Shaping the field of EU Data Law

by Nine Riis*

Abstract: The lawmakers in Brussels have worked relentlessly in recent years on enacting legislation targeting data. Yet, data legislation and the associated research have so far been conducted through the lenses of traditional fields of law, such as copyright law and fundamental rights law. While some authors do use the term “EU data law”, almost no works exist that elaborate on the term and set out the value in conceptually working with an independent field of EU data law. To bridge this gap, the article demonstrates how EU data law can be classified as an autonomous legal field pursuant to the theory of factual classification. Furthermore, it shows how EU data law diverges from adjacent legal fields by striving to safeguard five distinct objectives stemming from data’s particular characteristics. The objectives can be summarised as protection of the following: (i) a competitive market, (ii) fundamental rights, (iii) consumers, (iv) trustworthiness and (v) Open Data. The article argues that to effectively create, interpret and enforce data legislation, it is necessary for the EU lawmaker to take into account all of these objectives, thus making classification an essential tool for ensuring a coherent body of data legislation. Moreover, the article advances that there is a dichotomy within EU data law between economic goals and fundamental rights. While such a dichotomy is not an issue in itself, it is problematic if it is not adequately taken into account by the legislator when proposing and enacting data legislation. The article concludes that the EU legislator must actively acknowledge the effects of the dichotomy in order to ensure a coherent data legislation capable of sustaining a digital European society.

Keywords: data; data law; classification; economic goals; fundamental rights

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A. Introduction

The EU legislator has developed an avid interest in regulating data. The lawmakers in Brussels spare no time and they propose and enact new legislation targeting data at an unprecedented speed. Since 2018, the GDPR, NPDR, P2B Regulation, Open Data Directive, Data Governance Act and Digital Markets Act have


entered into force. Moreover, proposals for the Data Act\(^1\) and the AI Act\(^2\) are in progress and closely followed by scores of stakeholders both inside and outside the EU.

2 Despite the flurry of regulatory activity, data legislation and the resulting extensive research on data-related issues have mainly been conducted through the lenses of the traditional legal fields.\(^9\) The most extensive activities have been undertaken within copyright law,\(^10\) consumer protection law,\(^11\) competition law,\(^12\) data protection law,\(^13\) and fundamental rights law.\(^14\) This is a logical development as the increased use of data impacts many different parts of our society. Yet, the approach is problematic, because each legal field has its own set of objectives and criteria for balancing such objectives against each other. When EU data regulation uncritically incorporates core elements from different legal fields, it creates an inherent tension in the legislation.\(^15\) The tension is caused by the (often) contradictory objectives of the fields the legislator uses as steppingstones for the new legislation. Further, the approach results in a fragmented regulatory framework that governs unrelated legal issues within the same Directive or Regulation. On the whole, this obfuscates legal certainty.

3 Against this backdrop, the present article argues that EU data law is an autonomous legal field. The argument for a field of EU data law has been advanced before\(^16\) and several authors use the term as an established concept.\(^17\) In spite of this, there is almost no literature on the theoretical way of classifying the field and why it is valuable to treat data-related legal issues within EU data law. The present article fills this gap by using theories of classification to delimit EU data law and demonstrate that EU data law has its own objectives that diverge from those of adjacent fields of law. Further, it argues that insufficient awareness of EU data law as an independent field of law is an obstacle on the road to a coherent body of EU data legislation that can stand the test of time in the coming digital decades.

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1. OJ L265/1 (Digital Markets Act).
8. GDPR.
14. GDPR.
15. Streinz (n 9) 903; Joan Lopez Solano and others, ‘Governing Data and Artificial Intelligence for All: Models for Sustainable and Just Data Governance,’ (European Parliamentary Research Service 2022) 1.
16. The following works touch upon the topic: Christian Berger, ‘Property Rights to Personal Data? – An Exploration of Commercial Data Law’ (2017) 9 Zeitschrift für geistiges Eigentum (ZGE) 340; Björn Steinrötter, ‘The (Envisaged) Legal Framework for Commercialisation of Digital Data within the EU’ in Martin Ebers and Susana Navas (eds), Algorithms and Law (Cambridge University Press 2020); Streinz (n 9) Streinz is the most thorough work on the topic to date. Streinz’ work has a broader scope than the present article by focusing on the evolution of EU data law and on its intersection with the general regulation in the EU.
17. See, for example, the abstract of Linda Kuschel and Jasmin Dolling, ‘Access to Research Data and EU Copyright Law’ (2022) 13 JIPITEC; Clarissa Valli Buttow and Sophie Weerts, ‘Public Sector Information in the European Union Policy: The Misbalance between Economy and Individuals’ (2022) 9 Big Data & Society 2 (who defines the term in a footnote as a body of legislating in EU regulating data as an object); Neil Cohen and Christiane Wendehorst, ‘ALI-ELI Principles for a Data Economy’ 19.
B. Classification of the law

4 On the one hand, it can be argued that classification of the law is an irrelevant and theoretical task. Classification does not normally influence the substantive legal analysis, on the contrary, legal analysis is rarely bothered by a sharp division between different fields of law. If a lawyer is tasked with drafting a contract for IT services, they need to pay heed to contract law and implications from tax, competition, data protection and intellectual property law. This arguably makes classification appear a superfluous and formalistic task.

5 On the other hand, we operate with classification almost constantly when working as both practitioners and researchers. Many law firms and research institutions are organised in departments or working groups according to specialty. Further, few lawyers see themselves as generalists but rather specialise in one or several legal fields. This has, firstly, a practical purpose. The law and the number of legal sources is virtually unlimited and without any form of system, it is nearly impossible to know where to start when encountering a legal problem. In the absence of classification, it would be an insurmountable task for a lawyer to master the law and for law students to effectively embark upon their studies. Secondly, classification allows for the identification of the distinct objectives of a legal field. The objectives of a legal field are the values and interests the field persistently strives to safeguard. It is only with awareness of these objectives that legislators, practitioners and judges know how to create, interpret and enforce the law coherently. This is, in particular, relevant for EU law as the Court of Justice of the EU (CJEU) often uses a teleological method of interpretation in the case of inconsistent provisions in EU legislation. Consequently, classification is crucial in the quest for legal certainty.

6 Yet, an important note in this regard is that classification is not an end in itself. Rather, classification is a tool to effectively create, interpret and enforce the law. Accordingly, there is no universally correct form of classification and any attempt to identify one would be in vain. Instead, efforts should be made to argue why a specific form of classification is the most useful for creating a coherent field of law. The present article does not argue that the traditional fields of law within which data-related legal issues have so far been handled are irrelevant or obsolete. It argues that for the purpose of creating and enforcing data legislation, it is important to work within the field of EU data law to ensure that all relevant objectives are taken into account.

7 In the case of EU data law this article argues for internal factual classification based on the subject matter data. The classification is internal, because it only identifies the field of EU data law as opposed to classifying the whole of the law into different fields; the latter would take the form of external classification. Factual classification is one of the most favoured classification forms. Factual classification divides the law based on the part of social or economic life the relevant legal rules are most naturally associated with. A particular relevant parameter in this regard is the subject

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19 Alf Ross, On Law and Justice (Jakob vH Holtermann ed, Uta Bindreiter tr, Oxford University Press 2019) 242; Pound (n 18) 943f.

20 Ross (n 19) 242.

21 See also Pound (n 18) 944.

22 Ross (n 19) 242f Ross does not use the term objectives, but refers to the ‘[…] principles and ideas which express the prevailing values within the legal area [...]’.

23 See also Pound (n 18) 944 who states: ‘Legal precepts are classified in order to make the materials of the legal system effective for the ends of law’.

24 Koen Lenaerts and Jose A Gutierrez-Fons, ‘To Say What
matter to which the legal rules apply.29 For example, the field of construction law is commonly delimited based on the subject matter of construction agreements. Factual classification is in contrast29 to conceptual classification, where the latter delimits the law according to the specific characteristics of the legal norms and their underlying concepts.31 Pursuant to conceptual classification, it could, for example, be argued that public law consists solely of rules in the form competence norms.32 Factual classification is likely favoured due to the ease of understanding the classification for persons outside the legal field.31 Conceptual and factual classification are not the only forms of classification but the most common ones.34

8 However, there is an inherent risk in using factual classification. If the law is classified according to subject matter, an unlimited number of legal fields are identifiable at the risk of rendering classification meaningless: a danger that Easterbrook warns against in his infamous article “Cyberspace and the Law of the Horse”.35 Easterbrook’s main argument is that even though horses are without a doubt a particular species, cases concerning horses do not give rise to any distinct legal issues. Tort or contract law cases on horses do not examine problems different from those within general tort and contract law.36 Consequently, such a legal field “[…] is doomed to be shallow and miss unifying principles”.37 In order to avert the danger highlighted by Easterbrook, factual classification must be supplemented by something more than subject matter. “Something more” is difficult to qualify. Assistance is offered by theorists of comparative law who have struggled with similar issues when classifying legal systems. Zweigert and Kötz argue that a specific legal system is distinguished by its style,38 Zweigert and Kötz define style as, inter alia, the “[…] predominant and characteristic mode of thought in legal matters”39 setting a legal field40 apart from adjacent legal fields.41 Arguably, the predominant and characteristic mode of thought is crystallized into the objectives of a legal field. By focusing on style, the obstacle of one-dimensional classification based only on one single criteria42 (such as subject matter) is overcome. Accordingly, the danger of “the law of the horse” is averted.

9 Consequently, the field of EU data law is delimited based on subject matter—data—and the distinct objectives it persistently strives to safeguard. These objectives are identifiable in the data legislation proposed and enacted by the EU legislator as well as its accompanying policy documents. The objectives differ from those characterising traditional fields of law and stem from the issues created by data’s particular characteristics. Data’s particular characteristics and the corresponding objectives are more closely examined in the following section.

C. Delimiting the field of EU data law

I. The characteristics of data and the objectives of EU data law

10 For the purposes of this article, data is defined as “any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audiovisual recording”.43 The definition is found in several pieces of (proposed) EU legislation and is in alignment with the definitions advanced by

29 Jolowicz (n 27); Twinning, O’Donovan and Paliwala (n 27) 20 and; Seipel (n 27) 199f.
30 Note that some authors argue for an integrated form of classification that incorporate elements from both factual and conceptual classification, see Ross (n 19) 264 and to a certain extent; Seipel (n 27) 199.
31 Ross (n 19) 243; Seipel (n 27) 198.
32 Ross (n 19) 245.
33 Though Streinz does not explicitly address forms of classification, he seems to use the rationale of factual classification as well cf. Streinz (n 9) 902.
34 Ross (n 19) 243; Twinning, O’Donovan and Paliwala (n 27) 20; Seipel (n 27) 198; Note that the authors use slightly diverging terminology for the types of classification; factual classification is, for example, also known as functional classification, see, inter alia, ibid 201.
36 ibid 207f.
37 ibid 207.
39 ibid 68.
40 “Legal field” in the case of this article. Kötz and Zweigert examine “legal families”.
41 Kötz and Zweigert (n 38) 68.
42 ibid 67.
43 Defined in the Digital Markets Act art. 2(19), Data Governance Act art. 2(1), and proposal for the Data Act art. 2(1). In alignment is also para. 30 of the Open Data Directive.
The definition is useful and workable due to its broadness. Data can take many different forms and too narrow a definition risks inadvertently excluding some forms. Moreover, the definition emphasises that data must be digital, which is essential as data’s value creation is intrinsically connected with digital technologies. It is seldom that data in itself (and thereby the mere possession of data) generates value. Generally, data’s economic potential must be realised through different methods where the most common is data analysis. By analysing data, it is possible to derive insights with the potential of enabling better decision-making. Such analysis becomes even more valuable when the analysis and the ensuing decision-making are automated as is the case with machine learning algorithms and artificial intelligence. These technologies also create value as they autonomously improve themselves. The value extraction from data analysis can impact both businesses, NGOs and public entities and is thus extremely valuable for the EU economy. Data is therefore essential as an input to the operation and development of data analysis technologies.

Data differs from most other commodities in four main ways. Firstly, data is inexhaustible meaning that it can be copied an endless number of times without being exhausted nor compromised in terms of quality. It should be noted that such copying can be done at a very low cost. Secondly, data is non-rival and can therefore be managed simultaneously by any number of users and processes. Thirdly, data can be utilised in different contexts as the same data can constitute the input for different products and services. Lastly, data-driven business models are often characterised by network effects and economies of scope. Network effects occur when the value of a

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47 Wdowin and Diepeveen (n 46) 19.


51 Ibid.


54 Charles I Jones and Christopher Tonetti, ‘Nonrivalry and the Economics of Data’ (2020) 110 *American Economic Review* 2819, 2819 Note that the authors do not distinguish between inexhaustible and non-rival.


57 Cohen and Wendehorst (n 17) 126; Commission ‘Towards a common European data space’ (Communication) COM (2018) 232 final (n 48) 10.

58 Rubinfeld and Gal (n 45) 355f; Prüfer and Schottmüller (n 45) 368. Note that these works have also been cited in; Nine Riis, ‘The Duty to Supply Data under Art. 102 TFEU’, *Konkurrencestigetlige emner* 2/2020 (Bech-Bruun 2020) 160ff.

59 Nestor Duch-Brown, Bertin Martens and Frank Mueller-
product increases proportionally with the amount of people using the product.\textsuperscript{60} A classic example is a search engine algorithm improving in proportion with the number of entered search requests.\textsuperscript{61} Economies of scope happen when combined analysis of several datasets yield more efficient insights than analysing each data set separately.\textsuperscript{62}

12 The distinct characteristics of data described above create a risk of harm to different values and interests of the EU. The protection of these values and interests can be expressed as the five objectives of EU data law. Consequently, EU data law strives to safeguard (i) a competitive market, (ii) fundamental rights (iii) consumers, (iv) trustworthiness and (v) Open Data. The content of each of the objectives is elaborated on below.

1. A competitive market for data

13 The Commission has repeatedly stated that a competitive market for data must be established and protected.\textsuperscript{63} There are many views on what constitutes a “competitive market”, however, three main perspectives can be identified in relation to EU data law: (i) establishment of possibilities and incentives to trade data, (ii) removal of barriers to the internal market for data, and (iii) restrictions on large companies’ use of data.

a) Establishment of possibilities and incentives to trade data

14 As stated above, data is a crucial input for the operation and development of a vast number of technologies\textsuperscript{64} making access to data essential. One of the best ways to gain access to data is through trade, however, data trade has not sufficiently taken off in the EU and is especially lacking in B2B relations.\textsuperscript{65} Several explanations for this can be advanced. To start, data’s inexhaustible and non-rival nature makes it difficult for a contracting party to control how the data is used once it has been shared. Further, as the same type of data is usable in a variety of contexts pricing data can be complicated\textsuperscript{66} due to the fear of losing competitive edge. Both factors minimise companies’ incentives to trade data.

15 As a reaction, the Commission has introduced several legislative and non-legislative\textsuperscript{67} initiatives. On the side of legislation, the most relevant measures are the introduction of Article 34 of the proposal for the Data Act and Chapter 3 of the Data Governance Act. Article 34 of the proposal for the Data Act stipulates an obligation for the Commission to develop non-binding model contractual terms to support companies when they draft and negotiate agreements on data access and use. The rationale of the provision is to lower transactions costs and thus increase data trade.\textsuperscript{68} Chapter 3 of the Data Governance Act adopts a different approach by providing a voluntary scheme for certifying data intermediation services. Data intermediation services are defined as services that aim to establish a commercial relationship between “an undetermined number of data subjects or data holders on one hand and data users on the other”\textsuperscript{69} without using the provided data itself nor improving it with the aim of licensing it for profit.\textsuperscript{70} Accordingly, certified data intermediation services have a higher level of impartiality.\textsuperscript{71} The rationale...
behind the provisions is that impartiality increases trust in the intermediation services with resulting incentives to trade data through intermediaries.

b) Removal of barriers to the internal market for data

16 The EU was founded with the main aim of establishing an internal market.21 Accordingly, there should be no barriers to the free movement of data. This is, in particular, ensured by the NPDR explicitly prohibiting data localization requirements.74 Moreover, the GDPR ensures the free movement of personal data.79

c) Restrictions on large companies’ use of data

17 Data markets are prone to informational asymmetry,76 network effects (both direct and indirect)77 and economies of scope78 all of which can act as barriers to entry.79 Accordingly, it is difficult for new entrants to enter and establish themselves on the market. To address the risks stemming from these market characteristics, the proposal for the Data Act and the P2B Regulation impose ex ante restrictions on large companies’ use of data in order to prevent market foreclosure and abuse of market power.80

18 Articles 4 and 5 of the proposal for the Data Act oblige data holders81 to grant data users82 access to data generated by the users’ use of a product or related service.83 Similarly, Article 9 of the P2B Regulation sets out information obligations for online intermediation services. The information obligations include a duty to inform the users about the data the intermediation service has access to and how the data is used.

19 Both Regulations employ ex ante mechanisms to address barriers to entry and thus prevent strong market actors from further strengthening their position within a specific data market or use their market power to leverage their position into an adjacent market.84 Such ex ante mechanisms are commonly associated with EU competition law85 and the rationales underlying the Regulations are to a great extent similar to those in competition law. The goals of EU competition law are ambiguous, but it is generally acknowledged that they include, at least, efficiency and consumer welfare.86 These goals

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22 NDPR Art. 4(1).
23 GDPR art. 1(3).
25 Rubinfeld and Gal (n 45) 355f; Prüfer and Schottmüller (n 45) 368.
26 Rubinfeld and Gal (n 45) 352ff; Martens and others (n 76) 24.
27 Rubinfeld and Gal (n 45) 349ff.
29 Articles 4 and 5 of the proposal for the Data Act oblige data holders to grant data users access to data generated by the users’ use of a product or related service. Similarly, Article 9 of the P2B Regulation sets out information obligations for online intermediation services. The information obligations include a duty to inform the users about the data the intermediation service has access to and how the data is used.
30 “Data holder” is defined as: “a legal or natural person who has the right or obligation, in accordance with this Regulation, applicable Union law or national legislation implementing Union law, or in the case of non-personal data and through control of the technical design of the product and related services, the ability, to make available certain data” cf. art. 2(6) of the proposal for the Data Act. Note that SMEs are explicitly excluded from this definition cf. proposal for the Data Act art. 7(1).
31 “User” defined in art. 2(5) of the proposal for the Data Act. Access can also be granted to a third party designated by the user cf. art. 5 of the proposal for the Data Act.
32 See art. 2(2) and 2(3) of the proposal for the Data Act for definitions for “product” and “related service”.
33 Luigi Zingales, Fiona Scott Morton and Guy Rolnik, ‘Stigler Committee on Digital Platforms’ 336, 37.
34 An illustrative example is the electronic communications sector, which has historically been a focus of competition law due to its specific market characteristics. Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code [2018] OJ L321/36 includes ex ante obligations similar to those in the P2B Regulation and the proposal for the Data Act, for example, information obligations cf. art. 69 and obligations to grant access cf. art. 61.
35 See the thorough empirical analysis in Konstantinos Stylianou and Marios Iacovides, ‘The Goals of EU Competition Law: A Comprehensive Empirical Investigation’ [2022] Legal Studies 1, 5ff with references. The goals of EU competition law have been discussed at length, however, the discussion is outside the scope of this article.
are also evident in the Regulations as they seek to increase both efficiency and consumer welfare\(^{87}\) by facilitating access to data.

### 2. Protection of fundamental rights

The increased use of data and data analysis can collide with fundamental rights, in particular, (i) the right to protection of personal data cf. Article 8 of the EU Charter\(^{88}\) and (ii) the prohibition against discrimination cf. Article 21 of the EU Charter. Further, there is (iii) a risk of compromising democratic values due to large companies’ access to and use of data.

#### a) The right to protection of personal data

Legislation and case-law concerned with the protection of personal data is commonly referred to as data protection law.\(^ {89}\) Data protection has historically been one of the main forms of regulation of data in the EU\(^ {90}\) taking off with the enactment of the Personal Data Directive\(^ {91}\) in 1995. The rationale behind the Directive was partly harmonisation\(^ {92}\) and partly that the easiness of processing data digitally made it difficult for data subjects to exercise control over their personal data.\(^ {93}\) In 2018, the Directive was replaced by the GDPR,\(^ {94}\) which ensures the continued protection of personal data\(^ {95}\) based on the same rationale as the Directive.\(^ {96}\) Yet, the GDPR includes additional obligations (and a stricter fine regime) in light of the increased risks from advanced surveillance technologies and tools facilitating unauthorised access to personal data.\(^ {97}\) Though the GDPR is often referred to in its capacity as a fundamental rights instrument, it also pursues an economic goal by ensuring the unrestricted movement of personal data in the EU.\(^ {98}\)

#### b) The prohibition against discrimination

Article 21 of the EU Charter includes a broad prohibition against discrimination applying to the Member States and the EU institutions.\(^ {99}\) Further, prohibitions against general and specific non-discrimination are included in secondary EU legislation\(^ {100}\) applying to the private sector.\(^ {101}\) Accordingly, non-discrimination law in the EU has a broad scope. The specific concern in regard to data is algorithmic bias. If the data used as input in machine learning algorithms or artificial intelligence is biased, the output risks being biased as well—often articulated within data science as “Garbage in, garbage out”.\(^ {102}\) Moreover, as the output is often used to further improve the algorithm, the bias becomes an inherent part of the design of the particular

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\(^{87}\) P2B Regulation paras. 1 and 3 and Explanatory Memorandum to proposal for the Data Act pp. 3 and 12


\(^{90}\) Together with the Database Directive.


\(^{92}\) Personal Data Directive paras. 5-7

\(^{93}\) Personal Data Directive para. 4. See also Lynskey (n 89) 3.

\(^{94}\) GDPR art. 94(1).

\(^{95}\) GDPR art. 1(1), 1(2), and para. 1.

\(^{96}\) GDPR para. 9.

\(^{97}\) GDPR para. 6; Commission ‘Building a European Data Economy’ (Communication) COM (2017) 9 final (n 63) 3.

\(^{98}\) GDPR art. 1(3) and para. 13.


\(^{101}\) Wachter, Mittelstadt and Russell (n 99) 7.


\(^{103}\) See, for example, Bertie Vidgen and Leon Derczynski, ‘Directions in Abusive Language Training Data, a Systematic Review: Garbage in, Garbage Out’ (2020) 15 PLOS ONE e0243300,
algorithmic model. The risk is further intensified in light of the network effects and economies of scope characterising data business models as these effects tend to exacerbate the bias. Algorithmic bias may be covered by current EU non-discrimination law (though no cases have been tried in front of the CJEU), however, there are still gaps as well as evidence issues particular to cases of algorithmic bias. One of the initiatives to remedy this is Article 10 of the proposal for an AI Act. Article 10(3) explicitly states that training, validation and testing data used in high-risk AI systems shall be, inter alia, “representative”.

c) Risk of compromising democratic values due to large companies’ access to and use of data

Large companies’ (especially platforms’) access to and use of data may compromise democratic values. The risk is different from the competition law concern examined above. The competition law concern is based on an economic theory of harm according to which the consumer risks paying the price for the abusive behaviour of a dominant undertaking. The risks for democratic values are harder to qualify. Recent studies have highlighted that companies with access to large amounts of data can cause non-economic societal harms. With a wide reach and massive data sets large companies can, for instance, provide targeted news able to deliberately influence public opinion or promote specific political agendas jeopardizing the democratic values of the EU. Such behaviour may also infringe fundamental rights, for instance, the right to free elections. The preamble to the Digital Markets Act highlight these concerns by stating that the Act “[…] pursues an objective that is complementary to, but different from that of protecting undistorted competition on any given market, as defined in competition-law terms, which is to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, potential or presumed effects of the conduct of a given gatekeeper covered by this Regulation on competition on a given market. This Regulation therefore aims to protect a different legal interest from that protected by those rules and it should apply without prejudice to their application” (author’s emphasis).

The wording underlines that the conduct of large companies does not purely give rise to economic concerns. The specific provisions of the Digital Markets Act, inter alia, prohibits gatekeepers’ use of certain categories of data in competition with its business users. Further, it obliges the gatekeeper to provide business users with access to data that has either been provided or generated by the business users through the gatekeeper’s services. These obligations are similar to ex ante competition law mechanisms and arguably the obligations will also affect the competitive conduct of gatekeepers. However, as stated above, the Digital Markets Act has a broader scope of protection than merely competition on the market.

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\footnotesize{105 Wachter, Mittelstadt and Russell (n 99) 29; Raphaèle Xenidis and Linda Senden, ‘EU Non-Discrimination Law in the Era of Artificial Intelligence: Mapping the Challenges of Algorithmic Discrimination’ (2020) 174.}

\footnotesize{106 Wachter, Mittelstadt and Russell (n 99) 29; Xenidis and Senden (n 105) 174.}


\footnotesize{108 Busch and others (n 107) 20 and 22 state that personal data can be used to provide targeted news and thus work as ‘instruments for manipulation’. The quotation is taken from; van Dijck, Nieborg and Poell (n 107) 3.}

\footnotesize{109 Busch and others (n 107) 22.}

\footnotesize{110 See the values set out in art. 2 and 3 of the TEU.}

\footnotesize{111 Art. 3 of the Protocol of the European Convention on Human Rights (ascended by the EU cf. art. 6(2) of the TEU).}

\footnotesize{112 Digital Markets Act para. 11.}

\footnotesize{113 Busch and others (n 107) 17 also advance this interpretation.}

\footnotesize{114 As defined in art. 3 of the Digital Markets Act.}

\footnotesize{115 Data which has been either generated or provided by business users through their use of the core platform service (or supporting services), including data generated or provided by business users’ customers cf. art. 6(2) of the Digital Markets Act.}

\footnotesize{116 Digital Markets Act art. 6(2).}

\footnotesize{117 Digital Markets Act art. 6(10).}
3. Trustworthiness

24 The concept of trust and trustworthiness emerged in EU law concurrently with data-driven technologies. The Commission has emphasised that “[a] high level of trust is essential for the data-driven economy” and almost all legislation regulating data put emphasis on the importance of trust. The underlying rationale is that without trust in technology—and in particular trust that technology respects fundamental rights and European values—there will be no uptake in the use of such technology. Consequently, a lack of trust will prevent the effective development of a competitive EU market for data and the ensuing beneficial technologies.

4. Open Data

25 To encourage and ensure Open Data is an aim evident in EU data law. “Open Data” describes data in an open format that can be freely used, re-used and shared for both commercial and non-commercial gains. Open Data has been in focus since the entry into force of the Public Sector Information Directive (now the Open Data Directive) in 2003. Open Data is desirable both from a fundamental rights and a competition law perspective. Open Data can be perceived as an extension of the right to receive and impart information as set out in Article 11(1) of the EU Charter. Yet, Open Data is also advantageous for competition as the sharing and free availability of data grant companies new opportunities to produce and improve products.

a) Consumer protection

26 Consumer protection is anchored in Article 169 TFEU and in Article 38 of the EU Charter. One of the main goals of EU consumer protection law is to provide consumers with rights that enable them to establish a fair foundation for economic transactions. This is, inter alia, obtained by granting consumers appropriate and effective remedial rights in contractual relations as protected by the Sale of Goods Directive since 1999. Yet, these rights have been under growing pressure due to the increase in generated data. An example is the surge in business models based on consumers providing data as remuneration for (monetary) free services. A reaction to these business models has been a revision of the Sale of Goods Directive and the introduction of the Digital Content Directive. The Directives introduce contractual rules favourable to consumers procuring digital content, digital services and physical goods interconnected with or incorporating such content or services.

The rationales underlying the two directives are twofold. Firstly, the quality of the provided content and services using data improve

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120 Open Data Directive para. 16


122 Open Data Directive para. 5.
as consumers can exercise remedial rights in case of non-conformity leading to better products on the market. Secondly, the rules encourage consumers’ trust in technologies, because consumers know that the companies providing the data-driven services are contractually liable.

D. The inherent dichotomy in EU data law and the way forward

27 By defining the field of EU data law, all the objectives concerning data deemed important by the EU legislator are fleshed out. The objectives stem from the distinct issues created by data’s particular characteristics and differ from the objectives characterising traditional fields of law. Consequently, the classification of EU data law contributes to an enhanced understanding of the values and interests that are relevant to take into account when creating, interpreting, and enforcing data legislation. This, in turn, provides for a coherent field of law that ensures legal certainty.

28 When examining the objectives of EU data law, it is clear that there is an inherent dichotomy between economic goals on the one hand and fundamental rights on the other hand. Data has an enormous economic potential exacerbated by its ability to make an economic impact across a vast number of industries. Data-driven technologies have a broad scope; they can provide better and faster medical diagnosis, improve sustainability and innovate an uncountable number of products and services. It is exactly the broadness of data’s use that warrants the catchphrase “data is the new oil”. Yet, data also has the ability to compromise the democratic values upon which the EU is built and the potential to infringe fundamental rights. The extent of the risks ensuing from algorithmic bias or from large companies’ potentially far-reaching power are difficult to fully comprehend as our society may be impacted in ways we cannot yet imagine. The dichotomy is also evident when considering the subjects of protection in current data legislation. Arguably, there is a difference in the approach to regulation depending on if the subject of protection is a consumer assessing a product or the public seeking to navigate in a risk zone for fundamental rights.

29 Both economic goals and protection of fundamental rights are important and the legislator must decide how to balance them against each other, which the EU legislator has not sufficiently done. A relevant example is the continuous distinction between personal and non-personal data in EU legislation. The distinction relies on the assumption that data sets of personal and non-personal data are easily separated and that parallel application of different legal rules is possible. However, this is not necessarily aligned with reality and is problematic because the stricter mandatory requirements for processing of personal data (while justifiable from a fundamental rights perspective) effectively impede data trade. Consequently, there is an ensuing risk that the legal provisions mainly pursuing economic goals cannot efficiently achieve such objective. As an illustration, Article 12 of the Data Governance Act lists the requirements that must be satisfied in order to become a certified data intermediation

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132 See also Streinz (n 9) 934 in agreement.


136 ibid.

137 ‘The World’s Most Valuable Resource; Regulating the Data Economy’ (2017) 423 The Economist.

138 Solano and others (n 15) 53.

139 ibid 1; Streinz (n 9) 903.


141 Graef, Gellert and Husovec (n 140) 5.
service provider. Article 12 stipulates different requirements dependent on the provided data being personal or non-personal requiring stricter requirements for processing personal data. However, the provision does not take into account cases of mixed datasets or cases where non-personal data becomes personal due to the dynamic interpretation of what constitutes personal data. The latter situation is likely to arise due to the vast amount of different datasets available in data intermediation services. The sparse guidance in the Data Governance Act in this regard risks limiting the intended effect of Article 12 as providers may have difficulties satisfying the requirements of the provision and thus qualify for the certification.

It can be argued that the objective of trustworthiness can, in some cases, solve the dichotomy between economic goals and protection of fundamental rights. In other words, without fundamental rights protection (that is, trust) no EU citizen or company will use new technologies. However, the soundness of this rationale should be subject to closer examination. It is a convenient way to solve a complex matter, but when taking into account how all of our lives (and modern comforts) depend on new forms of data-driven technology, the argument seems weak.

An inherent dichotomy is not detrimental to a legal field, in fact, it is what characterizes almost all fields of law. However, it is important to acknowledge a field’s contrary stances and decide how to balance them against each other. This is, in particular, important when taking into account how speedily the EU legislator is proposing and passing data legislation. If the legislator does not acknowledge the different objectives of EU data law and their inherent tension, the risk is that none of the objectives will be effectively achieved. Further, legal uncertainty is increased as businesses and individuals have considerable difficulties navigating an increasing amount of legislation safeguarding opposing objectives.

The aim of EU data law is not to solve the dichotomy between the field’s objectives. In the words of Roscoe Pound, “Classification is not an end”. Classification is a tool used to construct a solid foundation for creating, interpreting and enforcing the law. By classifying EU data law, the present article brings to light the field’s objectives and their inherent tensions. This clarity can assist the EU legislator in making the decisions necessary for creating better and more consistent data legislation to sustain a digital European society in the coming digital decades.

142 The distinction used in art. 12 is also criticized by the European Data Protection Board and the European Data Protection Supervisor in ‘EDPB-EDPS Joint Opinion 03/2021 on the Proposal for a Regulation of the European Parliament and of the Council on European Data Governance (Data Governance Act) (2021) 28f. Note that some of the criticism issued in the opinion have been mitigated in the final approved text of the Data Governance Act.

143 See, for example, art. 12(j) – (n) operating with the distinction.

144 Wendehorst (n 140) 331; Graef, Gellert and Husovec (n 140) 3f.


146 Pound (n 18) 944.