

EU COMPETITION LAW, FUNDAMENTAL RIGHTS AND THE PRINCIPLE OF TRANSPARENCY – AN EVOLVING RELATIONSHIP

CRISTINA TELEKI*

Faced with the challenges posed by gatekeepers, EU competition law is undergoing a period of significant change. I attempt to show in this article that one can understand this change as a shift in the relationship between EU competition law and fundamental rights. More precisely, I show that the initial relationship between these two factors has been operational, in the sense that fundamental rights have been relied upon to operationalize the substance of competition law. In the operational relationship, the right to a fair trial has been deployed by the European Commission to create and expand its quasi-judicial arm. This long-standing operational relationship has recently evolved into an informative one, where the rights to privacy and data protection have informed the European Commission's merger assessments involving gatekeepers. Finally, I argue that, in light of the Meta/Facebook case and recent EU legislation, the relationship between EU competition law and fundamental rights can be called foundational. Indeed, it appears that both the CJEU and EU legislators intend to inject fundamental rights into the foundations of EU competition law. I also highlight how the principle of transparency has played an important role in these developments as an enabler and magnifier. These changes are significant and will impact the work of competition authorities, data protection authorities and other public bodies in the EU.

1 INTRODUCTION

The European Commission stated in the 2030 Digital Compass that its ambition is ‘to pursue digital policies that empower people and businesses to seize a human centered, sustainable and more prosperous digital future’.¹ To achieve this vision of empowered citizens and businesses, the strategy informed a program of policy reform which led to the adoption of the Digital Services Act (DSA)² – aiming to create a single market for digital services – and the Digital Markets Act (DMA)³ – a regulation aiming to establish contestable and fair markets in the digital sector and to define behavioural rules for the gatekeepers to these markets. According to Article 3 of the DMA, the European Commission may designate as gatekeeper an undertaking that fulfils, cumulatively, the following criteria: (1) it has a significant impact on the internal market; (2) it provides a core platform service which is an

* Postdoctoral Researcher, European Centre for Privacy and Cybersecurity, Maastricht University.

¹ Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘2030 Digital Compass: the European way for the Digital Decade’ COM (2021) 118 final, 1.

² Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1.

³ 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.

important gateway for business users to reach end-users; and (3) it enjoys a durable and entrenched position in its operations or it is foreseeable that it will enjoy such a position in the near future.

In light of this, EU competition law is entering a period of significant change during which its tools and procedures will be tested against challenges stemming from digital markets. An ensuing debate in the literature addresses the goals of EU competition law. The proponents of this debate argue that EU competition law should not only focus on consumer welfare but pursue other values as well, such as democracy and the rule of law.⁴ Other authors have suggested that EU competition law and competition officials should also take into account privacy – guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union (Charter)⁵ – and data protection – guaranteed by Article 8 of the Charter⁶ and the General Data Protection Regulation (GDPR)⁷ – in their assessments.

In this article, I propose a different viewpoint and submit that one can only understand the changes affecting EU competition law through its relation to fundamental rights. I propose, therefore, to show that the relationship between EU competition law and fundamental rights has evolved from *operational* to *informative* and is currently evolving from *informative* to *foundational*. The principle of transparency has accompanied these evolutions as an enabler and magnifier. To expand these arguments, I first focus on the early days of EU competition law and describe the *operational* relationship between EU competition law and fundamental rights. Second, I turn to the impact of privacy and data protection in a few well-known merger cases to describe the *informative* relationship between EU competition law and fundamental rights. Third, I highlight the growing *foundational* relationship between EU competition law and fundamental rights. Indeed, it appears that the current regulatory wave in the EU cracks open the foundations of EU competition law and injects fundamental rights – privacy and data protection in particular – into its substance. I draw my conclusions from the case law of the Court of Justice of the European Union (CJEU), the practice of the European Commission and recent EU legislation.

2 THE OPERATIONAL RELATIONSHIP BETWEEN EU COMPETITION LAW AND FUNDAMENTAL RIGHTS

The Sherman Act was the first antitrust law in the world and was adopted in the United States (US) in order to protect democracy.⁸ EU competition law, on the other hand, has been adopted and enforced as a market regulation tool. As Advocate-General Ad Geelhoed

⁴ Viktoria HSE Robertson, 'Antitrust, Big Tech, and Democracy: A Research Agenda' (2022) 67(2) The Antitrust Bulletin 259. Also, Nathaniel Persily, 'Can Democracy Survive the Internet?' (2017) 28(2) Journal of Democracy 63.

⁵ Article 7 of the Charter provides that 'everyone has the right to respect for his or her private and family life, home and communications'.

⁶ Article 8 of the Charter provides that 'everyone has the right to the protection of personal data concerning him or her'.

⁷ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

⁸ Eleanor M Fox, 'Antitrust and Democracy: How Markets Protect Democracy, Democracy Protects Markets, and Illiberal Politics Threatens to Hijack Both' (2019) 46(4) Legal Issues of Economic Integration 317.

argued, EU law has mainly been public economic law ‘aimed at the establishment and proper functioning of the internal market’ and that EU economic law was ‘characterized not so much by ethical preferences, but by choices of a more instrumental nature’.⁹ This initial arrangement has had numerous consequences. One such consequence has been the widely shared belief that competition law is special and that it should, therefore, remain sealed away from exogenous influences. As Gerber noted,

a central feature of European competition law tradition has been the idea that competition law is special and that using law to protect competition moves outside law’s normal domain. In this view, competition law is a new type of law which deals with problems for which traditional legal mechanisms are inappropriate, and thus it requires correspondingly non-traditional methods and procedures.¹⁰

This idea can be traced back to the early days of the EU. A review of the first Reports on the Activity of the European Community for Coal and Steel (ECCS) shows that competition policy was considered an integral part of the construction of the Common Market. In these early reports, competition policy was the only policy covered, other than the development of the Common Market.¹¹

The first Competition Policy Reports of the ECCS highlight the early emphasis placed on competition policy in somewhat self-aggrandizing statements. For example, the first Competition Policy Report highlighted that

competition is the best stimulant of economic activity since it guarantees the widest possible freedom of action to all. An active competition policy pursued in accordance with the provisions of the Treaties establishing the Communities makes it easier for the supply and demand structures continually to adjust to technological development. Through the interplay of decentralized decision-making machinery, competition enables enterprises continuously to improve their efficiency, which is the sine qua non for a steady improvement in living standards and employment prospects within the countries of the Community. From this point of view, *competition policy is an essential means for satisfying to a great extent the individual and collective needs of our society*.¹²

In the same vein, the early Annual Competition Reports of the ECCS assign the consumer as the main beneficiary of the Commission’s work in the field of competition. The Commission stated that its competition policy

⁹ Ad Geelhoed, ‘The expanding jurisdiction of the EU Court of Justice’ in Deirdre Curtin, Alfred E Kellermann, and Steven Blockmans (eds), *The EU Constitution: The Best Way Forward* (TMC Asser Press 2005) 403.

¹⁰ David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford University Press 2001) 12.

¹¹ European Community for Coal and Steel, ‘Summary of the Second General Report on the Activities of the Community (April 13, 1953-April 12, 1954)’ (1954) 4 Bulletin <<http://aei.pitt.edu/50821/1/B0220.pdf>> accessed 01 June 2024.

¹² Commission of the European Economic Community, *First Report on Competition Policy* (Luxembourg: Office for Official Publications of the European Communities 1972) 11 (emphasis added).

encourages the best possible use of productive resources for the greatest possible benefit of the economy as a whole and for the benefit, in particular, of the *consumer*. In this respect, the Commission is not only concerned with increasing by means of the rules of competition the quantity of goods available for consumption, but is also taking action to promote better information for *consumers*.¹³

This difference in wording is significant. Shrubsole thus noted that the use of the word ‘consumer’ has steadily grown during the 20th century, slowly replacing the word ‘citizen’ in books, media and policy documents.¹⁴ Another author found that ‘unlike the citizen, the consumer’s means of expression is limited: while citizens can address every aspect of cultural, social and economic life [...], consumers find expression only in the marketplace’.¹⁵

The early focus on consumers in EU competition law might explain its indifference to citizens and their fundamental rights. This indifference is well captured by what some scholars call a ‘silo approach’ wherein fields of law remain sealed off from exogenous influence, rather than communicating with each other.¹⁶ An early example of the separation and distance imposed by a silo approach to fundamental rights can be observed in the case of *Asnef/Equifax*.¹⁷ In this case, the CJEU was called to rule on the relevance of privacy and data protection for competition law assessments. More precisely, the CJEU was asked to give guidance on whether Article 101 of the Treaty on the Functioning of the European Union (TFEU) prevented financial institutions from setting up a credit information system that would allow them to exchange solvency and credit information on individual customers through the computerized processing of data. The CJEU ruled that this type of agreement neither had the object of restricting competition nor was it likely to have such an effect. It added, however, that any possible issues relating to the sensitivity of personal data were not, as such, a matter for competition law because they could be resolved on the basis of the relevant provisions governing data protection.¹⁸ This line of argument was accepted by the European Commission and remained predominant because it aligned with its interpretation of EU competition rules as protecting consumer welfare in the economic sense of the term. Namely, consumer welfare was primarily defined in terms of price, output, quality and innovation,¹⁹ with no consideration for fundamental rights, such as the rights to privacy and data protection.

In fact, as I have shown previously, the only relationship that EU competition law had with fundamental rights was with respect to the right to a fair trial.²⁰ The European Commission relied on the right to be heard to build its quasi-judicial arm and to ensure the transparency and predictability of its procedures. Thus, Article 19 of the first implementing

¹³ Commission of the EEC, *First Report on Competition Policy* (n 12) 12 (emphasis added).

¹⁴ Guy Shrubsole, ‘Consumers Outstrip Citizens in British Media’ (*Open Democracy*, 05 March 2012) <<https://www.opendemocracy.net/en/opendemocracyuk/consumers-outstrip-citizens-in-british-media/>> accessed 01 June 2024.

¹⁵ Justin Lewis, Sanna Inthorn, and Karin Wahl-Jorgensen, *Citizens or Consumers: What the Media Tell Us about Political Participation: The Media and the Decline of Political Participation* (Maidenhead: Open University Press 2005).

¹⁶ Eleanor M Fox, ‘Blind Spot: Trade and Competition Law—the Space Between the Silos’ (2023) 24(1) *German Law Journal* 269.

¹⁷ Case C-238/05 *Asnef-Equifax* EU:C:2006:734.

¹⁸ *ibid* para. 63.

¹⁹ European Commission, ‘Guidelines on the application of Article 81(3)’ [2004] OJ C101/97, recital 24.

²⁰ Cristina Teleki, *Due Process and Fair Trial in EU Competition Law: The Impact of Article 6 of the European Convention on Human Rights* (Brill/Nijhoff 2021).

regulation of Articles 85 and 86 of the Treaty establishing the European Economic Community (EEC) recognized that the undertakings concerned by the Commission's investigations should have the right to be heard.²¹ Other than this provision, the rest of Regulation 17/62 is dedicated to establishing the Commission's powers of investigation. One can thus argue that the initial relationship between EU competition law and fundamental rights has been *operational* in the sense that fundamental rights have been relied upon to operationalize the substance of competition law. The principle of transparency plays an important role in this relationship. Acting as an enabler of the right to a fair trial, the principle of transparency accompanies the exercise of the right to be heard and contributes to the legal certainty needed for the delivery of justice.

3 THE INFORMATIVE RELATIONSHIP BETWEEN EU COMPETITION LAW AND FUNDAMENTAL RIGHTS

The process of digitalization has led to the emergence of gatekeepers that may threaten not only the process of competition but also fundamental rights.²² Two legal regimes in the EU, however, offer stringent protections in favour of fundamental rights in a digitized society. The first is the Charter of Fundamental Rights of the European Union, and the second is the General Data Protection Regulation (GDPR). Whereas the Charter offers a broad and holistic approach to the protection of fundamental rights in a democratic society, the GDPR safeguards, in particular, the right to the protection of personal data.

Aware of the challenges posed by gatekeepers both to market competition and to fundamental rights, EU competition law has shifted its approach to attempt to integrate the latter. A number of merger cases involving gatekeepers speak of the progress towards an *informative* relation between EU competition law and fundamental rights. In these cases, the European Commission has addressed privacy and data protection concerns in its assessments by integrating these concepts into its theory of harm.

First, in the *Facebook/WhatsApp* decision, one of the theories of harm formulated by the European Commission concerned the possible merging of Facebook's and WhatsApp's datasets after the unification of these companies.²³ This theory of harm addressed the potential data protection risk of the merger. Despite the potential negative data protection repercussions, the Commission took the position 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 the EU competition law rules but within the scope of data protection rules'.²⁴

The fact that the European Commission included data protection in its theory of harm was an important step towards the informative relation between EU competition law and fundamental rights. Post-Facebook/WhatsApp mergers have deepened this relationship. Thus, in the assessment of Microsoft's acquisition of LinkedIn, the Commission's theory of

²¹ Regulation (EEC) 17/62 of the European Council of 21 February 1962 implementing Articles 85 and 86 of the Treaty [1962] OJ 13/204.

²² Spencer W Waller, *Antitrust and Democracy* (2019) 46(4) Florida State University Law Review <<https://ir.law.fsu.edu/lr/vol46/iss4/2>> accessed 01 June 2024.

²³ *Facebook/WhatsApp* (Case COMP/M.7217) Commission Decision of 3 October 2014.

²⁴ *ibid* para 164.

harm reflected the empirical findings of the market investigation which showed that privacy was an important parameter of competition and a driver of customer choice in the market for professional social networks.²⁵

In *Google/Fitbit*,²⁶ the European Commission went a step further. Acknowledging that Fitbit was a company active in the health and fitness sector, the European Commission took into account the data protection issues in relation to the sharing of Fitbit's unique datasets – including biometric data such as health and emotions – with Google. The approved merger thus included, among other considerations, 'ads commitments' which consisted of Google agreeing not to use the health and wellness data collected by Fitbit's devices for Google Ads and to store Fitbit's data in a 'data silo' which required the technical separation of Fitbit's user data. In addition, users' consent would be required for Google to be able to use the health and wellness data for other non-advertising services, such as Google Search, Google Maps, Google Assistant or YouTube.²⁷

The informative relationship between EU competition law and data protection law in *Google/Fitbit* had an institutional element as well. This was the first case in which the European Data Protection Board (EDPB) adopted an official statement.²⁸ The EDPB expressed concerns about the possible further combination and accumulation of sensitive personal data that could entail a high level of risk to fundamental rights to privacy and to the protection of personal data.²⁹ The EDPB also urged both companies to conduct, transparently, a full assessment of the data protection requirements and privacy implications of concerned mergers.

These cases relied on a few innovations that form the core of the informative relationship between EU competition law and fundamental rights, in particular privacy and data protection. The European Commission included for the first time privacy and data protection in its theory of harm. As Witt observed, before these cases, the European Commission had never considered the investigated transaction's impact on privacy a relevant factor. Instead, the European Commission focused exclusively on the conduct's impact on competition in terms of market shares, market concentration, barriers to entry and foreclosure effects.³⁰ Even though the European Commission cleared the mergers described above, this change was an important departure from its consumer welfare standard developed previously. In addition, the European Commission sent a signal to the private sector concerning its willingness to engage with privacy-related concerns flowing from increased concentration of data. In other words, the European Commission appears to have taken a stance in favour of fundamental rights informing its competition law assessments. Finally, the EDPB's intervention in this case signalled not only its interest in institutional cooperation but also its intent to guard and orient privacy assessments during merger proceedings. Its decision to intervene and inform EU competition law signals a new

²⁵ *Microsoft/LinkedIn* (Case COMP/M.8124) Commission Decision 14 October 2016.

²⁶ *Google/Fitbit* (Case COMP/M.9660) Commission Decision of 17 December 2020.

²⁷ *ibid* paras 964-73.

²⁸ EDPB, 'Statement on Privacy Implications of Mergers' (19 February 2020)

<https://www.edpb.europa.eu/our-work-tools/our-documents/statements/statement-privacy-implications-mergers_en> accessed 01 June 2024.

²⁹ *ibid*.

³⁰ Anne C Witt, 'The Digital Markets Act: Regulating the Wild West' (2023) 60(3) *Common Market Law Review* 625.

ownership arrangement of competition law in the EU which is more inclusive and transparent.

To conclude, the informative relationship between EU competition law and fundamental rights is concerned not only with consumers' interests but also with citizens' rights. This is a significant departure from the operational relation concerned mainly with undertakings and competition authorities. What is more, whereas in the operational relationship, fundamental rights are peripheral to the substance of EU competition law, the informative relationship relies on brief fundamental rights incursions allowed into the substance of competition law. Such incursions have not affected the substance of EU competition law. They have, however, paved the way towards the foundational relation between competition law and fundamental rights.

4 THE FOUNDATIONAL RELATIONSHIP BETWEEN EU COMPETITION LAW AND FUNDAMENTAL RIGHTS

The relationship between EU competition law and fundamental rights has not remained simply informative. On the contrary, this relationship is evolving into a foundational one as fundamental rights – particularly privacy and data protection – become integral parts of the foundations of EU competition law. Unlike the previous two relationships described above, the foundational relationship moves fundamental rights from the periphery into the substance of EU competition law. The protection of the rights of the citizen thus plays a crucial role in this relationship. As shown below, this evolution stems both from case law and legislative action.

4.1 *META/FACEBOOK* CASE

The case originated in Germany, where the Federal Cartel Office (FCO)³¹ issued an infringement decision against Facebook for exploiting consumers through excessive data collection under German competition law.³² The decision relied on an innovative theory of harm in which an abuse of a dominant position was inferred from the fact that Facebook had violated the GDPR.

Meta filed an appeal against this decision questioning the authority of the national competition authority to enforce data protection rules under EU competition law. The appeal led to a preliminary ruling request under Article 267 TFEU. The question the CJEU had to answer was whether a national competition authority could investigate and sanction an infringement of the GDPR as a violation under Article 102 TFEU.

The CJEU highlighted that, in the context of the examination of an abuse of a dominant position by an undertaking on a particular market, 'it may be necessary for the competition authority of the member state concerned also to examine whether that undertaking's conduct complies with rules other than those relating to competition law'.³³

³¹ Bundeskartellamt in German.

³² Bundeskartellamt, Decision no B6-22/16 of 6 February 2019. An English translation is available at: www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4 accessed 01 June 2024.

³³ Case C-252/21 *Meta Platforms and Others (Conditions Générales d'Utilisation d'un Réseau Social)* EU:C:2023:537, para 48.

Here, the CJEU enunciated what appears to be the debut of the foundational relationship between EU competition law and data protection law. More precisely, the CJEU highlighted that access to personal data and the possibility to process such data have become a significant parameter of competition between undertakings in the digital economy. Therefore, the CJEU held that an exclusion of the rules on the protection of personal data from the legal framework to be taken into consideration by the competition authorities when examining an abuse of a dominant position ‘would disregard the reality of this economic development and would be liable to undermine the effectiveness of competition law within the European Union’.³⁴

In what appears to be the most important part of its judgment, the CJEU noted that ‘the interests and fundamental rights of the data subject may, in particular, override the interest of the data controller where personal data are processed in circumstances where data subjects do not reasonably expect such processing’.³⁵

The CJEU stated that even if the operator of an online social network holds a dominant position on the social network market, this ‘does not, as such, prevent the users of that social network from validly giving their consent’.³⁶ To be clear, the CJEU recognizes that the existence of a dominant position may create a ‘clear imbalance [...] between the data subject and the controller, that imbalance favouring, inter alia, the imposition of conditions that are not strictly necessary for the performance of the contract’.³⁷

The CJEU has analysed the institutional aspect of the foundational relationship between EU competition law and fundamental rights as well. In particular, it noted that where a national competition authority identifies an infringement of the GDPR in the context of the finding of an abuse of a dominant position, this does not replace the role of the data protection supervisory authorities. In particular, the CJEU held that the national competition authority ‘neither monitors nor enforces’ the application of the GDPR.³⁸

Additionally, the CJEU imposes a duty on the competent national data protection supervisory authority of sincere cooperation with the national competition authority.³⁹ Graef recognizes this to be ‘a remarkable and less expected’ outcome of the case.⁴⁰ Indeed, the duty of sincere cooperation appears to be broad. It includes an obligation to respond to a request for information or cooperation within a reasonable period of time and to announce any intention to consult other concerned data protection authorities or the lead supervisory authority under the consistency mechanisms of the GDPR. If no answer is provided or if the data protection authority does not have any objections, the competition authority may proceed with its own investigation of the relevant data protection law.⁴¹

³⁴ *Meta Platforms and Others (Conditions Générales d’Utilisation d’un Réseau Social)* (n 33) para 51.

³⁵ *ibid* para 112.

³⁶ *ibid* para 147.

³⁷ *ibid* para 149.

³⁸ *ibid* para 49.

³⁹ *ibid* para 54.

⁴⁰ Inge Graef, ‘*Meta Platforms: How the CJEU Leaves Competition and Data Protection Authorities with an Assignment*’ (2023) 30(3) *Maastricht Journal of European and Comparative Law* 325.

⁴¹ *Meta Platforms and Others (Conditions Générales d’Utilisation d’un Réseau Social)* (n 33) paras 58-59.

4.2 THE DSA AND DMA

The foundational relationship between EU competition law and fundamental rights is also nourished by recent EU legislation, in particular the DMA and the DSA. Intended to lay the groundwork for a digital single market, this legislation is similar to previous efforts to create a single market, but different in its focus on citizenship and fundamental rights.

First, the DMA recognizes in recital 35 that the obligations imposed on gatekeepers are necessary to safeguard public order and privacy. Second, the DMA highlights that privacy and data protection should be taken into account by competition authorities when assessing the effects of collecting large amounts of data from users. Third, to ensure a minimum level of effectiveness of the transparency obligation, gatekeepers must provide an independently audited description of the basis upon which profiling is performed. The Commission is tasked with transferring the audited description to the EDPB to inform the enforcement of EU data protection rules. In addition, the Commission is empowered to develop the methodology and procedure for the audited description, in consultation with the European Data Protection Supervisor (EDPS), the European Data Protection Board, civil society and experts.

Although the DSA is not a competition law tool, it does contain provisions steering the behaviour of some of the undertakings designated as gatekeepers under the DMA. In addition, since the DSA applies to all providers of intermediary services in the EU, it will affect the behaviours and strategies of most undertakings doing business with gatekeepers. It is important thus to understand the fundamental rights provisions in this regulation.

First, the DSA addresses the *consumer vs. citizen dilemma* in favour of the citizen. The DSA recognizes that responsible and diligent behaviour by providers of intermediary services is essential for a safe, predictable and trustworthy online environment and for allowing EU citizens and other persons to exercise their fundamental rights.⁴² Article 34 of the DSA operationalizes this idea by obliging providers of Very Large Online Platforms (VLOPs) and Very Large Online Search Engines (VLOSEs) to identify, analyse and assess systemic risks in the European Union. Article 34 (1)(b) provides that VLOPs and VLOSEs must analyse

any actual or foreseeable negative effects for the exercise of fundamental rights, in particular the fundamental rights to human dignity enshrined in Article 1 of the Charter, to respect for private and family life enshrined in Article 7 of the Charter, to the protection of personal data enshrined in Article 8 of the Charter, to freedom of expression and information, including the freedom and pluralism of the media, enshrined in Article 11 of the Charter, to non-discrimination enshrined in Article 21 of the Charter, to respect for the rights of the child enshrined in Article 24 of the Charter and to a high-level of consumer protection enshrined in Article 38 of the Charter.

The DSA thus imposes important duties to safeguard fundamental rights in the EU on gatekeepers and, indirectly, on undertakings in their ecosystems. As gatekeepers adapt to

⁴² DSA recital 3.

comply with the DSA, the European Commission will increasingly be called to include a fundamental rights analysis in its competition law assessments as well.

Transparency plays an important role in the foundational relationship between EU competition law and fundamental rights. The DMA highlights, in this sense, that to achieve contestability of core platform services, gatekeepers must ensure an adequate level of transparency.⁴³ The DMA relies on the GDPR to show that ‘transparency puts external pressure on gatekeepers not to make deep consumer profiling the industry standard, given that potential entrants or start-ups cannot access data to the same extent and depth, and at a similar scale’.⁴⁴

In the same vein, the risk assessment demanded by Article 34(1)(b) of the DSA is an exercise in transparency requiring undertakings to disclose information that has not been disclosed before. This, in turn, will allow other undertakings to better operate in the digital environment. In addition, these provisions will empower citizens to understand how their rights are being protected in the digital space. Lastly, both the DMA and the DSA clarify the duties of EU and domestic institutions in relation to gatekeepers and other undertakings.

The transparency regime required by the DSA and the DMA thus appears to answer, first and foremost, the needs of *homo economicus*, the perfectly rational economic human. As Buijze noted, the principle of transparency requires that ‘legislation is clear, obvious and understandable, without room for ambiguities’.⁴⁵ In addition, the principle of transparency aims to enhance the functioning of the internal market by ‘facilitating effective decision-making by economic actors, and as a safeguard against undesirable market interferences by allowing *homo economicus* to defend his rights and to ensure that public authorities act in accordance with the law’.⁴⁶ From this point of view, the DSA and the DMA are transparency tools, regulating the relation between big undertakings and public authorities in the EU. At the same time, the transparency regime required by the DSA and the DMA place *homo dignus* – with his/her many fundamental rights – at the centre of their preoccupations. From this point of view, the DSA and the DMA are tools to protect fundamental rights in the EU.

5 CONCLUSION

Faced with the challenges posed by gatekeepers, EU competition law is undergoing a period of significant change. I have attempted to show in this article that one can understand this change as a shift in the relationship between EU competition law and fundamental rights. More precisely, I have shown that the initial relationship between EU competition law and fundamental rights was operational. In the operational relationship, the right to a fair trial was deployed by the European Commission to create and expand its quasi-judicial arm. This long-standing operational relationship has recently evolved into an informative one, as the rights to privacy and data protection have informed the European Commission’s merger assessments involving gatekeepers. Lastly, I have argued that, in light of the *Meta/Facebook*

⁴³ DMA recital 72.

⁴⁴ *ibid.*

⁴⁵ Anoeska Buijze, *Transparantiebeginsel in Het Recht van de Europese Unie* [The Principle of Transparency in EU Law] (Uitgeverij BOXPress 2013) 269.

⁴⁶ *ibid.*

case and recent EU legislation, the relationship between EU competition law and fundamental rights can be called foundational. Indeed, it appears that both the CJEU and the EU legislator intend to inject fundamental rights into the foundations of EU competition law.

Witt rightly noted that ‘thinking and acting in disciplinary and institutional silos is not helpful when it comes to regulating digital platforms whose business models require the collection and use of personal data’.⁴⁷ The cases and legislation described in this paper show that the period of disciplinary and institutional silos may be reaching its end in EU competition law. Instead, the foundational relationship between EU competition law and fundamental rights requires substantive and institutional cooperation. The principle of transparency plays an important role in this development as it allows clarity and certainty about the applicable rules. It answers the needs of *homo economicus* and places *homo dignus* at the centre of all publicly-funded endeavours.

The main question that remains is how the foundational relationship between EU competition law and fundamental rights will be operationalized to integrate other fundamental rights such as freedom of thought or the right to a healthy environment. Considering fundamental rights consistently during competition law assessments is a challenging task that will require consideration for all the rights guaranteed by the Charter.

⁴⁷ Witt (n 30).

LIST OF REFERENCES

Buijze A, *Transparantiebeginsel in Het Recht van de Europese Unie* [The Principle of Transparency in EU Law] (Uitgeverij BOXPress 2013)

Fox E M, 'Antitrust and Democracy: How Markets Protect Democracy, Democracy Protects Markets, and Illiberal Politics Threatens to Hijack Both' (2019) 46(4) *Legal Issues of Economic Integration* 317

DOI: <https://doi.org/10.54648/leic2019020>

— —, 'Blind Spot: Trade and Competition Law—the Space Between the Silos' (2023) 24(1) *German Law Journal* 269

DOI: <https://doi.org/10.1017/glj.2023.9>

Geelhoed A, 'The expanding jurisdiction of the EU Court of Justice' in Deirdre Curtin, Alfred E Kellermann, and Steven Blockmans (eds), *The EU Constitution: The Best Way Forward* (TMC Asser Press 2005)

DOI: https://doi.org/10.1007/978-90-6704-543-8_27

Gerber D J, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (Oxford University Press 2001)

DOI: <https://doi.org/10.1093/acprof:oso/9780199244010.001.0001>

Graef I, 'Meta Platforms: How the CJEU Leaves Competition and Data Protection Authorities with an Assignment' (2023) 30(3) *Maastricht Journal of European and Comparative Law* 325

DOI: <https://doi.org/10.1177/1023263x231205836>

Lewis J, Inthorn S, and Wahl-Jorgensen K, *Citizens or Consumers: What the Media Tell Us about Political Participation: The Media and the Decline of Political Participation* (Maidenhead: Open University Press 2005)

Persily N, 'Can Democracy Survive the Internet?' (2017) 28(2) *Journal of Democracy* 63

DOI: <https://doi.org/10.1353/jod.2017.0025>

Robertson V HSE, 'Antitrust, Big Tech, and Democracy: A Research Agenda' (2022) 67(2) *The Antitrust Bulletin* 259

DOI: <https://doi.org/10.1177/0003603x221082749>

Teleki C, *Due Process and Fair Trial in EU Competition Law: The Impact of Article 6 of the European Convention on Human Rights* (Brill/Nijhoff 2021)

DOI: <https://doi.org/10.1163/9789004447493>

Waller S W, *Antitrust and Democracy* (2019) 46(4) Florida State University Law Review
<<https://ir.law.fsu.edu/lr/vol46/iss4/2>> accessed 01 June 2024

Witt A C, 'The Digital Markets Act: Regulating the Wild West' (2023) 60(3) Common
Market Law Review 625

DOI: <https://doi.org/10.54648/cola2023047>