David Bailey, *Competition Law* (10th edn, Oxford University Press 2021).

⁷⁴ Stakheyev and Toksoy (n 69).

⁷⁵ eg *Microsoft/Yahoo!* (n 66); *Google/DoubleClick* (n 58).

⁷⁶ Stakheyev and Toksoy (n 69).

⁷⁷ Adelaida Afilipoaic, Karen Donders, and Pieter Ballon, 'The European Commission's Approach to Mergers Involving Software-Based Platforms: Towards a Better Understanding of Platform Power' (2022) 46(5) *Telecommunications Policy* 102288 <www.sciencedirect.com/science/article/pii/S0308596121001920> accessed 25 January 2023.

⁷⁸ Stakheyev and Toksoy (n 69).

(ii) Product Market

Defining digital product markets is not straightforward and, again, markets beyond the parties' pre-merger activities should be considered.⁷⁹ The Commission has spent considerable effort examining each potentially narrower relevant market, but has consistently left the 'exact market definition... open,'⁸⁰ contributing to the nebulous understanding of digital platforms.⁸¹ It is argued that identifying the potential data-related effects requires assessing mergers holistically; this section aims to advance a framework to achieve this.

(iii) All Sides of the Platform Must be Considered

Entities with multi-sided platforms often degrade the quality of their 'zero-priced' products/services to maximise revenues on another market, for instance, Facebook reducing WhatsApp's privacy to invest in advertising. Given market interdependencies, should a market definition encapsulate all products/services a multi-sided platform offers?

The Commission often defines markets narrowly, minimising direct overlaps between sub-markets (for instance, defining an e-book retail market instead of an online retail market).⁸² Identifying sub-markets should be the starting point. As various substitutes exist for different user groups on an overarching platform, defining a single market is neither a systematic nor accurate way of identifying competitive constraints. However, to account for indirect network effects, it is reiterated that all sides of the multi-sided platform(s) must be considered.

(iv) Substitutability Test For 'Free' Products or Services

Digital products/services are often 'free'. Hence, the conventional price-centric means of defining markets, such as the SSNIP (Small but Significant Non-transitory Increase in Price) test, cannot be properly applied. This subsection stresses that absent monetary price, the lack of comparable criterion may lead to an overly broad/narrow market.

For example, in *Facebook/WhatsApp*, the Commission assumed that WhatsApp would not degrade privacy for fear of users switching to alternative privacy-friendly platforms (Threema and Telegram).⁸³ Contrastingly, WhatsApp deteriorated its privacy policy to share user data with Facebook and remained a market leader (WhatsApp had 1.2bn active users/month (2017), up from 600m

⁷⁹ *ibid.*

⁸⁰ See eg *Facebook/WhatsApp* (M.7217) (n 5) para 33; *Microsoft/Yahoo!* (n 66) para 81; *Microsoft/LinkedIn* (n 30), para 87.

⁸¹ Chirita (n 27).

⁸² *E-Book MFNs and Related Matters (Amazon)* (Case AT.40153) Commission Decision 2017/C 264/06 [2017] OJ C264/7.

⁸³ *Facebook/WhatsApp* (M.7217) (n 5).

users during the merger). How? It is submitted that by assessing the privacy-quality parameter independently, the Commission had failed to adequately consider other non-price parameters—namely, network sizes—when deciding whether users actually consider Threema and Telegram substitutes to WhatsApp. As Esayas notes, when selecting messaging apps, the primary criteria for users is whether they can reach others.⁸⁴ Indeed, ‘the size of user base... is of... critical value to customers.’⁸⁵ Thus, that Threema (approximately 400,000 active users) and Telegram (approximately 50 million active users) offered similar privacy policies as pre-merger WhatsApp does not necessarily suggest that they can constrain WhatsApp’s post-merger privacy behaviour.⁸⁶

It is argued that China’s Supreme Court’s decision in *Qihoo v Tencent* provides helpful guidance on assessing the demand-side substitutability of ‘free’ products/services.⁸⁷ In *Qihoo*, to determine whether non-integrated instant messaging services and integrated instant messaging services were substitutes, the Court applied the ‘Small but Significant Non-transitory Decrease in Quality’ (‘SSNDQ’) test and established the ‘majority and important rule’.⁸⁸ The rule provides that when identifying substitutes, authorities must determine whether there are ‘adequate users who would regard a specific good as an alternative... based on the core demand of majority users and from the perspective of the key attributes of goods’.⁸⁹ Hence, the Commission in *Facebook/Whatsapp* should have asked whether, given both the network sizes and privacy policies, an adequate number of users would consider Telegram and Threema as close substitutes of WhatsApp.⁹⁰

(v) *Market for Data*

There is a debate, particularly following *Facebook/WhatsApp*, on whether to define a separate product market for data or data analytics.⁹¹ The Commission often underestimates the role of data as a key merger driver, resulting in a skewed assessment of the merger’s overall impact. Whilst the SSNDQ test may help gauge the substitutability of ‘free’ products/services at a surface level, it does not adequately assess the value and impact of data combinations. As the Cr mer report

⁸⁴ Samson Esayas, ‘Data Privacy in European Merger Control: Critical Analysis of Commission Decisions Regarding Privacy as a Non-Price Competition’ (2019) 40 *European Competition Law Review* 166 .

⁸⁵ *Facebook/WhatsApp* (M.7217) (n 5) para 129.

⁸⁶ Mike Butcher, ‘Telegram Claims 50M Monthly Active Users, Seems to Be Attracting Teams’ (*TechCrunch*, 8 December 2014) <<https://techcrunch.com/2014/12/08/telegram-claims-50m-monthly-active-users-seems-to-be-attracting-teams/#:~:text=Telegram%20Claims%2050M%20Monthly%20Active%20Users%2C%20Seems%20To%20Be%20Attracting%20Teams,-Mike%20Butcher%40mikebutcher&text=Telegram%2C%20the%20messaging%20app%20startup.post%20by%20the%20company%20today>> accessed 1 February 2022.

⁸⁷ *Qihoo 360 v Tencent QQ* (Supreme People’s Court of China, unreported decision, 16 October 2014).

⁸⁸ Huang Wei, ‘Relevant Market Definition and Market Dominance Identification in 3Q War’ (2015) 11 *Competition Policy International* 66.

⁸⁹ *ibid.*

⁹⁰ Esayas (n 84).

⁹¹ Davilla (n 2).

highlights, it is unclear how the SSNDQ test could be applied in practice.⁹² For instance, as the report questions, what level of quality degradation would amount to a 5-10% price increase for authorities to assess if the hypothetical monopolist would remain profitable?⁹³ It is, thus, submitted that the SSNDQ test is more of a conceptual guide than an objective criterion that could be applied by competition authorities.⁹⁴ To shift the focus to the theories of harm, this subsection argues that the Commission should define a market for data to investigate how the acquired datasets might be commercialised, and the potential effects of such commercialisation.⁹⁵ This would help competition authorities capture the extensive network effects and ‘intangible, non-economic injuries’ that may emanate from data monopolisation.⁹⁶

Google’s acquisition of Nest Labs (Google’s second-largest acquisition, unconditionally cleared by the FTC) supports this proposition. *Google/Nest Labs* illustrates how the existing key antitrust concepts, namely price-centric analysis and narrow market-by-market assessments, cannot adequately capture the cross-side network effects of data. Here, simply acquiring the same types of data Google already possessed, or was capable of extracting, was not the issue. Instead, the value was in acquiring data that Google did not have the reach to capture—consumers’ ‘offline behaviour’ in their homes—to strengthen Google’s position in the online search advertising market.⁹⁷ From a price-centric analysis, *Google/Nest* is ‘pro-competitive’ as it reduces the prices of thermostats. This, however, disregards the strategic merger driver: ‘the competitive significance of Google acquiring this data from many consumers’ homes to their already large dataset’.⁹⁸ Absent a market for data, the cross-side effects of data are often left unscrutinised, creating a legal gap. Crucially, it is submitted that the Commission’s non-assessment of *Google/Nest* (which, arguably, involves a wider variety of datasets than *Google/Fitbit*; hence, may pose greater anti-competitive effects than *Google/Fitbit*) evinces the Commission’s current sentiment of pushing data to the backseat and overlooking data’s competitive strength. Beyond facilitating the economic assessments of data, recognising a data market would also enable competition authorities to capture and analyse a merger’s potential to exploit consumers’ data, for example, through privacy degradation and online price discrimination (see Section IV below).

The Commission has, nevertheless, distinguished between data as an input product and data that is traded as a separate product. *Telefonica/Vodafone/EE/JV*

⁹² Crémer (n 41).

⁹³ *ibid.*

⁹⁴ OECD, ‘The Role and Measurement of Quality in Competition Analysis’ (Policy Roundtables DAF/COMP(2013)17, OECD June 2013) <www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf> accessed 25 January 2023.

⁹⁵ Jan Kupčík and Stanislav Mikeš, ‘Discussion on Big Data, Online Advertising and Competition Policy’ (2018) 39 European Competition Law Review 393.

⁹⁶ Stuart (n 1).

⁹⁷ *ibid.*

⁹⁸ Maurice Stucke and Allen Grunes, *Big Data & Competition Policy* (Oxford University Press 2016), 125.

concerned the JV's potential to create a unique and essential database for mobile advertising service providers, and foreclose the data analytics services market.⁹⁹ Unfortunately, the Commission dismissed this matter, concluding that there were other 'strong' market players that traded datasets.¹⁰⁰

It is argued that a separate market for data should be defined where the merger involves large quantities of data and/or it is clear that the merger's underlying motive is the potential/actual acquisition of significant datasets. Close coordination between competition authorities, data protection regulators and data experts would assist in capturing such mergers. The publication of guidelines vis-à-vis when a merger involving big data should be notified would also be ideal.

Alternatively, some have stressed that data is an 'essential facility'; thus, competition authorities should apply data access remedies to *both* horizontal and non-horizontal data-driven mergers. Whilst these remedies would facilitate the entry and expansion of digital markets, such mergers are problematic from a privacy policy perspective as they involve sharing user data with third parties.¹⁰¹ Thus, instead of obligating entities to share user data with competitors, this article favours blocking such mergers or applying alternative behavioural remedies (see Section III.D below).

Overall, recognising a market for data would empower a more thorough analysis of data concentrations, and 'better reflect reality',¹⁰² as digital companies often 'derive value from data far beyond the initial purposes for which the data had been collected',¹⁰³ and mergers are 'increasingly motivated by underlying datasets'.¹⁰⁴ This subsection attributed the Commission's lack of forward-facing assessments, such as in *Facebook/WhatsApp* and *Google/DoubleClick*, to its static approach to market definitions;¹⁰⁵ this must be changed and defining a market for data presents a way to implement this change.

⁹⁹ *Telefonica/Vodafone/Everything Everywhere/JV* (Case COMP/M.6314) Commission Decision 2013/C 66/04 [2012] OJ C66/5, para 549.

¹⁰⁰ *ibid* para 558.

¹⁰¹ Kupčik and Mikeš (n 95).

¹⁰² Pamela Jones Harbour and Tara Koslov, 'Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets' (2010) 76 *Antitrust Law Journal* 773.

¹⁰³ *ibid*.

¹⁰⁴ Stuart (n 1). Indeed, the OECD reported that the number of data-driven mergers more than doubled between 2008–2012 (European Data Protection Supervisor (EDPS), *Report of Workshop on Privacy, Consumers, Competition and Big Data 2 June* (11 July 2014) <https://edps.europa.eu/sites/default/files/pub-lication/14-07-11_edps_report_workshop_big_data_en.pdf> accessed 24 March 2023).

¹⁰⁵ *ibid*.

B. MARKET POWER: IS A VALUE-OF-TRANSACTION TEST NEEDED?

Often driven by short innovation cycles, the Commission has consistently recognised that ‘high market shares [in digital markets] are not particularly indicative of competitive strength’.¹⁰⁶ It is not always the turnover, but the datasets and other resources, such as, technology to mine data, that determine a company’s value (this partially explains the rise of ‘killer acquisitions’). Recognising that purely turnover-based jurisdictional thresholds may create a ‘legal gap’, the Commission considered introducing a ‘value-of-transaction test’.¹⁰⁷ It is submitted that value-of-transaction thresholds should not be implemented. Rather, when determining an entity’s market power, the Commission should shift its focus to the theories of harm instead.

Undoubtedly, a transaction’s value may stipulate the merger’s importance, whereby a higher transaction price may suggest higher market potential. As nascent undertakings are unlikely to be revenue-generating, the Commission may, under the existing EUMR regime, be excluded from reviewing certain anti-competitive mergers, including mergers involving start-ups with great potential to develop innovative ways to harvest big data. Thus, value-of-transaction thresholds may enable the Commission to capture ‘killer acquisitions’.

However, as merging parties themselves fix the transaction price, they may manipulate payment structures to lower the target’s valuation.¹⁰⁸ Furthermore, value-of-transaction thresholds may be broadly defined, creating uncertainties and delays in the notification process. The need for value-of-transaction thresholds should also be considered alongside the EUMR’s existing case referral system under articles 4(5) and 22 EUMR.¹⁰⁹ These articles provide that concentrations without a Union dimension (i.e., the proposed merger does not meet the turnover thresholds under article 1 EUMR) can be investigated by the Commission upon request by the Member State(s) or undertakings concerned. Indeed, *Facebook/WhatsApp* and *Apple/Shazam* were referred to the Commission under articles 4(5) and 22 EUMR respectively. Hence, on balance, there is no need for a value-of-transaction test.

¹⁰⁶ See eg *Apple/Shazam* (Case COMP/M.8788) Commission Decision C(2018) 5748 final (6 September 2018).

¹⁰⁷ ‘Consultation on Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control’ (*European Commission*, 2016), <https://competition-policy.ec.europa.eu/public-consultations/2016-merger-control_en> accessed 21 April 2022.

¹⁰⁸ Stakheyeva and Toksoy (n 69).

¹⁰⁹ *ibid.*

C. DATA DRIVEN MARKETS: A PRO-COMPETITIVE OR ANTI-COMPETITIVE REGIME?

The Commission's theory of harm assessments demonstrate a significant degree of consistency with its substantive guidelines and between different cases. The Commission is primarily concerned with horizontal overlaps (i.e., effects of the combined datasets) and vertical foreclosure theories (i.e., whether the merged entity would restrict competitors' access to datasets and whether such restriction would result in a significant impediment to effective competition).

Certainly, applying clear, uniform and predictable standards when assessing data-related theories of harm is valuable from a policy perspective.¹¹⁰ However, as stressed in Section II, the Commission should refrain from relying on conventional antitrust concepts. For example, by applying the traditional market foreclosure test, data-related issues were often dismissed not because there was no potential for concern, but rather, the data was either not 'unique' or 'inessential' to compete.¹¹¹ Instead, given the unique, multi-sided nature of each digital platform, the competitive effects of merged datasets should be evaluated on a fact-specific basis and extreme caution must be exercised before relying on legal precedents.

On the other hand, it is acknowledged that, rather than posing a problem, data might be construed as a potential justification for data-driven mergers. However, the use of data-based efficiency defences remains limited under EU law.¹¹² The only case was *TomTom/TeleAtlas*, where the parties argued that customer feedback data would enhance the quality of maps post-transaction.¹¹³ The Commission, unfortunately, did not opine on this argument; it declared the merger not anti-competitive, regardless of the supposed efficiencies.

Nonetheless, innovation-based justifications have been considered. Whilst there 'is scope for a wide range of benefits for both firms and consumers from the use of data',¹¹⁴ it is submitted that the 'innovation offence' must be scrutinised.¹¹⁵ Indeed, in *Microsoft/Yahoo!*, the Commission assumed that Microsoft could and would leverage the merged datasets to foster greater competition against Google, stimulating innovation in the search engine market. However, from a consumer's perspective, it is doubtful whether any significant innovation-based achievements

¹¹⁰ Ben Holles de Peyer, 'EU Merger Control and Big Data' [2018] 13 *Journal of Competition Law and Economics* 787.

¹¹¹ See eg *Microsoft/LinkedIn* (n 30); *Apple/Shazam* (n 108); *Google/DoubleClick* (n 58).

¹¹² of the US.

¹¹³ *TomTom/TeleAtlas* (Case COMP/M.4854) Commission Decision C(2008) 1859 (14 May 2008) paras 245–250.

¹¹⁴ CMA, 'CMA Publishes Findings on the Commercial Use of Consumer Data' (*Gov.uk*, 17 June 2015) <www.gov.uk/government/news/cma-publishes-findings-on-the-commercial-use-of-consumer-data> accessed 31 January 2022.

¹¹⁵ Stephen Kinsella, 'The Innovation Offence' (*Chillin'Competition*, November 2016) <<https://chillingcompetition.com/2016/11/14/the-innovation-offence-by-stephen-kinsella/>> accessed 31 January 2022.

can be noted.¹¹⁶ Additionally, raising ‘innovation justification(s)’ risks the Commission accepting obscure and/or speculative data-related theories of harm (for example, the combined datasets may enable the merged entity to create a new, competitive product, foreclosing rivals).¹¹⁷ This article therefore emphasises the need for greater empirical evidence on the competitive effects of data for the Commission make informed decisions.

This article also cautions against relying exclusively on the general defining characteristics of digital markets, namely, dynamic competition and rapid innovation,¹¹⁸ to assume that the merged entity would be incentivised to innovate post-transaction. Instead, there should be greater reliance on empirical analysis. For example, the unusually stable, oligopolistic online advertising market, dominated by Google and Facebook, seems to contradict the typical assumption that digital markets are driven by short innovation cycles.¹¹⁹

Empirical evidence on the competitive effects of data remains scarce. However, the controversies regarding the Commission’s merger decisions, and consumers’ dissatisfaction with certain post-merger effects, stress the need for empirical evidence when identifying counterfactual scenarios and assessing potential anti-competitive effects.¹²⁰

D. REMEDIES

There should be a gradual shift towards behavioural remedies, as increasingly applied in data-driven mergers, including *Google/Fitbit* and *Microsoft/LinkedIn*. Traditionally, purely behavioural remedies were viewed as complex, expensive and relatively ineffective as they require ongoing monitoring. Nonetheless, they seem warranted in digital mergers where access to platforms, intellectual property rights and data are likely more important to preserve competition than the transfer of physical assets.¹²¹ This view is echoed by European Commissioner Margrethe Vestager, who notes that the issue in digital mergers may not be platform sizes, but access to important input services, such as key technology.¹²² Rather than breaking up incumbents, competition authorities should attach greater consideration to remedies that ensure interconnection and interoperability between competing firms to encourage innovation. For example, the Commission could allow

¹¹⁶ Chirita (n 27).

¹¹⁷ Davilla (n 2).

¹¹⁸ Kupčik and Mikeš (n 95).

¹¹⁹ Thomas Hoppner, ‘Defining Markets for Multi-Sided Platforms: The Case of Search Engines’ (2015) 38 *World Competition* 349.

¹²⁰ Pauline Affeldt and Reinhold Kesler, ‘Big Tech Acquisitions — Towards Empirical Evidence’ (2021) 12 *Journal of European Competition Law & Practice* 471.

¹²¹ Thomas Wilson, ‘Merger Remedies – Is It Time to Go More Behavioural?’ (*Kluwer Competition Law Blog*, 21 February 2020) <<http://competitionlawblog.kluwercompetitionlaw.com/2020/02/21/merger-remedies-is-it-time-to-go-more-behavioural/>> accessed 4 February 2022.

¹²² Afilipoaic, Karen Donders, and Pieter Ballon (n 77).

a rival social network to interoperate with Facebook and, perhaps, offer a non-advertising-financed social network to Facebook users, without the latter losing their ability freely use Facebook.¹²³ Thus, although the Commission has already been applying behavioural remedies, it is submitted that the Commission should consider applying bolder strategies, subject to consumer and data protection regulations, to foster innovation whilst preserving competition.

As the European Data Protection Supervisor ('EDPS') opines,¹²⁴ antitrust enforcement should adopt a holistic approach when consumer welfare and data protection issues are involved. However, on the grounds of privacy, data access remedies should only be used if strictly necessary. Whilst data may facilitate the entry and expansion of digital markets, data access remedies may duplicate the function of data protection regulation (see Section IV.A.(iii) below) and raise additional privacy-related problems, such as data portability.¹²⁵ Hence, this article favours remedies aimed at access to platforms, patents and technology.

E. THE DIGITAL MARKETS ACT

(i) *The Digital Markets Act is here*

The EU's Digital Markets Act (DMA) is landmark law that aims to increase market contestability and fairness in the digital economy.¹²⁶ It imposes a list of *ex-ante* obligations and prohibitions on large online platforms—'gatekeepers'—that provide at least one of the ten types of digital services (such as digital advertising, search engines and social media), known as 'core platform services'.¹²⁷ Despite being hailed 'revolutionary' by some academics and practitioners, the implications of the DMA might not be as major as one might be led to believe.¹²⁸ This subsection specifically addresses the relationship between the EUMR and DMA. It is submitted that whilst the DMA complements the EUMR, the DMA, like the latter, does

¹²³ Pierre Larouche and Alexandra de Stree, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021) 12 *Journal of European Competition Law & Practice* 554.

¹²⁴ EDPS, *Preliminary Opinion on Privacy and Competitiveness in the Age of Big Data: The Interplay Between Data Protection, Competition Law and Consumer Protection in the Digital Economy* (March 2014) para 32 <https://edps.europa.eu/sites/edp/files/publication/14-03-26_competition_law_big_data_en.pdf> accessed 24 March 2023.

¹²⁵ de Peyer (n 110).

¹²⁶ Christophe Carugati, 'Which Mergers Should the European Commission Review Under the Digital Markets Act?' (*Bruegel*, 9 December 2022) <www.bruegel.org/policy-brief/which-mergers-should-european-commission-review-under-digital-markets-act#_ftnref5> accessed 30 January 2023; Larouche and de Stree (n 123) 542.

¹²⁷ Regulation (EU) 2022/1925 (n 7).

¹²⁸ Larouche and de Stree (n 123). See also: Björn Lundqvist 'The Proposed Digital Markets Act and Access to Data: A Revolution, or Not?' (2021) 52 *International Review of Intellectual Property and Competition Law* 239.

not rely on clear and objective criteria to identify problematic data-driven mergers.¹²⁹ Hence, the Commission should not overlook the significance of data and should integrate forward-facing theories of harm in its reviews.

(ii) *The Relationship Between the EUMR and the DMA*

As a starting point, it is worth highlighting that the DMA does not define gatekeepers based on their alleged monopolistic power. This allows lawmakers to foster greater antitrust enforcement in digital markets by bypassing the slow and complex process of defining markets based on the gatekeeper's alleged monopolistic power.¹³⁰ Moreover, as the obligations imposed on gatekeepers by the DMA are also present in the merger assessments' remedies, having the obligations codified would make the merger review process more efficient.¹³¹ As Monti comments, the DMA overcomes 'the slowness by which antitrust cases proceed...'.¹³² It is hoped that with the newly adopted DMA, there would be an increase in the number of merger reviews in the digital sector.¹³³

However, the DMA does not provide an objective framework for competition authorities to identify the anti-competitive strategies pursued by incumbents. Such strategies include acquiring potentially threatening firms to throttle any disruption.¹³⁴ It is argued that the DMA's response to strategic acquisitions, that is, obligating gatekeepers to inform the Commission of all their intended acquisitions,¹³⁵ is a relatively weak provision.

Whilst the absence of a fixed criteria allows the Commission to review any merger involving a gatekeeper, it also creates risks of over-enforcement of unproblematic mergers, inefficient allocation of resources for both competition authorities and gatekeepers, and legal uncertainty.¹³⁶ Even with guidance from the DMA, proving the actual reasoning behind a merger and assessing its potential effects is

¹²⁹ Carugati (n 126).

¹³⁰ *ibid.*

¹³¹ *ibid.*

¹³² Giorgio Monti, 'The Digital Markets Act – Institutional Design and Suggestions for Improvement' (2021) TILEC Discussion Paper 2021-04, 1 <<https://dx.doi.org/10.2139/ssrn.3797730>> accessed 30 January 2023.

¹³³ Of the 1,149 mergers involving potential DMA gatekeepers from 1987 to July 2022, the Commission reviewed only 21. Most mergers fell below EU and national merger control thresholds because of the low or non-existent turnover of the merger target. Carugati (n 126).

¹³⁴ By now it has become clear that Facebook's acquisitions of WhatsApp and Instagram are cases of this strategy, as the recent US States and FTC antitrust cases against Facebook demonstrates (*FTC v Facebook Civil Action 20–3590* (DC Dist Ct); *New York v Facebook Civil Action 20–3589* (DC Dist Ct)). As the DMA Impact Assessment notes, killer acquisitions would disrupt innovation. It specifically mentions that gatekeepers divert their resources away from research and development and towards mergers, to compete 'for the market'. At the same time, it is known that as 'a significant amount of innovation is driven by disruptive firms,' the law 'seeks to protect the competitive process by which disruptive firms challenge the status quo.' See European Commission, 'Impact Assessment Report' SWD(2020) 363 final, pt 1–2, paras 279, 280, 282–3, 322.

¹³⁵ DMA, art 14.

¹³⁶ Carugati (n 126).

difficult.¹³⁷ These two factors are particularly pertinent in where the data held by the target company lacks substitutability as such merger would either aim to improve the acquired target or pre-empt rivals from obtaining the data.¹³⁸ Thus, to identify the potential anti-competitive effects of a merger, competition authorities would still need to analyse each referred merger on a case-by-case basis and adopt forward-facing analyses throughout the review.

Arguably, by working in tandem with article 22 EUMR,¹³⁹ the DMA could become a workaround to the notification thresholds. However, even with the Commission's authority review to strategic acquisitions, a lacuna remains in the current merger control regime.¹⁴⁰ As Louche contends, many questions remain unaddressed, such as which theory of harm would justify blocking digital acquisitions, and which standard of proof should apply (balance of probabilities or balance of harms).¹⁴¹

On balance, the Commission's ability and incentive to review a greater number of digital acquisitions, via the DMA, to avoid under-enforcement is commendable. The DMA, in combination with article 22 EUMR, is a helpful tool that allows competition authorities to 'capture' and review a greater number of data-driven mergers. However, given the complexities and dynamics of digital markets, there is still yet to be a clear framework for competition authorities to identify problematic mergers.¹⁴² Therefore, it remains that the Commission should not overlook the significance of data and should include forward-facing data-related theories of harm in its merger reviews.

F. CONCLUSION

Section III sought to fill the gaps that were unaddressed by the Commission in its merger decisions. Derived from the existing EU merger control regulation and guidelines, Section III advanced numerous frameworks and adaptations aimed at facilitating a more comprehensive and refined analysis of the potential anti-competitive effects of big data. It first stressed the need to consider a market for data to capture the theories of harm stemming from the indirect network effects. It then highlighted the secondary role market shares and other financial thresholds should play when assessing digital markets; the primary focus should be the data-related theories of harm instead. Finally, the Section considered the impact of the DMA on EU merger control and argued that the Commission should

¹³⁷ Afilipoaic, Karen Donders, and Pieter Ballon (n 77).

¹³⁸ Michael L Katz, 'Multisided Platforms, Big Data, and a Little Antitrust Policy' (2019) 54 *Review of Industrial Organization* 695.

¹³⁹ Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases [2021] OJ C113/1. Under art 22 of the EUMR, a Member State may request the Commission to review a transaction that affects trade between Member States, and threatens to significantly affect competition (established on a prima facie basis).

¹⁴⁰ Larouche and de Streel (n 123).

¹⁴¹ *ibid.*

¹⁴² Carugati (n 126).

not overlook the significance of data and should integrate data-related theories of harm into its reviews. Overall (and perhaps, most crucially), Section III reiterated the need for the Commission to adopt a flexible, thorough and forward-facing approach, encompassing all sides of the platform, when assessing the potential effects of data concentrations.

IV. PRIVACY AND DATA PROTECTION

It is clear that the Commission has spent considerable effort evaluating the intricacies of data analytics and theories of harm through the lenses of the traditional economic analyses of horizontal and vertical (input) foreclosure effects. Whilst data is increasingly recognised as a source of market power, privacy-related consumer harm remains a blind spot in merger assessments.¹⁴³ Nonetheless, as privacy is often the price paid for a product/service today, it is attracting significant attention from competition authorities.

There are at least two emerging approaches for incorporating data privacy and protection concerns into antitrust assessments. The first, shared by both the European Commission and US FTC, argues that privacy can be a non-price competition parameter that may harm consumer welfare.¹⁴⁴ The second argues that data privacy is a fundamental right and competition authorities are responsible for assessing how a merger might directly affect this right.¹⁴⁵ It is submitted that both approaches are viable and useful for assessing data-driven mergers.

A. PRIVACY AS A NON-PRICE COMPETITION PARAMETER

Despite the emerging consensus of the need to consider privacy in merger review, questions remain as to how competition in privacy manifests. This Section attempts to address these questions. Section IV.A.(i) maps out the privacy-related theories of harm. Section IV.A.(ii) confronts the difficulties of defining the relevant markets. Whilst it is not necessary to quantify privacy degradation to incorporate it into merger assessments (*Microsoft/LinkedIn*), Section IV.A.(iii) evaluates how conjoint analysis may assist in measuring such harm. Finally, Section IV.A.(iv) highlights the fallacies of relying exclusively on data protection regulations to resolve the potential privacy-related anti-competitive effects of data concentrations. It is argued that the economic and non-economic implications of privacy must be considered in all mergers involving big data.

¹⁴³ Esayas (n 84).

¹⁴⁴ *ibid.* See also Dissenting Statement of Commissioner Pamela Jones Harbour (n 61).

¹⁴⁵ Chirita (n 27).

(i) Theories of Harm

At its core, competition policy is concerned with market power that may harm consumer welfare.¹⁴⁶ Ironically, the Commission's current approach largely disregards the potential detrimental data-related effects on consumers.¹⁴⁷ A key reason for this is the lack of clear and workable privacy-related theories of harm and seeks to remedy this.

In competition law, consumer welfare is determined by price, quantity and factors such as product quality, choice and innovation.¹⁴⁸ Where goods/services are 'free', the conventional reliance on price as the chief competition parameter deteriorates, and quality becomes the essential and significant measure of competition (*Microsoft/Yahoo!*)¹⁴⁹. Thus, underlying the recognition of privacy as a competition parameter is that privacy can be an element of product quality, consumer choice or innovation, and a merger could reduce the incentives to compete on these parameters.¹⁵⁰

Facebook/WhatsApp highlights some lessons on the privacy-as-a-quality parameter. First, despite noting that privacy is 'becoming increasingly valued' by consumers,¹⁵¹ the Commission refrained from properly examining whether the merger would reduce privacy. This reluctance might be attributed to the subjectivity of product quality. Quality is difficult to measure and may raise 'imprecise and complex comparisons'.¹⁵² Moreover, assessing the ultimate impact of privacy degradation is complex as increased data access may enable the online platform to enhance other functionalities, improving its overall product quality.¹⁵³

Secondly, when acknowledging the potential introduction of targeted advertisements on WhatsApp, the Commission did recognise, albeit implicitly, that increased data collection and/or the abandonment of WhatsApp's end-to-end encryption might reduce privacy.¹⁵⁴ Dismissing these matters on the assumption that privacy degradation would induce users to leave WhatsApp, the Commission seems to have overlooked the spill-over effects between the online advertising services and consumer communication services markets. Therefore, whilst it is not strictly the Commission's responsibility to cross-examine the business rationale for a merger, Section IV posits that a retrospective analysis of *Facebook/WhatsApp*

¹⁴⁶ Esayas (n 84).

¹⁴⁷ Elias Deutscher, 'How to Measure Privacy-related Consumer Harm in Merger Analysis? A critical reassessment of the EU Commission's merger control in data-driven markets' (2018) EUI Working Paper LAW 2018/13, <https://cadmus.eui.eu/bitstream/handle/1814/58064/WP_2018_13.pdf?sequence=1> accessed 7 January 2022.

¹⁴⁸ Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C45/7, para 19.

¹⁴⁹ *Microsoft/Yahoo!* (n 66) para 101.

¹⁵⁰ Esayas (n 84).

¹⁵¹ *Facebook/WhatsApp* (M.7217) (n 5) para 87.

¹⁵² Deutscher (n 147).

¹⁵³ *ibid.*

¹⁵⁴ *Facebook/WhatsApp* (M.7217) (n 5) para 184, para 174.

stresses the need for competition authorities to consider both the transacting parties' incentives to maintain their privacy standards post-merger and the actual revenues that could be gained from degrading privacy to invest in other markets.

Recognising privacy as an important competition parameter, *Microsoft/LinkedIn* endorsed the approach of framing privacy as a significant element of consumer choice. The Commission held that the potential foreclosure effects (see Section II) might marginalise existing professional social network competitors (for example, XING) that offer better privacy protection than LinkedIn, restricting consumer choice vis-à-vis privacy.¹⁵⁵ Based on the Commission's comparisons of XING's and LinkedIn's privacy policies, this paper highlights two observations.

First, the privacy-quality theory of harm is not limited to volume, quality and variety of data collected; it includes users' ability to control their data and make informed decisions.¹⁵⁶ Users are offered increased privacy (suggesting better quality products/services) where privacy policies are more 'unambiguous' and consent can be 'freely given' (XING).¹⁵⁷ Companies can compete on consent by, for example, requesting users to accept the company's privacy policies by ticking a box (XING), instead of assuming users' acceptance when they click the 'join now' button (LinkedIn).¹⁵⁸ Secondly, it is not always necessary to quantify privacy degradation to incorporate it into merger review.¹⁵⁹ As *Microsoft/LinkedIn* demonstrates, not all potential privacy-related harms are difficult to identify, and the classical anti-competitive conducts (in *Microsoft/LinkedIn*, tying/bundling) can raise privacy-related harm. Hence, privacy can be integrated into the existing antitrust frameworks.

Some have rejected the privacy-antitrust relationship. Notably, they argue that increased data access would lead to substantial pro-competitive efficiencies and that the 'relationship between privacy and quality... is purely subjective' as different consumers value privacy differently.¹⁶⁰ However, these arguments overlook the fact that considering privacy does not prevent the Commission from balancing privacy's potential anti-competitive effects against the transaction's efficiencies. Hence, it seems 'unwise to ignore an increasingly important parameter of competition... for the mere sake of simplicity'.¹⁶¹ Additionally, there are methodologies (see below) to measure privacy-related consumer harm, enhancing the accuracy of merger assessments vis-à-vis privacy.

Overall, this discussion demonstrates that privacy-related theories of harm may arise from (non-exhaustive list): increased user data/engagement, abandonment of privacy-enhancing technology (for example, end-to-end encryption), and

¹⁵⁵ *Microsoft/LinkedIn* (n 30) para 350.

¹⁵⁶ Esayas (n 84).

¹⁵⁷ *Microsoft/LinkedIn* (n 30) para 350.

¹⁵⁸ *ibid.*

¹⁵⁹ Esayas (n 84).

¹⁶⁰ James Cooper, 'Privacy and Antitrust: Underpants Gnomes, the First Amendment, and Subjectivity' (2013) 20 *George Mason Law Review* 1129, 1135–1138.

¹⁶¹ de Peyer (n 110).

consent.¹⁶² Importantly, the express application of the privacy-as-a-quality parameter theory in *Microsoft/LinkedIn* evinces the theory's maturity entails that such discussions are no longer limited to academia.

(ii) *Market Definition*

Having discussed how competition in privacy might arise, it follows to address the difficulties of defining the relevant markets. In particular, when are two firms considered competitors based on privacy, and thereby, of interest to competition law?

In general, similar products/services are considered to compete more fiercely than dissimilar products/services. This approach appears to apply to competition in privacy.¹⁶³ For instance, Tucker argues that privacy considerations are only 'cognizable' where 'the merging firms are significant rivals because of their competition on privacy and a large share of customers regard the merging parties as offering the best products as a result of their approaches to privacy'.¹⁶⁴ The Commission seems to echo Tucker's view when identifying the differences in WhatsApp's and Facebook Messenger's privacy standards as factors that made the platforms complementary instead of competitors.¹⁶⁵ This assumption can be challenged on two grounds.

First, it overlooks the potential of dissimilarities in privacy to exert competitive pressures on the merging entities. Economically, as all platforms strive to promote data security, privacy is a competition parameter regardless of the amount or type of data collected.¹⁶⁶ Accordingly, a dissimilar, attractive-to-users privacy offering will naturally influence other entities to adopt a similar/enhanced offering. For example, imitating WhatsApp, post-merger Messenger introduced end-to-end encryption 'to make Messenger your primary messaging platform'.¹⁶⁷ Whilst this implies that the merger did not eradicate Facebook's incentives to compete on privacy, it suggests that WhatsApp did impose competitive constraints on Facebook, prompting it to compete on privacy-enhancing technology.¹⁶⁸

Secondly, the Commission overlooked the competitive constraints an incumbent (Facebook) may impose on a smaller firm that offers better data privacy (WhatsApp). In the absence of empirical evidence, it is difficult to attribute WhatsApp's privacy degradation directly to the merger; nevertheless, the removal of Facebook's competitive constraints on WhatsApp may have encouraged

¹⁶² Esayas (n 84).

¹⁶³ *ibid.*

¹⁶⁴ Darren S Tucker, 'The Proper Role of Privacy in Merger Review' [2015](2) CPI Antitrust Chronicle <<https://ssrn.com/abstract=2614046>> accessed 4 January 2022.

¹⁶⁵ *Facebook/WhatsApp* (M.7217) (n 5) para 102.

¹⁶⁶ Esayas (n 84).

¹⁶⁷ Kate Conger, 'Facebook Messenger Adds End-to-End Encryption in a Bid to Become Your Primary Messaging App' (*TechCrunch*, 8 July 2016) <<https://techcrunch.com/2016/07/08/messenger-adds-end-to-end-encryption/>> accessed 4 January 2022.

¹⁶⁸ Esayas (n 84).

WhatsApp to alter its privacy policy.¹⁶⁹ The Commission should have assessed the extent the merger, by removing WhatsApp or Facebook as an important competitive constraint, would have enabled the merged entity to internalise the potential losses ensuing from consumers leaving WhatsApp owing to privacy reduction.¹⁷⁰ Without the merger, WhatsApp might not have degraded its privacy policy for fear of facing substantial revenue losses. The dangers of underestimating the competition arising from products/services with dissimilar privacy standards are well encapsulated by former FTC Commissioner Harbour:

Absent pressure from competitors who might provide more attractive alternatives to privacy-prioritizing consumers, a dominant firm might rationally choose to innovate less vigorously around privacy or, perhaps, to dole out privacy-protective technologies to the marketplace more slowly.¹⁷¹

None of these observations suggests that the Commission should or would have reached a different decision had it considered them. Instead, this subsection hopes to have highlighted some lessons and demonstrated the lack of proper frameworks for privacy-related antitrust issues. As the EDPS suggests, data protection norms could assist in identifying the competitive attributes of privacy.¹⁷² Indicators of increased privacy, for instance, reducing user data collected (articles 5(1)(c) and 9 GDPR)¹⁷³ and implementing default privacy protection features (article 25(2) GDPR),¹⁷⁴ may serve as a baseline in recognising the relevant competition parameters, and hence, spot relevant competitors.¹⁷⁵

The above analyses relate to overlooking the potential competition from dissimilarities. *Facebook/WhatsApp* can be equally critiqued for overestimating the competition from products/services with similar privacy policies. By assessing the privacy-quality parameter independently, the Commission's assumption that Threema and Telegram were substitutes of WhatsApp (see Section II) stresses the need for broader merger assessments, namely, a balanced consideration of other non-price parameters (such as network sizes) that may attract privacy-prioritising users.¹⁷⁶

¹⁶⁹ *ibid.*

¹⁷⁰ Facebook can recapture WhatsApp's consumer losses through increased user engagement on Messenger and/or enhanced targeted advertising.

¹⁷¹ Dissenting Statement of Commissioner Pamela Jones Harbour (n 61).

¹⁷² EDPS, *EDPS Opinion on Coherent Enforcement of Fundamental Rights in the Age of Big Data* (Opinion 8/2016, 23 September 2016) <https://edps.europa.eu/sites/edp/files/publication/16-09-23_bigdata_opinion_en.pdf> accessed 24 March 2023.

¹⁷³ Parliament and Council Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [2016] OJ L119/1 (GDPR).

¹⁷⁴ *ibid.*

¹⁷⁵ Esayas (n 84).

¹⁷⁶ *ibid.*

In essence, an evaluation of consumers' actual behaviour towards privacy degradation would have yielded a more accurate analysis of the role of privacy as a source of market power. It is in this context that the need to recognise a separate market for data and apply the SSNDQ test should be reiterated.

(iii) *Measuring Privacy-Related Consumer Harm*

The argument that privacy should be considered in merger assessments raises questions on how privacy-related harm can be measured. Specifically, when does privacy degradation become anti-competitive?

Antitrust authorities have emphasised, almost exclusively, using qualitative methods to measure privacy-related consumer harm.¹⁷⁷ For example, French and German regulators have suggested using privacy rules as a qualitative benchmark, the breach (or potential breach) of which would signal anti-competitive conduct.¹⁷⁸ However, this may duplicate the function of data protection regulation. Moreover, a merger might degrade privacy without violating privacy rules (see, for example, the comparison between LinkedIn and XING in *Microsoft/LinkedIn*). These observations do not suggest that quantitative analyses should be disregarded; they merely highlight that privacy rules may not be an ideal benchmark.

Alternatively, regulators may apply conjoint analysis to measure the potential privacy degradation quantitatively in monetary terms. Drawing parallels with *Qihoo*, Deutscher proposes a compelling three-step approach to administer this.¹⁷⁹ First, competition regulators could identify the product's/service's price and non-price attributes and their attributive levels. For example, in *Facebook/WhatsApp*, 'privacy' is an attribute of consumer communications services, and 'full profile disclosure; basic profile disclosure; no disclosure; etc' are privacy's attributive levels. Secondly, regulators could bundle, based on the merger's potential effects, different attributes, and attributive levels to 'create' the post-merger product/service. Thirdly, a sample of consumers could allocate 'utility points' to each product 'created' by the Commission, suggesting their preferences. From this, the Commission could estimate the relative importance of each attribute and attributive level is for consumers through multi-variable regressions.¹⁸⁰ It could weigh the 'utility point' changes in response to variations in attributes/attribution levels, with the 'utility point' changes in response to changes in monetary price. This would enable competition authorities to gauge the monetary value of certain non-price attributes of the product/service, such as privacy.

However, it is recognised that, like the SSNDQ test, conjoint analyses do not adequately account for all sides of a multi-sided platform. It does not measure

¹⁷⁷ Deutscher (n 147).

¹⁷⁸ *ibid.*

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*

the revenues that could be gained from degrading privacy to invest in other markets.¹⁸¹ Thus, whilst conjoint analyses would provide useful insights into entities' incentives to maintain/enhance/degrade privacy post-merger, it remains crucial to define a data market to evaluate the indirect network effects and potential exploitation of consumer data.

(iv) *The Privacy Fallacy*

The lack of clear privacy-related theories of harm largely stems from the orthodox assumption that privacy is not an antitrust concern and should be properly addressed by data protection regulations.¹⁸² Subsection (iv) identifies three key fallacies of relying on such assumption.

First, unlike merger control, the merging parties are not required to obtain approval from data protection authorities. Accordingly, any privacy-related assessments can only be found within merger control; furthermore, only antitrust authorities can condition a transaction's clearance to compliance with other regulations, including privacy laws.

Secondly, even if data protection regulators do spot any potentially significant privacy-related consumer harm, they do not have jurisdiction to block the transaction or subject it to suitable remedies.

Thirdly, platforms may be fully compliant with data protection and privacy rules and still degrade privacy. Indeed, *Microsoft/LinkedIn* stressed that although privacy regulations will restrict an entity's ability to access and process data, competition law nonetheless applies to any anti-competitive effects arising from, for instance, the entity's lawful attempts to access user data.¹⁸³ A retrospective analysis of *Facebook/WhatsApp* supports this submission.

Following its 2016 privacy changes, WhatsApp did not lose a significant number of users to 'less intrusive' messaging platforms.¹⁸⁴ This outcome can be attributed partially to users' behavioural considerations that limit users' ability to leverage privacy regulations to impose effective competitive constraints on an entity's privacy changes. Although data protection rules require companies to inform users about the type of data collected and why, users hardly read these policies.¹⁸⁵ Even when they do, data policies are obscure and full of legalese.¹⁸⁶ It would take a user approximately 244 hours/year to read the policies of each viewed website.¹⁸⁷ In the rare case where a user understands the policies, other behavioural consid-

¹⁸¹ Esayas (n 84).

¹⁸² Deutscher (n 147).

¹⁸³ *Microsoft/LinkedIn* (n 30) paras 177–179, 255, 375.

¹⁸⁴ *Facebook/WhatsApp* (M.7217) (n 5) para 174.

¹⁸⁵ Per the 2015 Eurobarometer survey, only 18% fully read privacy statements.

¹⁸⁶ Chirita (n 27).

¹⁸⁷ Aleecia M McDonald and Lorrie Faith Cranor, 'The Cost of Reading Privacy Policies' (2008) 4 *Journal of Law and Policy for the Information Society* 543.

erations may impair him/her from reacting competitively (the ‘privacy paradox’).¹⁸⁸ For example, privacy-sensitive users may disclose risky information when faced with the immediate benefits of disclosure (for example, unlocking new functionalities).¹⁸⁹ Furthermore, default settings make it difficult for users to detect privacy degradation and switch platforms.¹⁹⁰ Thus, unless users understand what, how and why data is being collected from them, they are unable to discipline an entity’s privacy behaviour.

The way WhatsApp notified users of its privacy degradation also reflects the increasingly prevalent business practice of leaving data subjects in the dark. For instance, WhatsApp applied default settings to its privacy policy—users who do not want to share their data with Facebook had to ‘uncheck the box’. However, a closer scrutiny of WhatsApp’s policy reveals that even if a user opts out, his/her mobile number will be shared for Facebook’s non-advertisement-related purposes, such as, fighting spam.¹⁹¹ This illustrates how companies can exploit users’ behavioural conduct through sophisticated policies and defaults.¹⁹²

It is recognised that other regulatory measures, such as unfair competition or consumer protection rules, may intervene where merger review fails to consider such factors. However, this does not excuse the Commission’s shortcomings. As the Commission’s conclusion was based on users’ ability to exert effective constraints on WhatsApp’s post-merger behaviour (i.e., by leaving WhatsApp), it should have considered whether actual consumer behaviour supports this conclusion.¹⁹³ Competition authorities should reinforce their evaluations with consumer surveys or research on behavioural economics before assuming that privacy rules are capable of equipping users with the tools to impose effective competitive constraints on an entity’s privacy practices.¹⁹⁴

The Commission’s over-reliance on privacy policies may have contributed to the perpetuation of ‘dysfunctional equilibrium’, which, per economist Farrell, is the combination of consumers’ cynicisms about businesses’ privacy promises and businesses’ lack of incentives to make such promises.¹⁹⁵ For example, from WhatsApp’s privacy deterioration, market entrants may learn that they are unable to significantly affect consumer demand by ‘making privacy-protective promises’ as users are unlikely to read them. Conversely, users may assume that entities will

¹⁸⁸ This paradox refers to the discrepancy between consumers’ stated privacy preferences and actual privacy-related behaviour. It is worth noting that applying conjoint analyses would enable antitrust authorities to consider the ‘privacy paradox’ as such analyses examine consumers’ behaviour rather than their stated preferences.

¹⁸⁹ Alessandro Acquisti, Laura Brandimarte, and George Loewenstein, ‘Privacy and Human Behaviour in the Age of Information’ (2015) 347 *Science* 509.

¹⁹⁰ *ibid.*

¹⁹¹ Esayas (n 84).

¹⁹² *ibid.*

¹⁹³ *ibid.*

¹⁹⁴ *ibid.*

¹⁹⁵ Joseph Farrell, ‘Can Privacy be Just Another Good?’ (2012) 10 *Journal on Telecommunications and High Technology Law* 251.

not protect their data (to monetise them instead), regardless of former privacy promises.¹⁹⁶ These phenomena contribute to the dysfunctional equilibrium. Escaping the equilibrium is difficult as it demands drastic behavioural changes, which likely requires actions from large digital players and/or regulators. It is submitted that competition law appears well positioned to protect consumer interests and prevent the nascent competition in privacy from being hindered.¹⁹⁷ Without merger control, competition on privacy will hardly mature.

Some argue that merger control and privacy law pursue different, or at least only partially overlapping, objectives.¹⁹⁸ Merger control seeks to promote economic efficiency and a well-functioning internal market, whereas privacy law aims to protect personal data. Thus, commingling competition and privacy issues may distort the doctrine of merger control—it may ‘shift antitrust law’s focus away from efficiency and alter its relatively predictable and transparent application’.¹⁹⁹ Whilst reviewing mergers in close co-ordination with data protection authorities may prolong the process, it is justifiable on consumer welfare grounds.

B. PRIVACY AS A FUNDAMENTAL RIGHT

This approach, initially proposed in *Google/DoubleClick*, urges authorities to block mergers that endanger an individual’s right to data protection, unless it is subjected to privacy safeguards.²⁰⁰ As this proposition does not concern purely antitrust issues, both the CJEU and Commission have rejected it, stressing that privacy is beyond the scope of EU competition law.²⁰¹ However, this section argues that article 21(4) EUMR may and should be applied as a solution of last resort to protect consumers’ privacy as a matter of public interest.

The main big data concerns in consumer relations (security breaches,²⁰² companies’ inability to rely on consumer’s consent,²⁰³ and discriminatory treatment)²⁰⁴ can be reconciled to a breach of the fundamental right to privacy when interpreted as the right to informational self-determination and the right to control personal data.²⁰⁵ Consequently, the fragility of free and informed consumer

¹⁹⁶ Esayas (n 84).

¹⁹⁷ *ibid.*

¹⁹⁸ de Peyer (n 110).

¹⁹⁹ Maureen Ohlhausen and Alexander Okuliar, ‘Competition, Consumer Protection, and the Right [Approach] to Privacy’ (2015) 80 *Antitrust Law Journal* 121, 153.

²⁰⁰ Esayas (n 84).

²⁰¹ See C-238/05 *Asnef-Equifax v Asociación de Usuarios* [2006] ECR I-11125, para 63; *Google/DoubleClick* (n 58); *Facebook/WhatsApp* (M.7217) (n 5).

²⁰² David C Vladeck, ‘Consumer Protection in an Era of Big Data’ (2016) 42(2) *Ohio Northern University Law Review* 493, 500, 506-507.

²⁰³ GDPR, art 6(1)(a).

²⁰⁴ Damiano Canapa, ‘Mergers, Data Markets and Competition’ in Joe Cannataci, Valeria Falce, and Oreste Pollicino (eds), *Legal Challenges of Big Data* (Edward Elgar Publishing 2020) 7–8.

²⁰⁵ Stefano Rodotà, ‘Data Protection as a Fundamental Right’ (Reinventing Data Protection, International Conference, Brussels, 12–13 October 2007) 2; Canapa (n 209).

consent does also amount to a breach of the right to privacy. It is submitted that the urgent need to recognise privacy as a matter of public interest must no longer be overlooked. Data can be worth up to \$5,000 annually per person to advertisers.²⁰⁶ Within the EU, ‘free’ online services ‘paid for’ by personal data are valued at over €300bn.²⁰⁷ The prevalent exploitation of consumer data today, especially through online advertising, is unjustified. For instance, targeted advertisements may facilitate online price discrimination;²⁰⁸ promote harmful, unchallenged stereotypes;²⁰⁹ and, exploit personal vulnerabilities.²¹⁰ Moreover, the costs of maintaining targeted advertising are staggering; yet, they only enable publishers to generate an estimated 4% more than non-targeted advertisements (an average increase of \$0.00008/advertisement).²¹¹ Counterproductively, irrelevant advertisements may irritate targeted audiences, inducing hostility against that brand. As the EDPS reiterated: ‘The Lisbon Treaty has created a *positive obligation on competition authorities*, including the Commission, to *uphold fundamental rights*, and that *privacy protection merited similar attention as the preservation of media plurality*’.²¹²

Nevertheless, some oppose the privacy-antitrust overlap. Interpreting article 2(2) EUMR literally, they argue that the Commission’s role in merger control is to assess whether a merger might ‘significantly impede effective competition’. Accordingly, assessing privacy as a standalone issue is beyond the Commission’s jurisdiction. However, as Anca rightly notes, there are wider public policy considerations than a narrow focus on privacy.²¹³ article 21(4) EUMR allows Member States to ‘take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law’. Privacy, being a concrete matter of public interest, may fall under the remit of ‘legitimate interests’.

²⁰⁶ Quentin Fottrell, ‘Who Would Pay \$5,000 to Use Google? (You)’ (*Consumer Watchdog*, 24 January 2012) <www.consumerwatchdog.org/who-would-pay-5000-use-google-you> accessed 5 March 2022.

²⁰⁷ European Commission, ‘Final Results of the European Data Market Study Measuring the Size and Trends of the EU Data Economy’ (European Commission, 2017) <<https://digital-strategy.ec.europa.eu/en/library/final-results-european-data-market-study-measuring-size-and-trends-eu-data-economy>> accessed 24 March 2023.

²⁰⁸ Luca Braghieri, ‘Targeted Advertising and Price Discrimination in Intermediated Online Markets’ (SSRN 2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3072692> accessed 5 March 2022.

²⁰⁹ Silvia Milano, ‘Targeted Ads Aren’t Just Annoying, They Can Be Harmful. Here’s How to Fight Back’ (*Fast Company*, 31 July 2021) <www.fastcompany.com/90656170/targeted-ads-arent-just-annoying-they-can-be-harmful-heres-how-to-fight-back> accessed 5 March 2022.

²¹⁰ *ibid.*

²¹¹ Natasha Lomas, ‘Targeted Ads Offer Little Extra Value For Online Publishers, Study Suggests’ (*TechCrunch*, 31 May 2019) <https://techcrunch.com/2019/05/31/targeted-ads-offer-little-extra-value-for-online-publishers-study-suggests/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAJGS1wlbOZZUm32TZjbMYhVUSiMg61KvWyn2jVvVvFHtBSPRpCqy-bUVdu7lroM3otUJw0JhCQHMRiOWarme0CCufA_3xer-Vfv4tWf19IE9KfQkaJ_xlj1zLyEF3tY4qK5K2uD9fHbOarmzmiTsZKS4JhvkCI8Zeo-Pm4PChouJ> accessed 29 January 2022.

²¹² EDPS, *EDPS Opinion on Coherent Enforcement of Fundamental Rights in the Age of Big Data* (n 172).

²¹³ Chirita (n 27).

It is recognised that sentence two of article 21(4) states: ‘public security, plurality of the media and prudential rules shall be regarded as legitimate interests’. The lack of direct recognition of privacy as a legitimate interest can, nevertheless, be overcome by applying the last paragraph of article 21(4),²¹⁴ which requires ‘any other public interest’ to be communicated to the Commission for an evaluation on a case-by-case basis. Whilst ‘other public interest’ grounds have ‘only very rarely been invoked’,²¹⁵ digital markets could be recognised as a strategic sector, especially as many digital platforms can be used for mass surveillance or profiling purposes by governments and private actors.²¹⁶

Further support for qualifying privacy as a legitimate interest can be found in the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights, articles 7 and 8 respectively,²¹⁷ which recognise privacy and data protection as fundamental rights. As fundamental rights, it would be in the public interest for competition authorities to consider mergers that raise privacy concerns. Accordingly, article 21(4) EUMR can be seen as a means by which the Commission can satisfy its obligation to uphold the fundamental right of privacy. Through enhanced coordination between distinct regulatory agencies, using competition law, consumer protection and data protection as complements would provide more effective enforcement against privacy concerns in big data.²¹⁸

C. CONCLUSION

Section IV aimed to demonstrate that the economic and non-economic implications of privacy must be considered in all mergers involving large quantities of data. From a purely antitrust perspective, *Microsoft/LinkedIn* affirmed that privacy can be a significant competition parameter as it is increasingly valued by consumers. Whilst the Commission has not substantiated or clarified this mere acknowledgement, it is submitted that greater co-ordination between competition, consumer and data protection authorities would greatly assist in examining the competitive effects of privacy in merger review. Such co-ordination would also empower the development of urgently needed privacy-antitrust frameworks.

Whilst the Commission is unlikely to denounce its strict boundaries between competition and data protection laws anytime soon (as evidenced by the reiteration of such division in *Google/Fitbit*), Section IV stressed that consumer and data protection regulators cannot address the privacy-related aspects of data-

²¹⁴ *ibid.*

²¹⁵ Vivien Rose and David Bailey (eds), *Bellamy & Child: European Union Law of Competition* (7th edn, Oxford University Press 2013), 568–569.

²¹⁶ Chirita (n 27). See also Ira S Rubinstein, ‘Big Data: The End of Privacy or a New Beginning?’ (2013) 3 *International Data Privacy Law* 74.

²¹⁷ Charter of Fundamental Rights of the European Union [2012] OJ C326/391, art 7; European Convention on Human Rights (signed 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, at 8.

²¹⁸ Canapa (n 204) 5.

driven mergers as they are unequipped to deal with mergers and the monopolistic powers that stem from data concentrations.

The likelihood of the Commission recognising privacy as a fundamental right is even lower as it is a non-economic concern, and ‘other public interest’ grounds under article 21(4) EUMR have only rarely been invoked. Nonetheless, as the exploitation of personal data may cause significant consumer harm, such as through online price discrimination and targeted advertising (see above), privacy should be considered a matter of public interest protected by the Lisbon Treaty. Blocking mergers on public interest grounds would, inevitably, attract unwarranted criticisms for being based on politics, rather than on economic considerations.²¹⁹ However, merger decisions are often economic and political decisions; over the last decade, they were ‘only exceptionally based on legal interpretation’.²²⁰ Thus, there is no reason why privacy cannot and should not be addressed under competition law. By refraining from considering privacy, competition authorities are disclaiming their responsibility to uphold consumers’ fundamental right to data privacy and protection.

V. CONCLUSION

This article has sought to demonstrate the urgent need to modify the way in which the existing EU merger control regulations and frameworks are applied to data-driven mergers. In analysing the most relevant data-driven mergers, Section II recognised the fallacy of applying the traditional market foreclosure test and narrow market-by-market assessments to determine the competitive value of data. These conventional concepts cannot properly address the novel characteristics of data and digital markets; hence, the potential anti-competitive effects of data concentrations—in particular, cross-side network effects and privacy degradation—have often been overlooked.

Section III advanced a series of adaptations and frameworks aimed at facilitating a more refined and comprehensive analysis of data in merger review. In particular, the Section argued that to properly assess the data-related theories of harm, the Commission should define a market for data and adopt forward-facing analyses throughout the merger review. Whilst the DMA facilitates the review of a greater number of digital acquisitions, the significance of data must still not be overlooked by competition authorities.

Finally, Section IV emphasised the need to incorporate privacy concerns into all merger assessments involving big data. Privacy should not only be recognised as a significant competition parameter (*Microsoft/LinkedIn*); it should also be considered a fundamental right that is protected by the Lisbon Treaty. As only competition law can address mergers and the monopolistic powers that stem from

²¹⁹ *ibid.*

²²⁰ *ibid.*

data combinations, Section IV submitted two viable approaches to integrate privacy into merger review.

As we now live in the ‘age of surveillance capitalism’ where users are ‘no longer customers, but... the raw material that power the digital economy’²²¹, it is hoped that the ongoing efforts to understand and regulate the use of data will escalate quickly to empower competition authorities to hold existing and future dominant platforms accountable to the consumer harm arising from this new market of big data.

²²¹ Stuart (n 1).