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THE INTERNET, USER AUTONOMY AND EU LAW

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This paper examines the Internet's origins and development as a 'freedom-enhancing' tool, alongside the contemporaneous evolution of EU law and regulation governing private economic power. The concept linking these two streams of discussion is that of 'user autonomy', which is implicated by the Internet's affordances for individuals, and which, it is argued, should also be the legal and regulatory framework's goal when governing Internet matters. However, the trends influencing EU law and regulation from the 1980s, especially neoliberalism, have resulted in these frameworks not being well-equipped to advance user autonomy in the Internet sphere, as will be explained in more detail below.

1 The Internet, power and freedom

The Internet emerged into the public realm in the 1990s: an interesting moment for ideology in recent Western history, with the fall of the Soviet Union and the seeming inevitability of liberal democracy's social and economic freedoms.

[1] Perhaps this was part of the reason that strong discourses around the Internet's freedom-enhancing aspects permeated the literature and discussion from this time, although this discussion also questioned the nation-state's role in managing the new medium. Indeed the 'cyberlibertarians' denied the authority, but also the very ability, of the nation-state to control the Internet,[2] and believed they were seeing a 'freeing' of culture and information in the online environment.[3] Subsequently, the advent of Web 2.0 and the birth of social media were also supposed to usher in a new era of freedom for users.[4]

However, this narrative sits awkwardly with the Internet's origins as a US government-based project associated with 'both the "closed world" of the Cold War and the open and decentralized world of the antiwar movement and the counterculture'.[5] The Internet's predecessor, ARPANET, rose out of a Cold War-era US military program, yet ARPA money also 'supported the "hackers" at MIT's Artificial Intelligence Lab' including Richard Stallman,[6] who would later become a luminary of the free software movement.

This dichotomy between centralised control and antiauthoritarian decentralisation rooted in the historical events leading up to the creation of the Internet has persisted throughout the Internet's public emergence from the 1990s until the present day. This complex relationship between the Internet, freedom and power will be explored below.

1.1 The Internet and freedom

The Internet's freedom-enhancing aspects is evidenced by early Internet users' experience,

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[1] F Fukuyama, *The End of History and the Last Man* (New York, Free Press, 1992).
[2] JP Barlow, 'A Declaration of the Independence of Cyberspace' (*Electronic Frontier Foundation*, 8 February 1996) <https://projects.eff.org/~barlow/Declaration-Final.html>.
[3] E Dyson and others, 'Cyberspace and the American Dream: A Magna Carta for the Knowledge Age' (*Progress and Freedom Foundation*, August 1994) <http://www.pff.org/issues-pubs/futureinsights/fi1.2magnacarta.html>.
[4] Y Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven, Yale University Press, 2006).
[5] R Rosenzweig, 'Wizards, Bureaucrats, Warriors and Hackers' (1998) 103(5) *American Historical Review* 1530, 1531.
[6] ibid 1542.

who viewed it as 'an open public space which was decentralised, diverse and interactive' but gave 'largely uncritical reception … to the commercialisation of the internet'.[7] Indeed, the absence of government control was lauded, and developed into a socio-political discourse producing various cyberlibertarian manifestos.[8] Due to factors which mostly concerned the lack of obvious content restriction, the Internet's transnational nature, the lack of visible de facto government control over the medium, and the initial lack of prominence of large corporate entities at these layers more visible to users, it appeared that the Internet represented an autonomous space in which users had control over their actions and online destiny. Indeed, some considered that the Internet provided the best outlet so far for individuals' free expression.[9]

These perceptions may have been informed by the fact that during the mid to late 1990s, the Internet even in developed jurisdictions still did not have a high rate of penetration. In addition, corporate involvement at the more 'visible' levels was still limited: e-commerce had not quite yet matured, due to factors such as this low rate of penetration, online security for credit card payments not being adequate and consumers not having sufficient trust in online corporations. What for-profit corporate involvement there was, however, was not met with much criticism, 'accord[ing] with the ethos of the time… a moment of triumphalism when democracy and capitalism had defeated communism'.[10]

While nation-states such as the US were at least attempting to control the Internet by the mid-1990s by enacting legislation, the corporate axis on the Internet until this point was not acting in a way which was manifestly restrictive of user behaviour, nor were there obvious poles of its dominance being seen. The user experience of the Internet in the 1990s and the legalistic conception of it[11] would suggest that it was an arena without centralised control either from dominant corporate bodies or nation-states, a truly public sphere for debate, culture and human flourishing.

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[7] J Curran, 'Rethinking internet history' in J Curran, N Fenton and D Freeman (eds), *Misunderstanding the Internet,* (Abingdon, Routledge, 2012) 41.
[8] Dyson and others, *Cyberspace and the American Dream;* Barlow *A Declaration of the Independence of Cyberspace.*
[9] E Volokh, 'Cheap Speech and What It Will Do' (1995) 104(7) *Yale Law Journal* 1805.
[10] Curran, 'Rethinking internet history' 41.
[11] In cases such as *Reno v American Civil Liberties Union,* 521 U.S. 844 (1997).

By the 2000s, for 'normal' Internet users without much in the way of technical knowledge, the advent of Web 2.0 was another pivotal moment when their freedom to make and create was facilitated by the Internet. Web 2.0 involved both the running of software programmes online on the Web rather than offline on a computer desktop, and increased and easier access for Internet users to publishing information online (and often the two combined). These Web-based applications - allowing information sharing, interoperability, user-centred design and collaboration - catalysed the phenomenon of mass user collaboration on the Internet, especially content generated by users, which opened up to a wider category of people the possibility of creating, participating and disseminating their creations to a vast global audience. From the advent of Web 2.0, users did not need to be equipped with any programming knowledge to create and share information in a public fashion on webpages.

Given Internet users' role in actively producing content and information, with Web 2.0 as a catalyst, the terms 'prosumer' and 'produsage' came to be used to describe this phenomenon.[12] Prior to this, particularly in the 'old media' world, individuals were generally viewed as mere consumers of what others were producing, which was usually done on a centralised scale and in the context of bureaucratic institutions of State or the Firm. There have been notable examples of 'prosumption' or 'produsage' before Web 2.0, such as in the free software movement where individuals had existed as both consumer and producers with the fruits of their works subsisting in a non-commodified knowledge commons.[13] Yet the Internet's affordances seemed to give many more people the tools to participate as active creators of content and information as well as passive consumers of the same.

The 'mainstreaming' of presumption/produsage via Web 2.0 has given rise to great potential transformations via decentralisation and democratisation in the way that resources are created, organised and managed. An important example of this is what Benkler has termed

[12] See: D Tapscott, *Digital Economy: Promise and Peril In The Age of Networked Intelligence* (New York, McGraw Hill, 1997), reintroducing the term originally coined by Alvin Toffler; A Bruns, *Blogs, Wikipedia, Second Life, and Beyond. From Production to Produsage* (Bern, Peter Lang, 2008).
[13] G Coleman, *Coding Freedom: the ethics and aesthetics of hacking* (Princeton, Princeton University Press, 2013).

'commons-based peer production'.[14] These are decentralised peer collaborative projects such as Wikipedia, where individual users work together for no fee to create the end-product, and over which no traditional intellectual property right is asserted and so the product is free to access and use.[15] This kind of information production is usually not explicitly exclusionary regarding who is entitled to participate in its creation, and is non-hierarchical inasmuch as individuals participating in the project are all on the same level and there is no official manager or owner dictating what must happen. Thus the process is free to join, and the product of the process is free to use and access. In addition, the cooperation among the individuals participating is not dependent on 'either market signals or managerial commands' and so elements of hierarchy are not present.

One significant benefit of these alternative platforms is that they decrease the extent to which individuals can be manipulated by the owners of the facilities on which they depend for communication – thus enhancing an individual's freedom and autonomy from hierarchical bureaucratic power, whether public or private. Yet the current legal and regulatory system is based on this public-private binary, having been formulated in an epoch prior to decentralised, non-proprietary and non-hierarchical information production. As a result, the system contains certain assumptions about the state of the world which no longer necessarily hold true.[16]

1.2 The Internet and power

However, despite the cyberlibertarians and then the emergence of commons-based peer production, the freedom-enhancing nature of the Internet has been far from clear cut.[17] Both the state and corporate actors reasserted their presence and power in the Internet ecosystem in various ways, including during the 1990s. Even if it is true that the Internet was a free(r)

[14] Benkler, *Wealth of Networks*; Y Benkler, 'From Consumers to Users: Shifting the Deeper Structures of Regulations Towards Sustainable Commons and User Access' (2000) 52 *Federal Communications Law Journal* 561.
[15] Benkler, *Wealth of Networks.*
[16] Daly, 'Free Software and the Law'; Coleman, *Coding Freedom.*
[17] J Curran, 'Reinterpreting the internet' in Curran, Fenton and Freedman (eds), *Misunderstanding the Internet.*

space during this time, when states and markets had not fully acknowledged the important of the Internet, '[g]overnments and large multinational firms now have pervasive presences in cyberspace'.[18] This may not be surprising: Wu has observed a tendency over time for predecessor communications technologies which started out with similar decentralised and open philosophies to move towards centralisation and more 'closed design'.[19]

Governments of both liberal democracies and authoritarian regimes, instead of fading out of cyberspace, in fact managed to assert political and legal control over the medium in various ways.[20] Aside from the overall success of repressive regimes such as China to contain their citizens' Internet access to 'permitted' practices,[21] so-called 'liberal democracies', led by the US, have engaged in mass surveillance of their citizens' online activities as well as the online activities of citizens (and leaders) of other countries, including supposed allies,[22] and certain kinds of content censorship have also manifested in these jurisdictions.[23] Although the enforceability of existing laws may be challenged by the Internet's decentralised design and transnational reach, nation-states have been able to regulate what occurs physically in their territory, and so online companies or users with some kind of presence whether physical, the existence of assets or infrastructure in a certain jurisdiction could be subjected to local laws, at least in part.[24] While it could be said that some 'ungovernable' (or very difficult to govern) parts of the Internet remain at the edges with decentralised initiatives such as Tor, cryptocurrencies and other activities 'under the radar' in the deep web,[25] governments'

[18] L Solum, 'Models of internet governance' in LA Bygrace and T Michaelsen (eds), *Internet Governance: Infrastructure and Institutions* (Oxford, Oxford University Press, 2009) 58.
[19] T Wu, *The Master Switch: The Rise and Fall of Information Empires* (New York, Knopf, 2010).
[20] JL Goldsmith and T Wu, *Who Controls the Internet? Illusions of a Borderless World* (Oxford, Oxford University Press 2006).
[21] See: R MacKinnon, 'Flatter world and thicker walls? Blogs, censorship and civic discourse in China' (2008) 134 *Public Choice* 31; B Liang and H Lu, 'Internet Development, Censorship and Cyber Crimes in China' (2010) 26(1) *Journal of Contemporary Criminal Justice* 103; E Morozov, *The Net Delusion: How Not to Liberate the World* (New York, Public Affairs, 2011).
[22] See: D Lyon, 'Surveillance, Snowden and Big Data: Capacities, consequences, critique' (2014) *Big Data and Society* 1.
[23] See: L Edwards, 'Pornography, Censorship and the Internet' in L Edwards and C Waelde (eds) *Law and the Internet* (Oxford, Hart, 2009); TJ McIntyre, 'Child Abuse Images and Cleanfeeds: Assessing Internet Blocking Systems', in I Brown (ed) *Research Handbook on Governance of the Internet* (Cheltenham, Edward Elgar, 2012); H Carrapico and B Farrand (eds), *The Governance of Online Expression in a Networked World* (Abingdon, Routledge 2015).
[24] Goldsmith and Wu, *Who Controls the Internet?*.
[25] P Biddle and others, 'The Darknet and the Future of Content Protection' in E Becker and others (eds), *Digital Rights Management: Technological, Economic, Legal and Political Aspects* (Berlin, Springer, 2003); P De Filippi, 'Bitcoin: a regulatory nightmare to libertarian dream' (2014) 3(2) *Internet Policy Review*; LJ Trautman,

attempts - and indeed successes - in controlling their citizens' Internet experiences would at least dampen how freedom enhancing the Internet actually is.

As regards private power, the emergence of large Internet corporations such as Google and Facebook is contemporary evidence of the (re)emergence of this pole of power in the Internet ecosystem. However, the 'privatisation' of the Internet started earlier: commercial providers 'supplementing the NSFNET backbone with a separate (though connected) national network capacity' and eventually 'the NSF quietly stepped out of the scene by selling off its assets, a process that was completed by April 30, 1995 at which point the Internet was unequivocally a private entity'.[26] The commercialisation of the Internet from the mid-1990s ushered in the development of the online marketplace in its initial, somewhat anarchic, version under limited state control.[27] Running parallel to this was the transition to privatised telecoms utilities in the EU from being state-owned enterprises, the liberalisation of these new markets and the generation of competition within them. The results of both processes, spurred on by similar ideological drivers, has been that the Internet and the infrastructure over which it runs in the EU are highly privatised spheres, with the majority of key actors being for-profit corporations. In addition, concentrations of such private power could be seen from the late 1990s onwards especially over virtual and physical infrastructure.

While Web 2.0 developments have opened up possibilities for users to create and share content, true, non-hierarchical, non-market commons-based peer production initiatives of the type described by Benkler remain few and far between. Aside from a few successful exceptions such as Wikipedia (which also now has a large managerial class and so may no longer be considered non-hierarchical)[28] these initiatives have not been strong and numerous enough to counter the resurgence of power from corporate and state quarters. Private power has managed to integrate itself into various peer production initiatives. One way has been for companies to collaborate on open source projects such as Open Office. Although traditional intellectual property rights are not asserted over such open source projects, the corporations

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'Virtual Currencies: Bitcoin & What Now after Liberty Reserve, Silk Road, and Mt. Gox?' (2014) 20(4) *Richmond Journal of Law and Technology* 1.

[26] BM Leiner and others, 'A Brief History of the Internet' (2009) 39(5) *ACM SIGCOMM Computer Communication Review.*

[27] Curran, 'Rethinking internet history' 34-42.

[28] See: N Tkacz, *Wikipedia and the Politics of Openness* (Chicago, University of Chicago Press, 2015).

involved often invest significant sums of money in them, with the motivation usually being that they are able to make profit through (proprietary) associated products and services eg user manuals, support etc.[29]

Another way private power has reasserted itself in Web 2.0 has been by providing the very platform over which users coordinate, including the most popular among users such as Facebook, Google's services and Twitter. While some of these platforms began life as small start-ups, due to network effects, economies of scale and scope,[30] and the performance of a 'curatorial' role over the plethora of content and other services available online,[31] some of them have ended up as large players with quasi-monopolistic status in their respective markets.

Although many of these platforms are free for users to use, in terms of costing them nothing financially, the for-profit corporations which run them make money by monetising the content that these users create using their platforms and services, a process which has been critiqued through the term 'digital labour'.[32] In addition, by participating in these corporately-owned web-based platforms and services, users and their behaviour generate a large amount of data which is stored, analysed and sold on to third parties by the platform owner – a process which has been termed 'economic surveillance'.[33]

While corporations primarily collect this data to use it for their own economic purposes or sell it on to advertisers or other firms, these large pools of user data have also proved useful to law enforcement and security agencies in both liberal democracies and authoritarian regimes. States access this data gathered by corporations either by obliging them to comply

[29] G Robles and others, 'Corporate Involvement of Libre Software: Study of Presence in Debian Code over Time' in J Feller and others (eds), *Open Source Development, Adoption and Innovation* (Berlin, Springer, 2007).
[30] A Graham, 'Broadcasting Policy and the Digital Revolution' (1998) 69 B *The Political Quarterly* 30.
[31] D Freedman, 'Web 2.0 and the death of the blockbuster economy' in Curran, Fenton and Freedman (eds), *Misunderstanding the Internet*.
[32] See: T Terranova, 'Free Labor: Producing Culture for the Digital Economy' (2003) *Electronic Book Review*; T Scholz (ed) *Digital Labor: The Internet as Playground and Factory* (Abingdon, Routledge, 2013).
[33] C Fuchs, 'Critique of the Political Economy of Web 2.0 Surveillance' in C Fuchs and others (eds), *Internet and Surveillance: The Challenges of Web 2.0 and Social Media* (Abingdon, Routledge, 2011).

with their demands (through using legislative means), by offering incentives for these entities to do so voluntarily and sometimes, it has been claimed, by hacking into the data stores or introducing secret 'backdoors' into software and hardware. Birnhack and Elkin-Koren have termed collaboration between states and large online corporations 'the Invisible Handshake' since the average citizen is not usually aware of the extent of this cooperation between the two axes of power, which is often fairly clandestine and 'beyond the reach of judicial review'.[34] Cohen has also remarked on these 'architectures of control' emerging where state and private interests - already deeply and inevitably intertwined - emerge.[35]

Regulation that governments impose on these platforms for surveillance and policing purposes may also contribute to market concentration given they increase barriers for potential new entrants into that particular market – which also has the effect of making them easier for governments to regulate given smaller numbers of companies able to operate in a particular market.[36] These platforms increasingly fulfil a key role in actively policing user activity for purposes including but going beyond national security and serious crime – such as defamation, data protection and copyright.[37]

Thus, despite the origins of the Internet in a publicly-funded project and the cyberlibertarian claims from the 1990s regarding the Internet's enhancement of economic and political freedom for users, the reality is that the Internet has become a heavily commodified space which has seen the emergence of for-profit actors performing a 'gatekeeping' function over data flows – both for their own economic benefit as well as for the state's surveillance and law enforcement capabilities.

2 User autonomy

[34] Birnhack and Elkin-Koren, 'The Invisible Handshake'.
[35] J Cohen, *Configuring the Networked Self: Law, Code and Everyday Practice* (New Haven, Yale University Press, 2012), 177.
[36] Birnhack and Elkin Koren, 'The Invisible Handshake'.
[37] See: L Edwards, 'The rise and fall of online intermediary liability' in Edwards and Waelde (eds), *Law and the Internet*, 47-88; G Sartor and M Viola de Azevedo Cunha, 'The Italian Google-Case: Privacy, Freedom of Speech and Responsibility of Providers for User-Generated Content' (2010) 18(4) *International Journal of Law and Information Technology* 356; O Lynskey, 'Control over personal data in a digital age: *Google Spain v AEPD and Maria Costeja Gonzalez'* (2015) 78(3) *Modern Law Review* 522.

Yet, it is the Internet's promise or possibility of enhanced individual freedom from bureaucratic structures of production which is important. The Internet has given rise to the more widespread possibility of individuals producing information as well as consuming it, facilitated by its many-to-many structure. While there are axes of hierarchical power which impede the full realisation of this promise, prosumers do exist, and in doing so cast doubt on whether the implicitly passive character of consumers traditionally envisaged by the law is appropriate. The Internet thus does provide the potential to enhance user autonomy both vis-à-vis the State and private corporations and includes an increased space for 'non-market' production.

Users can be conceptualised as human individuals ('natural persons' as opposed to 'legal persons') who both produce and consume information over the Internet. There has been some debate of what precisely constitutes a 'user' in the context of copyright law,[38] media and communications scholarship,[39] and science and technology studies (STS).[40] Here, no definitive position is taken as to which approach enumerated in these debates is the correct one: suffice it to say, the objective of this book is to introduce the concept of the individual as *user* into EU competition law and regulation which hitherto has only recognised the individual as *consumer* – an inappropriate and outdated concept given the increased capacity for individuals to produce as well as consume facilitated by the Internet (and other new technologies such as 3D printing).

One argument of this book is that 'user autonomy' is a more appropriate objective for law and regulation to achieve than 'consumer welfare'. This idea of user autonomy used here is inspired by Raz's conception of personal autonomy, which sees it as an end in itself ie deontologically:

> The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of

[38] See: J Cohen, '*The Place of the User in Copyright Law' (2005)* 74 *Fordham Law Review* 347; J Liu, 'Copyright Law's Theory of the Consumer' (2003) 44 *Boston College Law Review* 397; J Meese, 'User production and law reform: a socio-legal critique of user creativity' (2015) 37(5) *Media Culture Society* 753.
[39] See: J Hamilton, 'Historical forms of user production' (2014) 36(4) *Media Culture Society* 491; B Griffen-Foley, 'From tit-bits to big brother: a century of audience participation in the Media' (2004) 26(4) *Media, Culture & Society* 533; J Van Dijck, 'Users like you? Theorizing agency in user-generated content' (2009) 31(1) *Media, Culture & Society* 41.
[40] See: M Bakardjieva, *Internet Society: The Internet in Everyday Life* (Thousand Oaks, Sage, 2005).

> personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decision throughout their lives.[41]

Raz's conception of personal autonomy is not antithetical to state action: indeed, he sees a role for the government to 'take positive action to enhance the freedom of their subjects' (while warning of the dangers of concentrating power in the hands of the few).[42] This idea of autonomy involves the presence of meaningful choice in individuals' lives and them being free from 'coercion, restraint, or excessive undue influence', with 'freedom from manipulation [being] as important in this context as freedom from coercion'.[43]

This idea of autonomy, then, entails that individuals should have real choices as to what happens in their lives and should have the freedom to make those choices – and the state should act to facilitate this. However, the state may not have individuals' autonomy in its own interests, especially in the context of the Internet. Thus autonomy also ought to resist the undue influence of concentrations of power which may manipulate or coerce choices and choice-making, and can have both public (ie state-controlled) and private (ie corporate) characters. The malign influence of power with either of these provenances on individuals' autonomy ought to be viewed as suspect.

Although user autonomy is considered according to Raz's deontological view, user autonomy and free online information flows can also be seen to have significance beyond being worthy objectives to pursue in themselves. Free flows of information fit within the conceptualisation of free speech and expression, either explicitly in terms of Art 10 of the European Convention on Human Rights (ECHR) which encompasses the right 'to receive and impart information and ideas', or implicitly in the First Amendment to the US Constitution which protects free speech.[44] Furthermore, free flows of information, or at least political information, for some time has been viewed as a constituent part of a well-functioning (liberal) democracy,[45] and

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[41] J Raz, *The Morality of Freedom* (Oxford, Oxford University Press, 1988) 369.
[42] ibid 427.
[43] Bernal, *Internet Privacy Rights*, 25
[44] Although the US Supreme Court's First Amendment jurisprudence has not always been consistent with this notion. See: BP McDonald, 'The First Amendment and the Free Flow of Information: Towards A Realistic Right to Gather Information in the Information Age' (2004) 65(2) *Ohio State Law Journal* 249.
[45] L Diamond, *Developing Democracy: Towards Consolidation* (Baltimore, John Hopkins University Press, 1999).

even a hallmark of a more 'radical' digital democratic project such as that of WikiLeaks.[46]

There are, however, some limitations to the idea of user autonomy discussed here. Only natural persons (real human beings) and not legal persons (corporations) should be the beneficiaries of user autonomy. Horizontal conflicts of autonomy among individuals are also beyond the scope of this work – such conflicts might include the use of the Internet to vilify others on the basis of their race, sexual orientation, gender and so on, or the conflict between free speech and privacy which might arise in online defamation or the right to be forgotten. Here, instead, the concentration is on the detrimental effects of private economic power in the form of corporations on online information flows.

An ideal of how user autonomy in terms of optimal online information flows can be conceptualised as a state of affairs in which users are in control of their data and what is done with it, they are not subject to censorship, illegitimate restrictions on what they can send and receive, they have the fullest capacity possible to produce and disseminate information as well as consume it, and they are not subjected to blanket surveillance of their activities, whether for the benefit of the state or the benefit of for-profit corporations. Accordingly, this is the objective which EU law and regulation should aim to achieve.

3 User autonomy, non-economic values and EU competition law

While copyright law and debates for its reform have recognised the existence of users, this is not the case for EU competition law. Furthermore, the relationship between user autonomy and this area of law is far from clear cut, especially given the problems contemporary competition law has with including 'non-economic' values in its analysis. Here, the relationship between user autonomy and choice in competition law will be explored, before addressing the problems brought by these non-economic values in competition analysis.

[46] LJ Heemsbergen, 'Designing hues of transparency and democracy after WikiLeaks: Vigilance to vigilantes and back again' (2015)17(8) *New Media and Society* 1340.

3.1 User autonomy and consumer choice

Some element of autonomy may be found in the concept of choice in competition law: competition law, or competitive markets, should operate to give consumers a choice of products and/or services. This is a far more limited idea of choice and choice-making than that envisaged by Raz above, since there is no great concern with the background conditions against which the choice is made (such as imbalances in power, inequalities of resources and other deficiencies in how that choice is facilitated) so long as there have been no recognised violations of the competitive process, such as the formation of a cartel.

This idea of choice in competition law, however, accords with the illusory nature of choice in consumer capitalist society viewed by Horkheimer and Adorno: even though consumers may be able to choose among products that differ in shape, colour and design but all of these products have the same basis or set of fundamental assumptions.[47] Indeed, this illusory choice produces the spectacle of competition, even if there is not a true alternative to what is on offer, and individuals may also be unable to choose an entirely new category of product and service. Yet competition law is indifferent to the 'basis' or 'fundamental assumptions' which products have and is content with this illusory choice.

Competition law also does not concern itself with monopolies along the lines of Ilich's 'radical' ones, which may also reproduce Horkheimer and Adorno's illusory choice. Radical monopolies are monopolies not in the conventional sense of 'the exclusive control by one corporation over the means of producing (or selling) a commodity of service' which 'restrict the choices open to the consumer', but 'the dominance of one type of product rather than the dominance of one brand' which is produced by 'large institutions' rather than individuals or small groups of people.[48] Illich views a radical monopoly as being dangerous or undesirable because it 'imposes compulsory consumption and thereby restricts personal autonomy'. Radical monopolies might exclude the possibility that other structures than highly centralised private for-profit corporations can provide certain products and services, and individuals can only consume these products and services, rather than innovate themselves – given they do not have the tools to do so – or are not permitted to have them. This is close to the imagined

[47] M Horkheimer and TW Adorno, *Dialectic of Enlightenment: Philosophical Fragments* (Palo Alto, Stanford University Press 2002) 97.
[48] I Illich, *Tools for Conviviality* (New York, Harper & Row, 1973) 52.

scenario at the heart of contemporary competition law: that production occurs in bureaucratised structures, and is out of individuals' reach, who must only consume what these structures produce but cannot be empowered to produce themselves.

In any event, even this narrow conception of choice is not dominant within competition analysis since contemporary competition law (in theory anyway) operates to maximise 'consumer welfare' as an objective via the process of competitive markets.[49] This entails that contemporary competition law's objective is not to preserve the competitive process per se in order to offer choice to consumers,[50] although in practice this may amount to rhetoric rather than reality.[51] Both EU and US competition law now share the goal of maximising consumer welfare due to the influence of Chicago School neoclassical economic theory on the two systems,[52] though the EU variety diverges in also having the creation and maintenance of the Single Market as an additional goal.[53] One consequence of this approach has been that the accumulation of market power by an entity to arrive at a monopoly situation, as long as it has not been acquired illegally (eg via participating in a cartel) is not in itself a target for competition law. It is only when that dominant position is "abused" it is sanctioned under legal regimes such as that of the European Union, where an "abuse" of a dominant position is prohibited by Article 102 TFEU.

While 'consumer welfare' itself is a highly disputed term, open to differing interpretations,[54] competition authorities on both sides of the Atlantic carry out their analyses of whether consumer welfare is harmed primarily through the prism of the price for goods and services (including the effect of hypothetical increases and decreases in price on consumers) in order

[49] The objective of welfare was introduced by R Bork in *The Antitrust Paradox* 1st edn (Free Press, 1978) and has subsequently become generally accepted as the goal of competition law and policy. 'Consumer welfare' has been the view of welfare adopted by European and American competition authorities, but Bork himself referred to 'social welfare'. See: O Black, *Conceptual Foundations of Antitrust* (Cambridge, Cambridge University Press, 2010) 33.

[50] See: O Andriychuk, 'Rediscovering the Spirit of Competition: On the Normative Value of the Competitive Process' (2010) 6(3) *European Competition Journal* 575.

[51] P Akman, ''Consumer Welfare' and Article 82EC: Practice and Rhetoric' (2009) 32(1) *World Competition* 71.

[52] CA Jones, 'Foundations of competition policy in the EU and USA: conflict, convergence and beyond' in H Ulrich (ed), *The Evolution of European Competition Law: Whose Regulation, Which Competition?* (Cheltenham, Edward Elgar, 2006).

[53] SM Ramirez Perez and S van de Scheur, 'The Evolution of Law on Articles 85 and 86 EEC [Articles 101 and 102 TFEU]: Ordoliberalism and its Keynesian Challenge' in KK Patel and H Schweitzer (eds), *The Historical Foundations of EU Competition Law* (Oxford, Oxford University Press, 2013).

[54] JF Brodley, 'Economic Goals of Antitrust: Efficiency, Consumer Welfare and Technological Progress' (1987) 62 *New York University Law Review* 1020, 1032.

to define markets in the first place and determine how competitive they are. Although other factors can be included in this analysis, such as a decline in quality of goods or services, or restrictions on innovation in a sector, competition analysis uses primarily quantitative methods which are adept at measuring price, and is not so well suited to assessing these other, less easily quantifiable values - especially in scenarios where there is a zero monetary price.[55]

Yet if there is no clear conceptual definition of 'consumer welfare', it may be possible, conceptually at least, to integrate some broader values into its analysis that might give rise to the protection of something approaching 'user autonomy'. However, the incorporation of 'non-economic' values into the competition analysis is neither conceptually nor empirically simple.

3.2 Non-economic values in EU competition law

The idea of 'consumer welfare' even within the confines of mainstream competition law is a problematic concept. A precise definition of 'consumer welfare' is difficult to come by, and at first blush it also makes the assumption that consumers are an amorphous mass with the same needs and interests, which does not reflect the diversity of consumers in reality. It is true that the conception of 'consumer' in EU law is inclusive of 'customers' and so encompasses intermediate customers as well as final consumers even if in practice 'customer welfare' does not always coincide with 'consumer welfare'.[56] It also seems that the definition of 'consumer' will depend on the context in which it is being used: describing the objectives of competition law, determining whether competition rules have been infringed, or in reference to those participating in the rules' enforcement.[57] Attempts have been made to distinguish between different kinds of consumers, such as 'marginal' (ie consumers which value the product in a way which is approximate to its current price, and so very sensitive to price fluctuations) compared to 'infra-marginal' consumers (ie those whose value of the product is a lot higher

[55] MS Gal and DL Rubinfeld, 'The Hidden Costs of Free Goods: Implications for Antitrust Enforcement' (2015) UC Berkeley Public Law Research Paper 2529425, NYU Law and Economics Research Paper 14-44 <http://ssrn.com/abstract=2529425>.

[56] P Akman, ' 'Consumer' versus 'Customer': The Devil in the Detail' (2010) 37(2) *Journal of Law and Society* 315.

[57] A Albors-LLorens and A Jones, 'The Images of the 'Consumer' in EU Competition Law' in D Leczykiewicz and S Weatherill (eds), *The Images of the 'Consumer' in EU Law* (Oxford, Hart Publishing, 2016).

than its original price and so are relatively insensitive to price fluctuations) or even 'ignorant' and 'knowledgeable',[58] but consumers as a whole are even more heterogeneous than these attempts suggest. Furthermore, although the enumerated objective of competition law is now generally accepted to be the maximising of consumer welfare through competitive markets, there is a gaping lack of empirical evidence to suggest that competition or competition law actually achieves a greater measure of consumer welfare however defined.[59]

While it might be argued that competition law and its consumer welfare standard are simply not *supposed* to mirror entirely the interests and concerns of autonomous users, the situation remains that absent sector-specific regulation, competition law acts as large corporate Internet players' arbiter of last resort. This is accompanied by the Chicago School's ideological arguments that there should be no government intervention aside from correcting market failures, since the market is presumed to be a more efficient allocator of resources than the state. Yet, as Cohen remarks, '[i]dealized models of market choice cannot provide a useful template for evaluating the dynamics of constrained, path-dependent choice that predominated in markets for networked or network-capable information technologies'.[60]

From the perspective of competition law, Internet users are a different category of actor than mere consumers, around whom competition law is constructed. Consumers and users may well have overlapping but also different needs and desires, which the concept of 'consumer welfare' that is currently used in competition analysis does not capture. The user does not only care about characteristics of products such as price and quality, but also whether the product comprises more capacity to produce as well as consume. Furthermore, what happens to what the user produces is of high importance – whether it is enclosed as the intellectual property of the web platform used by the user, whether it is shared in a commons or whether it remains under the user's own individual control.

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[58] WS Comanor, 'Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy' (1985) 98 (5) *Harvard Law Review* 983, 991-2. The author posits that it is the preferences of marginal consumers which are more important to suppliers of goods and services since they are more sensitive to changes, yet overall societal gains or losses from changes in the product or service depend on the preferences of all consumers, and so changes which reflect the preferences of marginal consumers may well not reflect those of other kinds of consumers such as the infra-marginal.

[59] Black, *Conceptual Foundations of Antitrust*.

[60] J Cohen, *Configuring the Networked Self*, 181-182.

Accordingly, user autonomy is not identical to consumer welfare. Competition law takes a paternalistic attitude towards consumers, who are characterised as largely passive and without the capacity for production. It is true that consumers are considered not to be entirely passive in competition analysis inasmuch as their ability to switch to competitors' products and services is considered, as well as the barriers they face to exit. However this kind of activity encompasses a very small area of autonomy for individuals and does not go far enough to conceptualise them as having the ability to create as well as consume. Competition law's regard paid to individuals' ability to choose and switch to the alternative products and services from competitors may well be considered one of Illich's radical monopolies inasmuch as this may constitute one type of product which competition law does not envisage consumers making themselves.

In addition, competition law taking into account 'other' 'non-economic' values – essentially those not currently captured by consumer welfare despite pertaining to aspects of the economy - in its analysis may be easier said than done.[61] It is true that Townley has called for EU competition law to have as its task ensuring 'the well-being of its peoples',[62] which would involve goals beyond efficiency. Furthermore, the incorporation of 'social values' into 'economic' areas of law has also been discussed in the context of trade.[63] Yet until recently, the main interaction of EU competition law and 'social' concerns, especially human rights, was comprised by debates around procedural fairness in the course of enforcement.[64]

However, of late two factors have shifted the debate on EU competition law and 'social' or 'non-economic' values: the rise of Big Data and its interaction with competition analyses; and the EU's Charter of Fundamental Rights coming into force.

[61] RJG Claassen and A Gerbrandy, 'Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach' (2016) 12(1) *Utrecht Law Review* 1.
[62] C Townley, *Article 81 EC and Public Policy* (Oxford, Hart Publishing, 2009) 50.
[63] See: A Lang, *World Trade Law After Neoliberalism* (Oxford, Oxford University Press, 2011).
[64] See: A Andreangeli, *EU Competition Enforcement and Human Rights* (Berlin, Edward Elgar, 2008); P Nihoul and T Skoczny (eds), *Procedural Fairness in Competition Proceedings* (Berlin, Edward Elgar, 2015).

3.3 Data, democracy and competition

The European Data Protection Supervisor (EDPS) initiated a public debate on the role of data in competition analyses of online markets in the EU with a 2014 Preliminary Opinion on the subject.[65] It is true that data plays a role of pivotal importance in the Internet ecosystem: it is an input and output of computer processing, and flows of data are what the network carries. Thus, control over the data inputs, outputs and flows has competition consequences as well as those for free expression and privacy.

The EDPS considered that the collection and control of very large amounts of personal data are a source of market power for large players in European Internet markets, and may even constitute 'essential facilities' in certain circumstances, such that a refusal of access to such data may constitute an abuse of dominance. This is not a new issue as such – access to a dominant competitor's data, protected by intellectual property, has been addressed already in certain cases such as *Magill* and *IMS Health*.[66] However, the EDPS also considered that it may be necessary to incorporate violations of the right to data protection into the concept of consumer harm in the context of competition enforcement, for instance when a dominant entity is restricting users' freedom of choice and control over their personal data, such as when they are offered a product for zero monetary price yet 'pay' with the collection of their data and data about their behaviour.[67]

This suggestion of incorporating other values such as data protection – and the idea of user autonomy - into competition analysis, and 'consumer welfare' in particular, is not novel. As mentioned above, Townley has critiqued the sole use of the 'economic' approach including vis-à-vis consumer welfare as omitting other valuable societal goals because they are 'too difficult' to quantify.[68] In addition, Stucke has remarked that competition policy can go

[65] European Data Protection Supervisor, 'Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy' (Preliminary Opinion), (2014) EDPS/2014/06.
[66] Joined Cases C-241 & 242/91 *Radio Telefis Eireann and Others v Commission* [1995] ECR I-743; Case C-418/01 *IMS Health v NDC Health* [2004] ECR I-5039.
[67] EDPS, 'Privacy and competitiveness in the age of big data', 32.
[68] C Townley, 'Which Goals Count in Article 101 TFEU?: public policy and its discontents' (2011) 9 *European Competition Law Review* 441.

beyond promoting economic efficiency, and in fact disperse economic and political power and promote individual freedom, arguing for a 'blended approach' to competition goals.[69] Yet Stucke does not explain very adequately what this would mean across the board of competition investigations and issues, and seems just to be a different interpretation of economic policy objectives in the scope of competition law, such as protecting small and medium businesses.

Historically, competition law has not always been underpinned by the neoclassical economic thought leading to its contemporary 'economic' or quantitative analysis. Even within the history of competition law, accumulations of private power has been put under suspicion for reasons beyond what the final product or service looks like and costs. For instance, German economic movement ordoliberalism considered it the state's role to ensure that the (otherwise) free market fulfils its theoretical potential, and competition as opposed to mere exchange was pivotal in achieving this. If the state does not act in this way, not only would the market economy suffer and not produce optimal results, but that private corporate power was also to be checked due to its potential to undermine the (democratic) political process and government, since economic power could translate into political power. Ordoliberals saw the threat to individual liberty as not only emanating from the government, but also from powerful economic institutions. Competition law had a different role from the current mainstream conception, which is not aimed at achieving optimal consumer welfare or efficiency, but instead at preserving individual freedom against threats from private power, and competition in itself is crucial, an end in itself rather than a mere means to an end.[70] The ordoliberals were not anti-capitalists critical of all sorts of private power, but something more along the lines of critics of unchecked private power and proponents of a social market economy,[71] with a 'strong state' that would be effective in its ability to discharge effectively its duties and responsibilities regarding inter alia the economy such as providing order and facilitating competition.[72] For ordoliberals, thus, competition is not something that occurs naturally in markets, but a process that must be created and maintained by the state. In

[69] M Stucke, 'Reconsidering Antitrust's Goals' (2012) 53 *Boston College Law Review* 551, 590.
[70] M Vatiero, 'The Ordoliberal Notion of Market Power: An Institutionalist Reassessment' (2010) 6 (3) *European Competition Journal* 689.
[71] MA Peters, 'Foucault, biopolitics and the birth of neoliberalism' (2007) 48(2) *Critical Studies in Education* 165.
[72] N Goldschmidt and H Rauchenschwandtner, 'The Philosophy of Social Market Economy: Michel Foucault's Analysis of Ordoliberalism' (2007) Freiburg Discussion Papers on Constitutional Economics 07/4, 8-9

addition to ordoliberalism, the development of antitrust law in the US, especially prior to World War II, pointed to a distrust of the accumulation of private power beyond merely economic reasons, since this could become stronger than the democratic state itself, and the danger was identified in contemporary American society as the concentrated economic power which had arisen since the Great Depression and included cartels.[73]

These views of competition law would give it a more overtly political role than its contemporary manifestation. In practice, this could mean that competition law would intervene in the market on more occasions than it does now, and for reasons that were not strictly economic, or on the basis of other, non-quantitative evidence, employing something like the UK's former 'public interest' test in competition law.[74] Critics could point to such interventions being less predictable and more arbitrary than those which are currently used, giving less legal certainty to market players. Yet, as Endicott notes, law is necessarily vague – because it necessarily uses abstract terms,[75] and here such abstract terms may be these qualitative values that competition law should tackle.

In any event, in Europe (and the US for that matter) neoliberalism - not ordoliberalism or anti-corporatism - is the dominant tendency in competition law and policy. Neoliberalism has come to be used since the 1980s to refer to a resurgence of 19th century *lassiez-faire* economic liberalism.[76] Neoliberalism, inspired by neoclassical economic theories has promoted economic liberalisation, fiscal austerity, free trade, open markets and the privatisation of previously nationalised industries and public services and deregulation/regulation in the most unobtrusive way possible vis-à-vis the functioning of the free market.[77] It has been a guiding current in EU policy (and accordingly the law and

[73] TA Freyer, *Antitrust and Global Capitalism, 1930-2004* (Cambridge, Cambridge University Press, 2006) 22.
[74] See: A Scott, ''The Evolution of Competition Law and Policy in the United Kingdom', in P Mehta (ed), *The Evolution of Competition Laws and their Enforcement: A Political Economy Perspective* (Abingdon, Routledge, 2011), 189-213.
[75] T Endicott, 'Law is Necessarily Vague' (2001) 7(4) *Legal Theory* 379.
[76] See: T Boas and J Gans-Morse, 'Neoliberalism: From New Liberal Philosophy to Anti-Liberal Slogan' (2009) 44(2) *Studies in Comparative International Development* 137; S Clarke, 'The neoliberal theory of society' in A Saad-Filho and D Johnston (eds) *Neoliberalism: A critical reader* (London, Pluto Press, 2005), 50-59.
[77] D Harvey, *A Brief History of Neoliberalism* (Oxford, Oxford University Press, 2005).

regulation produced by this policy) over at least the last 20 years if not longer,[78] and competition and sector-specific regulation have been influenced by its ideas.[79] Buch-Hansen and Wigger have argued that EU competition law has undergone a 'neoliberal transformation' which has been primarily in the interests of transnational globalised capital rather than in the interests of other social groups, challenging the established view that it is consumers (and their 'welfare') who are purported to be the main beneficiaries of competition.[80]

Thus, the critique of private economic power for being problematic for democracy and individual ('political') freedom - as well as for what consumers pay and the quality of products and services - is no longer prominent within the competition discourse, nor incorporated into the current More Economic Approach, as a result of the neoliberal influence over this area of law. In the likely event of no major changes being made to competition law's methodology in the near future, the current version of competition law is not so well-equipped to take into account more qualitative factors, as a regime which operates using mainly quantitative data – to establish relevant markets, market shares and other phenomena. Measuring the extent to which user autonomy or some subset of that such as data protection or personal freedom, is promoted or harmed would seem to be a more qualitative than quantitative exercise, and generally one that will not be measured in financial terms. For non-economic objectives it may be more expedient to use law and policy aside from competition law to achieve them, since using competition law to do so can be costly and ineffective.[81] Competition law has a particular ideology and aims,[82] which may well not be sufficiently conceptually supple to bend to these situations. Yet still, competition law may be looked to in situations where there is an accumulation of private economic power that threatens individuals' 'political' as well as 'economic' freedom merely because it is the one regime *available* in the circumstances, but not because it is a wonderfully *appropriate* part of the law for dealing with such situations.

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[78] See: KW Rothchild, 'Neoliberalism, EU and the Evaluation of Policies' (2009) 21(2) *Review of Political Economy* 213; S Bernhard, 'From conflict to consensus: European neoliberalism and the debate on the future of EU social policy' (2010) 4(1) *Work Organisation, Labour and Globalisation* 175; DS Grewal and JS Purdy, 'Introduction: Law and Neoliberalism' (2014) 77(4) *Law and Contemporary Problems* 1.

[79] C Hermann, 'Neoliberalism in the European Union' (2005) DYNAMO Thematic Paper.

[80] Buch-Hansen and Wigger, *The Politics of European Competition Regulation*. In the US, an empirical study suggested that antitrust policy did not actually improve consumer welfare in practice: RW Crandall and C Winston, 'Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence' (2003) 17(4) *Journal of Economics Perspectives* 3.

[81] Townley, *Article 81 EC and Public Policy*.

[82] WH Page, 'Ideological Conflict and the Origins of Antitrust Policy' (1991) 66(1) *Tulane Law Review* 1.

3.4 Fundamental rights and competition

In both Europe and the US judicial and administrative bodies are under duties to apply the law in ways which are not incompatible with fundamental rights[83] and the Constitution respectively.[84] Indeed, fundamental rights and the Constitution have primacy over other laws in their respective legal systems.[85] In the EU, the coming into force of the Charter of Fundamental Rights has shifted the discussion of non-economic values in competition law, since these rights are addressed to the EU's institutions and bodies and Member States' national authorities when implementing EU law. Along with more traditional human rights, the Charter elevates data protection to a right – but it is unclear how these rights interact with other areas of EU law such as competition.[86] Currently, discussion on how this interaction will play out is theoretical since there have been no concrete incidents since the Charter's coming into force where EU competition law has had to encounter fundamental rights. Yet there is some speculation on what shape this interaction may take.

One consequence of the existence of the Charter and its rights may entail be that the judiciary or administrative body cannot ignore these rights when investigating or adjudicating competition cases, or at very least should not produce an outcome which is incompatible with these rights. Since rights are not solely economically-based, then this would inevitably involve dealing with non-economic values. However taking account of rights may prove

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[83] Due to the European Convention on Human Rights to which all EU Member States are parties; and the Charter of Fundamental Rights of the European Union which is binding on EU institutions. The question of the EU's accession to the ECHR is an ongoing issue at the time of writing after the CJEU's Opinion in late 2014 that such accession was incompatible with EU law. See: Opinion 2/13 of the Court 18 December 2014 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=480235>.

[84] See Roberts CJ at 31-32 in *National Federation of Independent Business v Sebelius* 567 U.S. ___ (2012), 132 S.Ct 2566.

[85] DH Ginsburg and DE Haar, 'Resolving Conflicts between Competition and Other Values: The Roles of Courts and Other Institutions in the U.S. and the E.U.' in P Lowe and M Marquis (eds), *European Competition Law Annual 2012: Public Policies, Regulation and Economic Distress* (Oxford, Hart Publishing, 2014).

[86] C Kuner and others, 'When two worlds collide: the interface between competition law and data protection' (2014) 4(4) *International Data Privacy Law* 247; F Costa-Cabral and O Lynskey, 'The Internal and External Constraints of Data Protection on Competition Law in the EU' (2015) LSE Legal Studies Working Paper 25/2015 <http://ssrn.com/abstract=2703655>.

institutionally difficult given the 'explicitly technocratic remit' of many EU telecoms regulators (some of which also have competition investigatory powers) and even for those with no legislative impediment to taking account of human rights, their organisational culture may preclude the consideration of rights in practice – or at least take those responsible out of their professional comfort zone.[87] Costa-Cabral and Lynskey argue that data protection values could be taken into account in a competition analysis of a product or service's 'quality', such as by assessing the 'quality' of competitors' data use policies, an assessment for which data protection can serve as a 'normative yardstick'.[88]

There are some indications of what this kind of approach in competition law would look like from the 'constitutionalisation' phenomenon in some EU Member States' domestic private law – namely the UK, Netherlands and Germany.[89] This has involved the application of fundamental rights in certain disputes between private parties in contract and tort, such as in situations where there are several possible interpretations of these laws, the court should follow the interpretation which best upholds the parties' fundamental rights. To the extent that the promotion of user autonomy would include the promotion of rights such as free expression, privacy, and freedom of assembly then it may be advanced through similar means in competition law. By analogy, if there are several possible applications of competition law to a particular scenario, then the competition authority should proceed with the application which best upholds data protection, or free expression, or autonomy.

While this method could be incorporated into competition analyses without too much legislative upheaval (although possibly some practical issues that could be solved by closer coordination between eg data protection authorities and competition authorities), the problem may be that competition law does not apply to a given circumstance in the first place: either there is no finding of dominance, or even if there is dominance, there is not a recognised

[87] I Brown and CT Marsden, *Regulating Code: Good Governance and Better Regulation in the Information Age* (Cambridge, MIT Press, 2013) 142.
[88] Costa-Cabral and Lynskey, 'The Internal and External Constraints of Data Protection on Competition Law in the EU', 17.
[89] See: T Barkhuysen and SD Lindenbergh, *Constitutionalisation of Private Law* (Leiden, BRILL, 2006); S Grundmann (ed), *Constitutional Values and European Contract Law* (Alphen aan den Rijn, Kluwer Law International, 2008); and C Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Alphen aan den Rijn, Kluwer Law International, 2008).

abuse – even if those circumstances harm user autonomy.

Thus, a suspicion of anticompetitive abuse – which absent a merger situation necessitates either a dominant position or evidence of collusion – is still a necessary prerequisite for triggering a competition investigation and analysis, regardless of what other values may be incorporated into that analysis. For this reason, it may remain that this is not the most effective way of securing data protection, or any other desirable (non-economic) value, regardless of any move to 'constitutionalise' competition law or using data protection measures as a measure of 'quality'. In any event, 'the pursuit or consideration for other non-economic goals under competition law is at odds with neo-liberalism',[90] and so likely to give rise to much regulatory tension if competition bodies find themselves under press to apply non-economic values that may be encompassed by human rights.

The dominance of the More Economic Approach in contemporary EU competition law, underpinned by quantitative analyses of consumer welfare and premised on neoclassical economics, entails that reform to encompass the non-economic aspects of user autonomy would not be simple. Indeed, as already mentioned, a discussion of the possible paths competition law reform could take is outside the scope of this book. Aside from the possible constitutionalisation of competition law through applications and interpretations in accordance with the protection of fundamental rights, any further move towards the incorporation of 'non-economic' values, such as those promoting user autonomy, individual freedom and/or democracy, into the current competition law analysis of consumer welfare is likely to be difficult if not impossible in practice.

4 Private power and fundamental rights

EU competition law is not the only part of the legal and regulatory framework being examined for its ability to achieve user autonomy when confronted with private economic

[90] F Feretti, *Competition, the Consumer Internet, and Data Protection* (Berlin, Springer, 2014) 94

power over online information flows. Fundamental rights are another important area which, can act to protect autonomy, especially free expression and privacy. However, the extent to which these rights apply to infringement by private entities is not clear-cut, especially with the ascendancy of neoliberalism over the last few decades.

The relationship between fundamental human rights and neoliberalism is contested and complex.[91] One view is that economic liberalism and human rights in general have a productive and strong relationship, and both can be achieved through similar methods.[92] In this view, human rights can also be seen as a 'civilising' force vis-à-vis transnational capitalist globalisation, correcting it if things go awry.[93] Another view would be that fundamental rights are not inherently capitalist or neoliberal, and can be guided by, for instance, anti-statist anti-capitalist anarchist ideology to enhance individual autonomy beyond (bureaucratic) capitalist and socialist conceptions.[94] In any event, the practical application of fundamental rights has been shaped by neoliberal norms. Fundamental rights are mainly enforceable vis-à-vis the nation-state despite there being certain transnational accumulations of capital which are more powerful than certain countries, and also despite the very real violation of individuals' rights that these corporations' business practices can entail in certain circumstances.[95]

Data protection stands out as an area of EU law which seems to have a theoretical basis in fundamental rights (namely privacy), yet which applies to private entities and not just the state and its emanations. While EU data protection law thus conceived would appear not to fit into the neoliberal paradigm, its nature is actually hybrid: it has a fundamental rights

[91] S Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' (2015) 77 *Law and Contemporary Problems* 147.

[92] EU Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights in the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13 *European Journal of International* Law 621, 621–22. See also EU Petersmann, 'Human Rights and International Trade Law: Defining and Connecting the Two Fields' in T Cottier, J Pauwelyn and E Burgi (eds) *Human Rights and International Trade* (Oxford, Oxford University Press, 2005).

[93] D Kinley, *Civilising Globalisation: Human Rights and the Global Economy* (Cambridge, Cambridge University Press 2009), 1-3.

[94] S Turner, 'Anarchist Theory and Human Rights' in N Jun and S Wahl (eds), *New Perspectives on Anarchism* (Lanhan, Lexington Books, 2010).

[95] See: S Deva, 'Human Rights Violations By Multinational Corporations and International Law: Where From Here?' (2003) 19 *Connecticut Journal of International Law* 1; D Kinley and J Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44(4) *Virginia Journal of International Law* 931.

component but also an economic basis in seeking to facilitate free trade in personal data within the EU internal market.[96] Moreover, Lynskey views data protection as a 'permissive' legal regime which allows the collection of personal data so long as certain criteria are met, 'ostensibly endors[ing] the commodification of personal data'.[97] Otherwise, data protection can be seen to exist to correct a market failure, namely the lack of privacy protection of personal information that market forces alone would entail.[98]

Moreover, data protection law is not always well-enforced in practice.[99] Part of this lack of enforcement involves the lack of transparency around data collection and use, the 'black boxes' into which data goes, which challenge effective regulation.[100] Indeed, the argument has been made that existing laws and their enforcement (which itself is patchy across Member States) have only a marginal effect on real-world data processing practices.[101] Furthermore, neoliberal forces can be seen at work in the large amount of industry lobbying employed to influence the recent reform of EU data protection law, in a way which would minimise the effect of these reforms on these companies' business practices.[102]

5 Regulating for user autonomy

In light of these deficiencies with existing areas of law, some commentators have discussed how a more expansive idea of what is termed here 'user autonomy' might be applied to the normative governance of the Internet. For instance, Benkler is of the view that the Internet should be regulated in a way which enables a wide distribution of the capacity to produce and disseminate information.[103] Furthermore, Elkin-Koren and Salzberger advocate that markets on the Internet should be evaluated 'not only like any other market by the criteria of

[96] O Lynskey, *The Foundations of EU Data Protection Law* (Oxford, Oxford University Press, 2015).
[97] Ibid, 238.
[98] A Acquisti, 'Privacy and Market Failure: Three Reasons For Concern, and Three Reasons for Hope' (2012) 10 *Journal on Telecommunications and High Technology Law* 227.
[99] G Greenleaf, 'Global data privacy in a networked world' in I Brown (ed) *Research Handbook on Governance of the Internet* (Berlin, Edward Elgar, 2012).
[100] See: F Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Cambridge, Harvard University Press, 2015).
[101] BJ Koops, 'The trouble with European data protection law' (2014) 4(4) *International Data Privacy Law* 250.
[102] See: WG Voss, 'Looking at European Union Data Protection Law Reform Through A Different Prism: The Proposed EU General Data Protection Regulation Two Years Later' (2014) 17(9) *Journal of Internet Law* 1.
[103] Benkler, 'From Consumers to Users'.

efficiency, but also as a public sphere, commons or mechanism for private and collective actions'.[104] Frishmann has also argued that the Internet should be managed as a 'commons', and the debate should be around the question of what kind of Internet environment is demanded by society as a whole rather than the narrow view of competition and neoclassical economics-driven regulation.[105] Finally, Brown and Marsden have advocated that both human rights and economic efficiency concerns be taken into account when regulating the Internet in order to take account of individuals' production as well as consumer functions - what they term 'prosumer law'.[106]

Yet in practice, ex ante Internet regulation has been approached differently. These existing approaches to Internet regulation can broadly be grouped into three categories: 'traditional' state-led regulation; industry self-regulation; and multistakeholder co-regulation.[107] The experience so far with these different regulatory categories does not inspire confidence that user autonomy will be upheld if ex ante regulation is employed.

Industry self-regulation is the process 'whereby an industry-level organization sets rules and standards relating to the conduct of firms in the industry' either on a 'voluntary' basis or with some degree of government mandate.[108] While self-regulation can be more 'efficient' than state-led regulation, it has been heavily critiqued for the unlikelihood that market participants will actually act in the best interests of society overall rather than their own business interests. As Braithwaite puts it, '[s]elf-regulation is frequently an attempt to deceive the public into believing in the responsibility of an irresponsible industry [and s]ometimes … a strategy to give the government an excuse for not doing its job'.[109]

State-led regulation may be seen as more democratically legitimate inasmuch as the public

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[104] N Elkin-Koren and EM Salzberger, *Law and Economics of Cyberspace: The Effects of Cyberspace on the Economic Analysis of Law* (Berlin, Edward Elgar, 2004) 27.
[105] B Frischmann, *Infrastructure: The Social Value of Shared Resources* (Oxford, Oxford University Press, 2012) 317-327.
[106] Brown and Marsden, *Regulating Code* 20.
[107] ibid 2.
[108] N Gunningham and J Rees, 'Industry Self-Regulation: An Institutional Perspective' (1997) 19(4) *Law and Policy* 364.
[109] J Braithwaite, 'Responsive Regulation for Australia' in P Grabosky and J Braithwaite, *Business Regulation and Australia's Future* (Griffith, Australian Institute of Criminology, 1993) 93.

interest may be better represented by the state rather than just the self-interest of business, and the regulators may be democratically accountable to the legislature or even directly to the electorate. In theory, thus, ex ante state-led regulation of private economic power may be seen as another means of promoting user autonomy in Internet markets, and may be preferred to a reform of competition law.

However, state-led regulation also has its weaknesses, and in the EU its application to concentrations of private economic power, particularly in the communications sector, has been influenced by neoliberalism. Telecoms services were formerly run by state-owned monopolies in each EU Member State, but since the 1980s have been subjected to a process of privatisation, with the liberalisation of telecoms markets which have opened the telecoms incumbent up to competition, reflecting neoliberal ideology.[110] In most EU Member States, the nation-state has gone from having a very large amount of control over telecoms by owning and operating the monopoly provider, to a much-reduced role in their operation, as the arbiter of the conduct of the privatised players.[111] In the wake of these developments, ex ante regulation is only imposed to aid these markets in becoming competitive, such that when they are deemed competitive, market-based solutions to problems will suffice. Regulation should only apply when markets are not competitive, and then should 'fade out'. Competitive markets do not require *ex ante* regulation unless there is a market failure, and regulation can be introduced only to address that failure – and not for other reasons, e.g. social policy. Indeed, there are many arguments advanced *against* regulation where there are no 'market failures' and even counsel to forbear from regulation even where there *are* market failures, because of, for instance, the adverse impact regulation may have on innovation particularly in high tech markets.

One systemic problem of state-led regulation is the possibility of 'regulatory capture' – that the regulator does not regulate in some notion of the 'public interest' but is subject to

[110] S Simpson, *'Pervasiveness and efficacy in regulatory governance – neo-liberalism as ideology and practice in European telecommunications reorganisation'* (European Consortium for Political Research Standing Group on Regulatory Governance Second Biennial Conference, (Re)Regulation in the Wake of Neoliberalism. Consequences of Three Decades of Privatization and Market Liberalization, Utrecht, June 2008).

[111] While it is true that some EU nation-states still retain some level of ownership in the incumbent telecoms provider, the expectation is that such ownership will eventually be relinquished in favour of full privatisation.

'capture' by the economically powerful and so its regulatory output reflects those interests.[112] While it is true that regulatory theory has moved beyond a 'pure interest-group driven analysis' to take account of institutional design for instance,[113] regulatory capture is still attempted (and can be successful) in practice, including in the EU.[114] Brown and Marsden note 'widespread' capture of regulators and legislators in the field of copyright law, especially as applied to the Internet – as well as other 'government failures' in regulating the Internet such as the 'overregulation' of censoring content.[115]

These problems detract from the likelihood of ex ante state-led regulation being successful in advancing Internet users' autonomy in the face of accumulations of private economic power. These corporations are likely to lobby to ensure that such regulation is not enacted since it would impose further obligations on them and curtail lucrative business practices. Examples of this happening in practice have been the corporate lobbying around net neutrality and the forthcoming data protection regulation. While both of these measures, as will be seen later, would go some way to advancing users' interests, corporate lobbies – and their Member States allies – have ensured that they are not overly invasive of many practices which inhibit user autonomy.

Furthermore, even where ex ante state-led regulation may be enacted which *would* go some way at least to enhancing users' autonomy, the time taken to arrive at this stage may be so long that the regulation becomes too little, too late. This is precisely the case with the EU's net neutrality regulation. Net neutrality was first raised as a possible policy issue in the early 2000s, yet it has taken more than ten years to arrive at the point where ex ante regulation will be imposed on ISPs. Business practices and technology have moved on considerably in the

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[112] See: R Coase, 'The Economics of Broadcasting and Government Policy' (1966) 56(1/2) *The American Economic Review* 440; GJ Stigler, 'The Theory of Economic Regulation' (1971) 2 *Bell Journal of Economics and Management* 3.

[113] See: R Baldwin and others, 'Introduction: Regulation – the Field and the Developing Agenda' in R Baldwin and others (eds), *The Oxford Handbook of Regulation* (Oxford, Oxford University Press, 2010).

[114] See: Corporate Europe Observatory, 'The record of a Captive Commission: The 'black book' on the corporate agenda of the Barroso II Commission' (Brussels, 2014) <http://corporateeurope.org/power-lobbies/2014/05/record-captive-commission>.

[115] Brown and Marsden, *Regulating Code* 2. Farrand has also examined lobbying in EU copyright law formation: B Farrand, 'Lobbying and Lawmaking in the European Union: The Development of Copyright Law and the Rejection of the Anti-Counterfeiting Trade Agreement' (2015) 35(3) *Oxford Journal of Legal Studies* 487.

last ten years while the proposed regulation does not address them fully. The 'light touch' model of economic regulation seems to have created a situation in which there is extreme caution on the part of European organs aside from the Parliament to introduce such ex ante regulation vis-à-vis concentrations of private economic power, and so in practice it may not be a very efficacious route to protecting and promoting user autonomy.

The multistakeholder co-regulatory model can be conceptualised as a regulatory 'third way' which is neither state-led regulation nor industry self-regulation, and which explicitly involves consumers as part of the institutional setting for regulation, for which it claims more legitimacy as compared to these other forms of regulation.[116] In practice, co-regulation can take various forms, but what they have in common is 'the fact that the regulatory system is made up of a complex interaction of a general framework of legislation and a self-regulatory body'.[117]

Multistakeholder co-regulation encompasses nation-states, industry as well as other stakeholders, typically from the 'technical community' and civil society. While this may aid the legitimacy of the regulatory process, the presence of these participants in the regulatory process may also be critiqued – particularly those from civil society not being representative of the citizenry more generally and thus raising questions of effectiveness, accountability and legitimacy, or civil society groups only being included as a window-dressing exercise, a criticism which has been levelled at the multistakeholder process in ICANN.[118] Furthermore, the multistakeholder fora currently in existence tend to emphasise 'governance' rather than 'regulation' or 'legislation' as such and form more of a 'conversation' around the issues under consideration rather than the formation of enforceable norms, with a notable example of this being the annual Internet Governance Forum whose impact (or lack thereof) can be called into question.[119] The extent to which these multistakeholder processes may represent user autonomy is limited in two dimensions: the deficiencies in representation these stakeholders encompass; and the lack of enforceable norms these processes may produce in practice – or

[116] CT Marsden, *Net Neutrality: Towards a Co-Regulatory Solution* (London, Bloomsbury, 2010) 164.
[117] ibid
[118] See: M Mueller , *Networks and states: The global politics of Internet governance* (Cambridge, MIT Press, 2010).
[119] Ibid.

that the enforceable norms which are produced may reflect government and business interests more than civil society's.

Finally, given the state's evident interest in the surveillance of users, and the constitutional convenience of this surveillance being carried out by private entities, strong regulation - whether state-led, self-regulation or co-regulation - which protects and promotes user autonomy (and in particular the data privacy aspects thereof) is unlikely to be implemented in practice. Users may have to look elsewhere than the law for realistic and immediate ways in which their autonomy can be advanced in the Internet sphere.

6 Better ways of achieving user autonomy?

If law and regulation are deficient in the ways enumerated above, then users may consider turning to extra-legal solutions in order to enhance their online autonomy.

Benkler's model of non-hierarchical, non-market 'commons-based peer production' is not dominant in the Internet ecosystem, but '[its] logic radically contradicts that of capital' and thus can be looked to as an alternative to the status quo for achieving user autonomy.[120] In building this alternative, Bauwens acknowledges different schools of thought around the commons, including those approaches which are compatible with capitalism, but instead of opposing those approaches per se, advocates 'efforts to make the commons more autonomous from profit-maximizing entities and the system as a whole'.[121] In making the commons more autonomous from the current (neoliberal capitalist) system, individuals become more autonomous from both bureaucratised state and corporate power – a point recognised by

[120] J Rigi, 'Peer Production as an Alternative to Capitalism: A New Communist Horizon' (2012) 1 *Journal of Peer Production.*
[121] M Bauwens, 'From the Theory of Peer Production to the Production of Peer Production Theory' (2012) 1 *Journal of Peer Production.*

Benkler himself in recent writing.[122]

This goes beyond the 'infrastructure as a commons' argument advanced by Frischmann, who advocates commons *management* (although not ownership) for the Internet and communications networks - a resource management principle which entails that the resource is available to all within a community on a non-discriminatory basis. Individuals' autonomy, however, can be better served by infrastructure which is not only managed on a commons basis but also owned and controlled by the peers themselves on a fragmented, decentralised basis.[123] For instance, mesh networks and community clouds are technical solutions offered which can operate both under commons management and under commons ownership and control.[124]

Thus, as a result of the deficiencies in the existing legislation and regulatory approaches in the EU, user autonomy, when faced with concentrations of private economic power performing gatekeeping functions over online information flows, may best be pursued and advanced outside of legal and regulatory structures. The alternative methods suggested are 'code-based' ie infrastructure, software, online intermediaries and other tools. Unlike Lessig, 'code' in this sense is not considered in a technodeterministic fashion, which arguably has its own roots in neoliberal/neoclassical ideas of economic rationality.[125] Instead, the technical solutions suggested are designed with a particular view of society and technology in mind, one which adheres to the idea of user autonomy, by preserving privacy, enabling expression and resisting both corporate and state control. The code-based solutions suggested, as will be seen, are embodiments of users' own autonomy through peer production on a commons-basis as well as are designed to promote their own autonomy – particularly through the use of peer to peer design.

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[122] Y Benkler, 'Practical Anarchism: Peer Mutualism, Market Power and the Fallible State' (2013) 41(2) *Politics & Society* 213.

[123] Although this may be difficult to conceptualise for Western legal systems which attribute property ownership to sole individuals or formalised legal persons. See: M Dulong de Rosnay, 'Peer to Peer as a Design Principle for Law: Distribute the Law' (2015) 6 *Journal of Peer Production.*

[124] See: P De Filippi and F Treguer, 'Expanding the Internet Commons: The Subversive Potential of Wireless Community Networks' (2015) 6 *Journal of Peer Production.*

[125] See: V Mayer Schonberger, 'Demystifying Lessig' (2008) *Wisconsin Law Review* 713, 737.

It is acknowledged that these value-imbued code-based alternatives to law and regulation are not perfect in their enhancement of user autonomy – there may be barriers to participation for users, such as a lack of technical expertise. However, they are *better* options than law and regulation in the sense that they are immediately available and already embody user autonomy values. For the moment, this is to be preferred to waiting for law and regulation, possibly, to reform in a way which promotes user autonomy. As already mentioned, this may be a longer term project which may require more profound societal change. Thus, in the meantime, technical solutions, even if imperfect, present the most feasible and pragmatic way of achieving user autonomy.

7 Conclusion

This paper has set a theoretical backdrop to empirical discussion in various ways. Firstly, the Internet's origins and development, surrounded by discourses around its freedom-enhancing qualities have been outlined, and contrasted to the emergence of poles of power in that environment. The concept of 'user autonomy' was introduced as the goal which the legal and regulatory system should seek to achieve given the Internet's affordances for individuals. The main legal regimes in the EU governing private power online were explored, and the argument made that they are conceptually flawed due to neoliberal influence in achieving the goal of user autonomy. Instead, immediate extra-systemic solutions are suggested as alternatives to achieving user autonomy. The kind of attributes these solutions ought to have to best uphold and protect user autonomy are outlined: ideally they should be infrastructure and services managed and owned on a decentralised commons basis.