

**CONSUMER WELFARE AND DATA-BASED POWER IN EU COMPETITION LAW  
– FROM HISTORICAL STANDPOINTS TO NEW APPROACHES**

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The research focuses on the topic concentration of market power in the digital economy and its negative effects on consumers and society. The goal of consumer welfare in EU competition law and its redefinition is the overarching theme that connects the other goals of EU competition law, anti-competitive concerns in the digital economy and the ideas of ordoliberalism together. The objective is to highlight how a historical approach to the goals of EU competition law can help to redefine the basis of consumer welfare from a more well-founded standpoint.

The concerns of ordoliberalism, which emerged as a school of thought in Germany in the first half of the 20<sup>th</sup> century, and the ones in the digital economy are similar. Understanding the connections between economic and political power in society is the starting point for the research. The main references consist of research on ordoliberalism, social sciences and on competition law.

The evolution of consumer welfare standard is assessed from its inception in the Chicago School to the current significance in EU competition law, concluding in the challenges that the digital economy brings to its definition, for example regarding the question of whether privacy should be included in its scope. These challenges are linked to digital platforms' data collection practices which result in the concentration of economic power in the hands of a few. Economic assessment of consumer welfare should be kept as the baseline, but other values should be included in its scope to capture the harms that occur to consumers in the digital economy.

Concerning the concentration of power, the ordoliberal concerns in the 20th century and their connections to the current situation are discussed. Also, other relevant goals of EU competition law, such as effective competition structure and process, efficiency, innovation, economic freedom and democracy are assessed together with their connections to the welfare of consumers and ordoliberalism.

To conclude, it is presented that the goal of consumer well-being should be the new, overarching goal of EU competition law, which combines the social values of ordoliberalism with the goals of political and economic freedom and effective competitive process. By assessing the current concerns from a historical point of view, one can avoid the fallacy of seeing today's issues detached from the past and focus on strengthening the flexible, goal-based approach of assessing the current market realities.

Keywords: competition law, EU law, consumer welfare, concentration of market power, ordoliberalism, digital economy, digital platforms, data

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Tutkimuksessa keskitytään markkinavoiman keskittymiseen digitaloudessa ja sen kielteisiin vaikutuksiin kuluttajiin ja yhteiskuntaan. Tutkimuksen pääteemana on yhdistää kuluttajien hyvinvointistandardi EU:n kilpailuoikeuden muihin tavoitteisiin, digitalouden aiheuttamiin ongelmiin ja ordoliberalismin käsityksiin. Tavoitteena on tuoda esiin, kuinka historiallinen lähestymistapa EU:n kilpailuoikeuden tavoitteisiin voi auttaa määrittelemään kuluttajien hyvinvointistandardin uudelleen vastaamaan paremmin digitalouden haasteisiin.

Saksassa 1900-luvun ensimmäisellä puoliskolla syntyneen ordoliberalismin koulukunnan ja digitalouden huolet ovat samankaltaisia, mikä on yksi tutkimuksen lähtökohdista. Tutkimuksen lähdeaineisto koostuu pääasiassa tutkimuksesta liittyen ordoliberalismiin, yhteiskuntatieteisiin ja kilpailuoikeuteen taloudellisen vallan ja sen keskittymisen osalta.

Kuluttajien hyvinvointistandardia käydään läpi lähtien sen synnystä Chicagon koulukunnassa, sen nykyiseen merkitykseen EU:n kilpailuoikeudessa, päätyen digitaalitalouden haasteisiin. Nämä haasteet liittyvät digitaalisten alustojen tiedonkeruukäytäntöihin, jotka johtavat taloudellisen vallan keskittymiseen harvojen käsiin. Kuluttajien hyvinvointistandardin osalta taloudellinen arviointi on pidettävä lähtökohdana, mutta muita arvoja tulisi sisällyttää sen määritelmään, jotta kuluttajille aiheutuvia vahinkoja voidaan arvioida paremmin digitaloudessa.

Taloudellisen ja poliittisen vallan keskittymisen osalta tutkimuksessa käsitellään 1900-luvun ja nykytilanteen yhtymäkohtia. Lisäksi tutkimuksessa arvioidaan muita EU:n kilpailulainsäädännön tavoitteita, kuten tehokasta kilpailurakennetta ja prosessia, tehokkuutta, innovaatiota, taloudellista vapautta ja demokratiaa sekä niiden yhteyksiä kuluttajien hyvinvointiin ja ordoliberalismiin.

Yhteenvedona voidaan todeta, että EU:n kilpailuoikeuden uuden päätavoitteen tulisi olla kuluttajien hyvinvointi (consumer well-being), joka yhdistää ordoliberalismin sosiaaliset arvot poliittisen ja taloudellisen vapauden sekä tehokkaan kilpailuprosessin tavoitteisiin. Arvioimalla nykyisiä huolenaiheita historiallisesta näkökulmasta voidaan välttyä näkemästä nykypäivän kysymykset irrallaan menneisyydestä ja keskittyä vahvistamaan joustavaa, tavoitteisiin perustuvaa lähestymistapaa nykyisten, digitalouden markkinatilanteiden arvioimiseksi kilpailuoikeudessa.

Asiasanat: kilpailuoikeus, EU-oikeus, kuluttajien hyvinvointistandardi, markkinavoiman keskittyminen, ordoliberalismi, digitalous, digitaaliset alustat, data

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## ABBREVIATIONS

Art.	Article
BEUC	The European Consumer Organization
CCLP	The University of Oxford Centre for Competition Law and Policy
CJEU	The Court of Justice of the European Union
EC	The European Community
ECLI	The European Case Law Identifier
EEC	The European Economic Community
EEC Treaty	Treaty establishing the European Economic Community
EU	The European Union
GWB	Gesetz gegen Wettbewerbsbeschränkungen (Act against Restraints of Competition)
ICT	Information and Communication Technology
OECD	The Organisation for Economic Co-operation and Development
OJ	The Official Journal of the European Union
OS	Operating system
Para.	Paragraph
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
U.S.	The United States of America

# 1 INTRODUCTION

## 1.1 Starting points

*“Competition policy cannot - - be pursued in isolation, as an end in itself, without reference to the legal, economic, political and social context.”*<sup>1</sup>

The former statement was mentioned at the beginning of the 1990s as a part of a European Community (EC) competition policy report, but its relevance in today’s digital economy is even more relevant due to the technological developments affecting the society. Competition law and its interpretation are rooted in ideology and path-dependent. A pluralism of goals, not restricted to economic ones, underpin the European Union (EU) regime.<sup>2</sup> Therefore, one should not always look for answers under the predominant ideology, but rather by returning to the legal foundations of EU competition law.<sup>3</sup>

There has been a concern about the concentration of *data-based power*<sup>4</sup> in the current markets and how it affects consumers negatively. The topic is relevant since currently more than half of the biggest companies in the world by market capitalization are, at least for a part, two-sided digital platforms that use data in their business.<sup>5</sup> Services and products, such as mobile apps and search engines, are often free, which leads to the question of how competition law situations in these zero-price markets should be assessed. Data collection<sup>6</sup> can increase businesses’ market power and profits<sup>7</sup> but encroach on the users’ privacy in increasingly complex ways.<sup>8</sup> Also, information and communication technology (ICT) markets are highly concentrated and natural monopolies are formed due to network externalities and economies

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<sup>1</sup> European Commission, XXII<sup>nd</sup> Report on Competition Policy, 1992, p. 13.

<sup>2</sup> See Ezrachi 2017 and 2018.

<sup>3</sup> C-23/14, *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2015:343, Opinion of Advocate General Kokott, para. 4.

<sup>4</sup> I use the term *data-based power* to refer to the biggest tech companies’ market power, which has accumulated through business models based on various data collection practices. As discussed further in this research, market power in the digital economy can also shift towards the sphere of political power in various ways, which is one characteristic of the accumulation of data-based power in the current society.

<sup>5</sup> Wikipedia, List of public corporations by market capitalization.

<sup>6</sup> Collecting data includes extracting information of users’ personal information, but also GPS tracking, information on user preferences and other miscellaneous data collected for example in relation to user interfaces of different apps, websites or search engines. For the purposes of this research I will use ‘collecting data’ or ‘data collection’ as a definition for all the possible information gathering actions, since they are constantly developing.

<sup>7</sup> Graef 2016, p. 265-267.

<sup>8</sup> In the case of Facebook, see Tufekci, Zeynep, Facebook’s Surveillance Machine, The New York Times, 19 March 2018.

of scale.<sup>9</sup> Due to this, EU competition law rules on abuse of dominance are at the centre stage in preventing negative market effects.

Since I present a view in which careful interference in markets is needed to prevent these new kinds of harms that dominant private companies pose, I set out to tackle similar concerns that were presented in ordoliberal competition law approach in the mid-20<sup>th</sup> century. One of the concerns at the time was the threats that private economic power posed to society.<sup>10</sup> Similar themes are present in the 21<sup>st</sup> century; concentration of power stemming from the concentration of data to dominant players in respective areas of the digital economy, such as e-commerce, social media and search engines.

I will assess consumer welfare as a goal in EU competition law and its relevance and changing interpretations in the digital economy from a historical point of view. A broader outlook on the foundations of EU competition law is needed to understand the current changes in the market. On a theoretical level, I will connect the pluralism of goals in EU competition law that centre around consumer welfare<sup>11</sup> and views of ordoliberalism to form a historically well-founded outlook on addressing the challenges raised by the digital economy.

Consumer welfare has for a long time been the main goal of EU competition policy.<sup>12</sup> Simply put, the objective is that undistorted competition should, in the end, benefit consumers as the final customers.<sup>13</sup> The content of the standard has developed through references in normative and other material of the EU, from the case law of the European Court of Justice (CJEU) and in academic research.<sup>14</sup> Also, many of the other goals of EU competition law are linked to consumer welfare.<sup>15</sup> For that reason, I find it important to analyse the evolution of the consumer welfare standard and its connections to other goals, to be able to tackle the current issues regarding competition law in the digital economy comprehensively.

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<sup>9</sup> Tirole 2017, p. 397-398.

<sup>10</sup> Gerber 1998, p. 265.

<sup>11</sup> *Ezrachi* connects the different goals of EU competition law that are relevant in the digital economy. See *Ezrachi* 2018.

<sup>12</sup> *Ibid.*, p. 4.

<sup>13</sup> T-213/01 and T-214/01, *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft v Commission*, ECLI:EU:T:2006:151, para 115.

<sup>14</sup> The benefits, and on the other side, harms, which competition brings to consumers, can be divided into three components. They are; 1. value for money (price and quality being the main components), 2. product variety and consumer choice and 3. innovativeness (consumers benefit when new products are developed). See *Fatur* 2012 47-58. I will go through the goal of consumer welfare in more detail in chapter 3.

<sup>15</sup> *Ezrachi* 2018, p. 4.

There has been a considerable amount of research on the challenges that the development of the digital economy has brought to competition law<sup>16</sup> and discussion on the role of consumer welfare and other goals of EU competition law in it. For example, problems in competition law regulation in the digital economy have been identified on a national and a global level.<sup>17</sup> There is also newer research into the position of ordoliberalism in the framework of EU competition law<sup>18</sup> and on the influence of other schools of thought<sup>19</sup>, including discussion on the goals of competition law within these traditions<sup>20</sup>. The academic research on the topic of power in society has been invaluable in outlining the wider concerns of economic and political power accumulation.<sup>21</sup> This theme will be discussed in the next main chapter.

Research is needed to assess how consumer welfare and related goals should be seen in data-driven markets since traditional price-centric approach fails on its premises in the new market reality.

The two-fold significance of data has to be noted when it comes to assessing these situations. First, data is valuable to businesses as they can monetize it, for example, through advertising. Second, data protection is important for consumers, since the collection of user data can raise privacy concerns. Economic and non-economic values should be assessed together to get a thorough view of the situation and not to end up with false negatives regarding the harms to consumers.

In my research, I will analyse the evolution of the goal of consumer welfare in different schools of thought. I will bring forward a historical point of view from ordoliberalism, which is a school of thought that focuses, for example, on the concentration of private power and its negative effects on society, and connect it to the current issues of data-based power in the digital economy and the harms to consumers. In this way, I will offer a different kind of approach, one which looks back to the starting points of EU competition law. Also, I will present and redefine the goal of *consumer well-being* and its relation to consumer welfare in the digital economy.

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<sup>16</sup> Competition authorities in the EU and in member countries, for example in Finland, Sweden, the UK, France and Germany and intergovernmental organizations, such as the United Nations and the Organization for Economic Co-Operation and Development (OECD) have paid attention to the topic. As to the connection of data and competition law, research has been conducted, for example, on access to information (Mäihäniemi 2017), in relation to data protection law (Graef 2016), big data (Stucke – Grunes 2016) and exploitative conducts under abuse of dominance (Botta – Wiedemann 2018), just to name a few.

<sup>17</sup> Ezrahi 2018. In connection with information and communication technology network industries, see Fatur 2012.

<sup>18</sup> Behrens 2018; Behrens 2014.

<sup>19</sup> Bartalevich 2016; Giocoli 2009.

<sup>20</sup> Kuoppamäki 2003; Gerber 1998.

<sup>21</sup> Castells 2013; Cohen 2019; Zuboff 2019.

## 1.2 Scope and structure

Throughout the research, I will keep consumer welfare as the overarching theme that connects the points related to other goals of EU competition law, anti-competitive concerns in the digital economy and different schools of thought in competition law. The starting point to the research is acknowledging the harms that occur to consumers from the concentration of data-based power. My objective is to highlight how historical approach to the goals of EU competition law can help to define the basis of consumer welfare and subsequently aid in approaching the current problems from a more well-founded, theoretical standpoint.

My research question is *how the consumer welfare standard should be redefined and interpreted, considering the historical context of competition law, to capture the harms that the concentration of data-based power brings to consumers and society*. I will look into the evolution of consumer welfare in EU competition law through ideas of Chicago (and post-Chicago) School and ordoliberalism. The Chicago School's economic approach to consumer welfare has affected EU competition law from the 1990s onwards. On this note, the definition of consumer surplus, which is discussed later, is of significance in assessing the definition of consumer welfare.

In ordoliberal thought, economic freedom rather than the welfare of consumers is the main focus and competition law is attached to the social factors of freedom and justice. Thus, the social function of competition is at the centre stage.<sup>22</sup> However, as competition law in the EU has been significantly shaped by ordoliberalism and German tradition, I find it useful to analyse the tradition's viewpoints on consumers' position in competition law. On this note, I will assess the possibility of interpreting the goal of consumer welfare through ordoliberal values, as a way to protect the consumer more comprehensively in the digital economy. As the protection of economic freedom and consumer choice are important factors in ordoliberalism, *consumer's freedom to choose* could be included in the consumer welfare standard in the digital markets, where dominant tech companies pose terms and conditions which *de facto* lock-in consumers to certain digital platforms.

I will assess the possibility of incorporating the variety of values regarding the consumer to the goal of consumer well-being, which should be the new, overarching goal in EU competition law in the digital economy. Consumer well-being would incorporate the current consumer welfare standard as well as other important goals of EU competition law which

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<sup>22</sup> Kuoppamäki 2003, p. 197, 202.

have an underlying connection to the welfare of consumers and ordoliberal ideas. Subsequently, by uniting these different goals, a more comprehensive outcome on the harmful effects of concentration of data-based power in the digital economy could be achieved. A historical approach can help to see that these goals and values are not new to competition law thinking.

Also, the goals regarding the EU as a political and economic union have inevitably shaped the goals of competition law and consumer welfare. Interestingly, goals of EU competition law, such as effective competition structure, economic freedom and democracy also appear in ordoliberal thinking. These goals should be protected through competition law in the digital economy. This becomes essential as economic power concentrates to digital platforms and their influence affects consumers in aspects that transcend the traditional boundaries of competition law assessment – for example regarding elections and free speech.

The collaboration between Cambridge Analytica and Facebook<sup>23</sup> offers an example of harsh privacy exploits and the use of algorithmic influence over voters in different elections in the EU and the United States of America (U.S.). The competition law connection comes into play when consumers are locked-in to a platform in a dominant position and have no viable alternatives to choose from. Massive datasets of personal data are accumulated, and the risks of their exploitation grow as the possibilities for economic benefit expand. Therefore, data-based economic power is linked to political power, and a connection to ordoliberal concerns of the concentration of private economic power can be drawn.

First, I will present the connections between political power and economy as a starting point to the otherwise theoretical, goal-oriented research. Second, I will assess the evolution of the consumer welfare standard, concluding in the challenges that the digital economy brings to its definition. Then, I will explain how digital platforms collect and exploit user data in their business which leads to the concentration of economic power in the hands of a few dominant players. Concerning the concentration of power, I will go through the ordoliberal concerns in the 20<sup>th</sup> century and the connections to the current situation. I will also answer the question of how other goals and welfare standards of EU competition law come into the picture and their connections to consumer welfare and ordoliberalism.

In my research, I will not analyse in-depth the competition law-specific articles in the Treaty on the Functioning of the European Union (TFEU), such as Articles (Art.) 101 and 102 TFEU

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<sup>23</sup> Tufekci, Zeynep, Facebook's Surveillance Machine, The New York Times, 19 March 2018.

on exclusionary and exploitative abuses.<sup>24</sup> I will mention these articles when assessing how, for example, data collection practices can harm consumers. However, the main theme is to theoretically assess the framework of goals in EU competition law and how the harms to consumers, and the society as a whole, could be better taken into account regarding the risks of concentration of private economic power due to the accumulation of personal data. Also, I will not discuss further the topic of whether privacy and data protection concerns should be included in the consumer welfare assessment. I will rather take the stance that they should be included in the assessment since there has been much research on the topic in the last few years.<sup>25</sup>

### *1.3 Main arguments*

My arguments consist of the following elements. In connection with the negative effects stemming from the concentration of data-based economic power, I will provide insight into how the concerns in the 20<sup>th</sup> century ordoliberalism were similar to current ones. Since the concentration of data is prone to have wide-ranging effects on society, countermeasures against it need to be enforced more comprehensively. A structured way for better regulation, without changing parts of the doctrine itself, is to enforce the goals which underlie the competition law provisions in the EU treaties. Concerning the goals of EU competition law, I will argue that enforcing the consumer welfare standard by capturing various consumer harms, such as harms to privacy, in its scope will, in a theoretically well-founded manner, lead competition law enforcement in the digital era towards a more holistic approach. The goal of consumer well-being should be the new, overarching goal which incorporates the different values and goals of EU competition law.

When looking at the historical importance of competition law, the events at the beginning of the 20<sup>th</sup> century in Germany shaped the intellectual scope of ordoliberalism, as the unrestricted concentration of power affected the rise of totalitarianism in ways which paved the way for World War II. The ordoliberal idea of a state that is bound by principles of an economic constitution which would work as a framework for its regulatory reach thus gained

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<sup>24</sup> As I will refer to EU documents published before the entry into force of the Treaty of Lisbon, the numbering for the competition-specific Articles can differ. Art. 81 of the Treaty establishing the European Community (the EC Treaty) is Art. 101 in TFEU, and Art. 82 of the EC Treaty is Art. 102 in TFEU.

<sup>25</sup> See the references in chapter 3.3.2.

support in the shaping of post-war Germany. Subsequently, German intellectual traditions had an influential role in shaping the competition law policies of the EC.<sup>26</sup>

This example shows that the regulatory framework of a state or a union is attached to its historical events and political climate. As a more recent example, ordoliberal thoughts that promote a more ordered economy surfaced again after the economic crisis at the end of the first decade of the 21<sup>st</sup> century.<sup>27</sup> However, reactions to the changes in the economy transfer to policy choices in a longer timeframe. On this note, I propose that the acknowledgement of the negative effects of the concentration of data-based power should already be transferred to the agenda of EU competition policy, beyond just the privacy concerns, which have already emerged in the political agenda and academic research.<sup>28</sup> In this way, without suggesting the exact substantive approaches in this research, the focus on the theoretical and goal-based dimension of strengthening the regulatory approach could reduce the negative effects of concentration of data-based economic power in today's digital markets.

Regarding the risks of concentration of private power, I will bring out why protecting goals of efficiency, innovation, economic freedom and democracy are invaluable, and how these goals relate to the goal of consumer welfare. Consumer welfare has strong roots in EU competition law from a historical point of view. By adding a historical approach to the interpretation of the consumer welfare standard, one can avoid the fallacy of seeing today's issues detached from the past.

To conclude, I will argue that the current EU competition law framework can regulate competition in the digital economy. However, proper assessment of harms to consumer welfare, going beyond the traditional price-effects, is required. The reality is that the harms to product quality and variety, consumer choice and the level of innovativeness, are more difficult to value than traditional price-effects. In this regard, I suggest that a thorough economic assessment is conducted on the negative effects that digital platforms' pose on

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<sup>26</sup> See chapter 4.1.1 on ordoliberalism. Germans, who were active participants in the formation of the EC, and proponents of ordoliberalism, promoted ordoliberal principles in the formation of European economic institutions. See Gerber 1994, p. 81.

<sup>27</sup> Siems – Schnyder 2014, p. 378.

<sup>28</sup> Also, several national and European competition authorities have made publications on competition law in the digital economy. See Autorité de la Concurrence – Bundeskartellamt, Competition Law and Data, 2016; Crémer, Jacques – De Montjoye, Yves-Alexandre – Schweitzer, Heike, Competition policy for the digital era, Report for the European Commission, 2019; Kuner – Cate – Millard – Svantesson – Lyskey 2014; 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, 2014; Furman, Jason – Coyle, Diane – Fletcher, Amelia – McAuley, Derek – Marsden, Philip, Unlocking digital competition. Report of the Digital Competition Expert Panel. 2019; Raijas – Rosendahl – Saastamoinen – Vuorinen 2017; United Nations Conference on Trade and Development, Competition issues in the digital economy, 2019.

markets, for example, in cases of alleged abuse of dominance. As for the goals of EU competition law in the digital economy, the redefined consumer well-being goal should be the main objective.<sup>29</sup>

#### *1.4 Methods*

One of the starting points for my research is that data-based competition is prone to affect the markets in a way that market power is concentrated. Subsequently, the influence of the most dominant companies is constantly increasing. To this end, I will point out how competition law for its part should react to the anti-competitive practices in the digital economy which harm the consumers. In this connection, I will draw similarities between the current concerns and the ones in ordoliberalism as mentioned above. Also, the historical approach to the different goals of EU competition law will be the main theme in assessing their significance from a theoretical point of view. In this way, the current concerns will be linked to the historical development of EU competition law. As stated, the argumentative basis will be stronger when the current techno-economic phenomena related to the digital transformation of the markets is not detached from the historical continuum of competition law goals.

Evaluation, which rises only from seeing the competition law issues through defined regulatory options, is theoretically too confined. One example of this is the economics-based approach to free services, such as mobile apps, in online markets. If the default, monetary-based competition law assessment cannot be transcended in these situations, the competition law framework will fail before it can even grasp the realities connected to personal data as the new currency of the internet. As a whole, the swift evolution of digital markets in the last ten years requires looking outside of the confines of the economics-based approach also when it comes to goals of EU competition law.

Since the concentration of data-based power already affects the markets, I present that assessment should be made on a theoretical level on how the ordoliberal ideas can help to transcend the current scope of consumer welfare to a one that takes into account the characteristics of competition in the digital markets. My point is to evaluate the current goals of EU competition law through the lens of ordoliberalism and make suggestions to the current EU competition policy by combining these goals into a theoretically well-founded framework.

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<sup>29</sup> The European Data Protection Supervisor demanded effective guidance already in 2014 on application of competition, consumer protection and privacy rules for free online services. See 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*, 2014.

As economic reasoning is inherent in competition law, I use economic literature to understand the changes that the digital transformation has brought to the economy and its implications on competition law.<sup>30</sup> When I look into the non-economic harms to consumer welfare, my point is not to encroach on the basis of EU competition law, but rather to bring out the necessity of acknowledging factors beyond the strictly economic ones when it comes to assessing harms to consumers. Also, one of my main arguments is that the economic value of data, even though different from the monetary price of a traditional good, must be considered in assessing consumer harms and the conduct of dominant undertakings in digital markets. Hence, my point is to supplement the economic approach in assessing the implications that data has on competition, not to discard it.<sup>31</sup>

I acknowledge that economics-based assessment is a foundation in competition law cases, but it doesn't offer a full picture of the competition in the digital markets and regarding the pluralism of values that underpin EU competition law.<sup>32</sup> However, a thorough assessment of the relationship between economic and non-economic goals in competition law would be a topic of its own. Thus, the focus of my research will be on the topic of consumer welfare and its relation to other important goals in EU competition law and the concentration of economic power in the digital economy. The discussion on the relationship between economic and non-economic goals is still necessary, especially since the scope of consumer welfare, and its economic and non-economic dimensions, has been viewed differently in different traditions and periods.

## **2 POWER AND SOCIETY**

The starting point to my research and the purpose of this chapter is understanding the connections between economic and political power in society. I will assess how these connections between power and the economy were characterized in ordoliberalism, which emerged as a school of thought in Germany in the first half of the 20<sup>th</sup> century. Similar themes are also visible in the current digital age. The question of how the abuse of private power in the digital economy affects society is also linked to the goals of competition law.

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<sup>30</sup> The winner of the Nobel Prize in Economics, Jean Tirole, discusses aspects on how to think about the role of economics in modern society. See Tirole 2017.

<sup>31</sup> Also in ordoliberal tradition, economic principles are seen as a basis for competition law. See Gerber 1998.

<sup>32</sup> Ezrahi 2018, p. 3.

There has been a considerable amount of research regarding the post-industrialised era, the economic order of which has been characterized, for example, as *informational capitalism*<sup>33</sup> or *surveillance capitalism*<sup>34</sup>. The theories behind these definitions are fundamental in understanding the power dynamics in the current digital economy and function as starting points to this research. The topic of power in the economy and society covers countless research articles and books, from which I have chosen the most important ones connected to my research.

By first presenting the connections of political and economic power one hundred years ago and today, the assessment of consumer welfare and other goals of competition law will be evaluated in the context of concrete societal circumstances. Also, this chapter will lay the groundwork for understanding the phenomenon of concentration of private power, which is one cause of negative market effects in the digital economy and the main concern of ordoliberalism. The question of how the goals in EU competition law can be comprehensively harnessed to tackle the problems stemming from the concentration of private power is discussed in-depth in the following chapters.

## 2.1 Power relations and ordoliberalism

*“The issue on which we focused together was... the issue of private power in a free society.”*<sup>35</sup>

The above citation by *Böhm*<sup>36</sup> captures the essence of ordoliberalism. In the early discussions between the scholars of the Freiburg School, it was agreed that the political and economic disintegration of Germany in the early 20<sup>th</sup> century was caused by the weakness of the state and its legal system, which couldn't prevent the creation and abuse of private economic power.<sup>37</sup> Taken out of its historical context, the citation by *Böhm* is still relevant today, as data-based power is accumulating to private actors in the society. However, the question to be asked is who is focusing on this issue in the 21<sup>st</sup> century. My goal is to partly answer this question by focusing on the goals, and their redefinition, in EU competition law, and to draw attention to the need for more extensive research on the topic.

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<sup>33</sup> Cohen 2019.

<sup>34</sup> Zuboff 2019.

<sup>35</sup> Böhm 1960, p. 162.

<sup>36</sup> Franz Böhm, a jurist, and Walter Eucken, an economist, are viewed as the founding fathers of ordoliberalism. See Di Porto – Podszun – Behrens 2018, p. 144, 147.

<sup>37</sup> Böhm 1960, p. 162.

The historical context of ordoliberalism was the failure of the Weimar Republic in the 1920s due to the pressure from private economic power, which was caused by the absence of a strong state to counterbalance the power of the strongest economic actors.<sup>38</sup> The cartelization and monopolisation of the German economy since the 1870s was tied to the rise of totalitarianism and *laissez-faire* liberalism, which was incapable of controlling the concentration of private economic power.<sup>39</sup> This led to social and political ‘group anarchy’ (*Gruppenanarchie*) between powerful interest groups<sup>40</sup>, which in turn raised the demand for strong political leadership. Subsequently, the ordoliberals contented that *laissez-faire* liberalism helped the rise of the Nazi regime’s centrally planned economy.<sup>41</sup>

One of the practical issues in the Weimar Republic was that the high levels of economic power enabled the largest corporations and cartels to use standardized contracts to create their own market rules. The executive branch of the government was unable to control this progression since those being regulated were powerful enough to change the objectives of the regulator in their favour. This led to the self-destruction of economic freedom, especially during the 1920s. The ordoliberals realized that the prohibition of cartels wasn’t enough, and that monopoly power itself distorted the competitive process. Thus, the law should prevent the creation of monopolies, abolish existing ones or at least control the conduct of existing monopolies. An autonomous monopoly office should be established to enforce competition norms.<sup>42</sup>

On a theoretical level, *Eucken* started from the premise that capitalism was socially irrational to constitute an alternative between *laissez-faire* liberalism and socialism. Classical economists such as *Smith* had recognized that the economy was embedded in the legal and political system, but gradually economists had lost sight of these links. The economic thought had lost its touch with the social and political reality, which *Eucken* and other scholars set out to correct. It was realized that economic systems did not just happen but were formed through political and legal decision-making. The outcome of this decision-making process established a nation’s economic constitution (*Wirtschaftsverfassung*).<sup>43</sup>

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<sup>38</sup> Gerber 1994, p. 27-28.

<sup>39</sup> *Ibid.*, p. 28; Foucault 2004, p. 80; Mestmäcker 2010, p. 34.

<sup>40</sup> Böhm 1980, p. 68.

<sup>41</sup> Miksch 1949, p. 165; Miksch 1947, p. 212–217; Foucault 2004, p. 110; Eucken 1952, p. 334; Mestmäcker 2010, p. 36.

<sup>42</sup> Gerber 1998, p. 250-251, 254.

<sup>43</sup> *Ibid.*, p. 237, 245.

The enforcement of competition rules was seen necessary for the economic well-being of the citizens, which in turn was seen necessary for political freedom to be realized. It could be said that ordoliberalism focused on the state's balanced role regarding other actors in the economy and society. The state's role was to protect society from the misuse of private economic power and be strong enough to resist the influence of private power groups. However, the law would only provide the basic principles and the government wouldn't have the discretion to intervene in the economy except to enforce those principles. Thus, the legal principles directed but also constrained the conduct of the government and the private sector.<sup>44</sup> In ordoliberal terms, the role of competition policy was that it formed the core of the regulatory policy, *Ordnungspolitik*, which offered the toolkit to define competition policy comprehensively in relation to other sectors of social policy.<sup>45</sup> According to the regulatory policy, individual decisions of the state, such as one's relation to competition law, should follow, and be constrained by, the principles of the economic constitution.<sup>46</sup>

Ordoliberalism influenced the inclusion of competition law provision in the Treaty establishing the European Economic Community (EEC Treaty). Also, many ordoliberals were chosen to the top positions in the competition law area during the early decades of the EC. Thus, the ordoliberal ideas shaped German and European institutions during the first half-century of the EC. Without understanding the framework of ordoliberalism and its concepts, much of the EC's history and the current situation in the EU is likely to be misunderstood.<sup>47</sup> In the application and interpretation of competition rules, ordoliberal convictions of competition law provisions prevailed.<sup>48</sup> For example, in the *Continental Can* case, the court took the stance that the Art. 102 TFEU also meant to prevent indirect harm to consumers, in contrast to only direct harm<sup>49</sup>, through the elimination of competitors through exclusionary abuses.<sup>50</sup>

“The provision is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3 (f) of the Treaty.”<sup>51</sup>

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<sup>44</sup> Ibid., p. 240, 247.

<sup>45</sup> Kuoppamäki 2003, p. 190.

<sup>46</sup> Gerber 1998, p. 246.

<sup>47</sup> Ibid., p. 264-265.

<sup>48</sup> Gormsen 2005, p. 5.

<sup>49</sup> Joliet 1970, p. 250.

<sup>50</sup> Mestmäcker 1973a, p. 613, 639; Mestmäcker 1973b, p. 36.

<sup>51</sup> C-6/72, *Europemballage Corporation and Continental Can Company v Commission*, ECLI:EU:C:1973:22, para. 26.

Next, theories of power and characterizations of the economic order in the 21st century will be discussed. There is a connection between ordoliberalism and the different characterizations of the current economic order since neoliberal ideas form the basis of these theories.<sup>52</sup> It is a good starting point to see these correlations, as competition law is always tied to the economic principles that are seen as the most relevant.

## 2.2 *Power in the digital economy*

In economic theory, the current economic order has been characterized in the 21<sup>st</sup> century research as informational capitalism or surveillance capitalism. These definitions are the most relevant for my research since they also emphasize the role of consumers at the centre of the accumulation of data-based power. *Cohen* relies on the term informational capitalism to characterize the current economic order where “market actors use knowledge, culture, and networked information technologies as means of extracting and appropriating surplus value, including consumer surplus”.<sup>53</sup> In this chapter, I have mainly focused on surveillance capitalism since it emphasizes the unprecedented nature of the current market evolution and its negative effects on consumers, which demand changes in the framework of competition law. However, there are a few important points from *Cohen’s* work that should be considered.

One of the points is that the institutional changes in the markets and the society, for example from industrial capitalism to informational capitalism, are not sequential but rather cumulative. Thus, the changes in the markets must be connected to the underlying factors that have led to the current situation. Also, the current legal system is to an extent the outcome of an earlier period of sociotechnical and economic transformation.<sup>54</sup> This statement connected to competition law as a part of the regulatory structure in the modern societies validates at least partially the inclusion of the historic approach to the reassessment of the goals and values of competition law.

On the importance of the historical approach, the form of political ideology (or governmentality) in informational capitalism is neoliberalism, which emphasizes continuity and change.<sup>55</sup> Both neoliberalism and ordoliberalism originated from the same scholarly discussions in the 1930s and 1940s but diverged in the post-war period in the 20<sup>th</sup> century. However, both, especially ordoliberalism, emphasize the role of private law and competition

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<sup>52</sup> Behrens 2014, p. 5-6.

<sup>53</sup> Cohen 2019, p. 6.

<sup>54</sup> *Ibid.*, p. 2, 6.

<sup>55</sup> Cohen 2019, p. 7.

rules against restraints of competition. Thus, they share the view that the freedom to operate in the market cannot mean the possibility to limit the freedom of other agents in the market.<sup>56</sup>

To characterize the current market environment, *Zuboff* defines the term surveillance capitalism extensively in her work. The main points from this definition regarding my research are connected to the unprecedented nature of power concentration and the challenges to market democracy. Surveillance capitalism is a form of capitalism that is, for example, “- - marked by concentrations of wealth, knowledge and power unprecedented in human history - -” and that is the “- - origin of a new instrumentarian power that asserts dominance over society and presents startling challenges to market democracy.”<sup>57</sup> In connection to this, also the negative effects of the concentration of data-based market power are unprecedented. Therefore, competition law for its part must react accordingly to the gravity of this phenomenon by moving to a well-founded, comprehensive approach to the goals of EU competition law.<sup>58</sup> The term ‘digital markets’, which I extensively use in my research is not the same as surveillance capitalism. They are however closely connected, as surveillance capitalism “is a logic that imbues technology and commands it into action”.<sup>59</sup> It is essential to understand how information technologies in business models reflect and reproduce economic and political power.<sup>60</sup> I will discuss these links further in the research in connection with the respective goals of EU competition law.

The new species of power in surveillance capitalism is *instrumentarianism*, i.e. power which accumulates from knowing and shaping human behaviour through computational architecture and smart networked devices. The driving force behind industrial capitalism was the intensification of the means of production. In comparison, surveillance capitalism is characterized by the continuous development of means of behavioural modification and the transformation from knowledge to power.<sup>61</sup> The company that “invented and perfected” surveillance capitalism was Google. Business conduct that characterizes surveillance capitalism has also spread to other big tech companies such as Facebook, Amazon and Microsoft. Therefore, it is no surprise that many of these firms are mentioned further in my research in connection with the accumulation of data-based power. To be clear, the current situation is that the mechanisms and economic imperatives of surveillance capitalism are not

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<sup>56</sup> Cerny 2016, p. 78; Behrens 2014, p. 5-6.

<sup>57</sup> Zuboff 2019.

<sup>58</sup> Ibid., p. 8.

<sup>59</sup> Ibid., p. 15.

<sup>60</sup> Cohen 2019, p. 1.

<sup>61</sup> Zuboff 2019, p. 8-9.

limited to the large tech companies but establish the basis for most internet-based companies.<sup>62</sup>

However, competition law is only one sphere of market and social control that needs to be developed further to tackle the negative effects stemming from this new economic order. Regarding what is happening in the economy, new naming and analysis are needed from a multi-scientific point of view. For example, categories such as ‘monopoly’ and ‘privacy’ are commonly used to get a grasp of the current market problems. Even though these categorizations are essential, they cannot possibly capture the entirety of unprecedented negative effects from surveillance capitalism.<sup>63</sup> In my research, I aspire to shed light on the essential role of competition law, and the need of changing its base goals and values to get a grasp of the expanding market dynamics relating to the accumulation of data-based power.

As mentioned above, Google is a prime example of a dominant company in the digital markets. The proactive efforts through which it has established its power illustrate the link between economic and political power in the surveillance capitalist economy. Executive personnel from Google played a leading role in *Obama’s* successful presidential campaigns of 2008 and 2012.<sup>64</sup> This cooperation was fortified by the movement of staff between Google-affiliated companies and the White House.<sup>65</sup> Both of these strategies were employed by Google to shelter it from political interference and critique by establishing itself as a competitive advantage in electoral politics.<sup>66</sup> Also, Google has spent record amounts of money on lobbying against privacy legislation and initiatives that would have hindered its freedom to capture and process behavioural data.<sup>67</sup> One of the most astounding practices of Google has been its influence over university professors that have supported Google’s positions on matters related to, for example, competition law.<sup>68</sup>

Besides, dominant platforms, such as Google, are unmatched in the extent of power and influence they wield over their users due to, for example, the widespread use of mobile and internet services. The privileged access to flows of information gained by the platforms

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<sup>62</sup> Ibid., p. 10.

<sup>63</sup> Ibid., p. 14, 21.

<sup>64</sup> Cain Miller, Claire, How Obama’s Internet Campaign Changed Politics, Bits, 7 November 2008; Rutenberg, Jim, Data You Can Believe In, The New York Times Magazine, 20 June 2013.

<sup>65</sup> See Google Transparency Project.

<sup>66</sup> Zuboff 2019, p. 122.

<sup>67</sup> Brodtkin, Jon, Google and Facebook lobbyists try to stop new online privacy protections, Ars Technica, 24 May 2017. Google has also been one of the most influential lobbyists in the EU. See Lomas, Natasha, Google Among Top Lobbyists Of Senior EC Officials, TechCrunch, 24 June 2015.

<sup>68</sup> Mullins, Brody and Nicas, Jack, Paying Professors: Inside Google’s Academic Influence Campaign, The Wall Street Journal, 14 July 2017.

enables them to possess both *network power* and *network-making power*.<sup>69</sup> This means not only self-enforcing the power of a dominant network by the extension of its standards but also reconfiguring the networked environment in ways that consolidate their dominance over the production of knowledge and data collection.

Another interesting theory of power is *the communication theory of power and social change* by *Castell*. In this theory, power is always enforced by institutions. Counterpower, on the other hand, is the challenge coming from the social actors which defy these institutions since they don't see their interests and values sufficiently represented by them. This dynamic is illustrated in a societal context where, for example, citizens oppose the government due to poor living conditions. Subsequently, in a functioning democracy, the people will elect new representatives. In *Castell's* theory, communication networks help to facilitate this counterpower by connecting people in different ways than the traditional media.<sup>70</sup>

However, the powerful actors in the surveillance capitalist economy rely on people using these communication networks since companies benefit from the collected personal data. Also, the power that in surveillance capitalism shifts to dominant tech companies, is different from the political power of the states. The extraction of personal data from consumers is hardly contested in the age of smart devices, where people seemingly benefit from free digital services, as opposed to for example poor living conditions which easily facilitate social outcries. Consumers as the social actors who could challenge the power of the dominant tech companies are mainly ignorant of the negative effects of data-based power accumulation. In my view, since consumers are unlikely to rise to the barricades in the age of surveillance capitalism, it is the role of the institutions such as the EU to take action.

Concerning the topic of consumer welfare, on a broader level of social and economic theories, *the culture of consumerism* is one of the most fundamental layers of cultural globalization and directly related to the formation of capitalist markets.<sup>71</sup> As virtually all countries live under capitalism, consumerism is global. So, even though competition laws vary from country to country, capitalism and the consumers' position in the markets have similar themes regardless of the competition law framework in question. Tech companies' reach to consumers' everyday lives is further strengthened by the characteristics of surveillance capitalism, where data extraction and behavioural modification practices shape the markets. My point is that the

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<sup>69</sup> Castells 2013, p. 45-46.

<sup>70</sup> Ibid., p. xlv-xlvii.

<sup>71</sup> Castells 2013, p. 118.

protection of consumers should, regardless of the jurisdiction, be the focus of competition law goals since consumers have always remained at the centre stage of the markets through industrial- and post-industrial economy to the current economic order.

In the following chapters, I will connect the phenomenon of power in the economy to the theoretical level of competition law. The research will then proceed from analysing the content of the consumer welfare standard to the concentration of power in the economy from historical and current standpoints. This assessment will affect the redefinition of consumer welfare to meet the requirements of the digital economy. Then, other goals of EU competition law and ordoliberal ideas will be linked to this redefinition to enforce the new theoretical approach. In summary, this comprehensive assessment will link the market realities to a theoretical framework of EU competition law goals.

### **3 CONSUMER WELFARE AND COMPETITION LAW**

#### *3.1 Starting points*

Whether the market brings benefits to consumers is the general focus of the concept of consumer welfare.<sup>72</sup> However, it should be noted that when assessing the content of the consumer welfare standard, it is different in EU competition law and U.S. antitrust law. Second, consumer welfare as a concept in economics is to some extent different from the current concept of consumer welfare in EU competition law. In economics, the concept of consumer surplus implicates the difference between what consumers would have been willing to pay for a good and what they, in reality, had to pay.<sup>73</sup> However, in EU competition law, this price-related factor is only one component of the consumer welfare standard. For example, service or product quality, consumer choice and innovativeness are also taken into account when assessing the benefits which pass on to the consumers. These points will be elaborated further in chapter 3.3.

The term consumer welfare was first introduced in the U.S. antitrust law as an economic concept.<sup>74</sup> Since this concept differs from the EU law definition, I will concisely present these differences in this chapter as a starting point for analysing the position of the consumer welfare standard in the digital economy and within the other goals of EU competition law.

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<sup>72</sup> Fatur 2012, p. 47.

<sup>73</sup> Albæk, Svend, Consumer Welfare in EU Competition Policy, DGS, 2013, p. 70.

<sup>74</sup> Daskalova 2015, p. 133-135, 148.

The main differences between the concept of the consumer welfare standard in the EU and the U.S are how the harms to consumers are qualified, i.e. whether non-price parameters are included in the assessment.

I will analyse the consumer welfare standard in different traditions and its significance in the digital economy where the concentration of data poses harms to consumers beyond price-effects. I argue that going beyond the different views of the consumer welfare standard, a variety of goals and objectives which affect the consumer should be included in the assessment of consumer harms in the digital economy. An assessment of the threats stemming from the concentration of data-based power supports this approach, since market failures in the digital economy may have serious consequences regarding, for example, the privacy of consumers.<sup>75</sup>

### 3.2 *Consumer welfare and different traditions*

#### 3.2.1 Chicago School

With the rise of the Chicago School in the late 1970s in the U.S., the price centric approach to antitrust became the focus. Competition law's other economic, political, social and moral concerns were dismissed by some lawyers and economists. Also, the competition agencies would challenge only a few mergers that would have led to higher post-merger prices in narrowly-defined markets. This was connected to a "fear of false positives" in the competition law enforcement of Chicago School, namely the risk of over-enforcement chilling procompetitive business activity. In the digital economy, the data-driven network effects increase the cost of *false negatives*, i.e. the harmful results from under-enforcement.<sup>76</sup> Thus, in competition law enforcement in the digital economy, the concern should be more on the side of false negatives. The characteristics of data-driven markets are discussed further in this research. Chicago School thinking never established comprehensively in Europe. However, similarities in the economic-based thinking can be drawn in the more economic approach of EU competition policy from the 1990s onwards.<sup>77</sup>

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<sup>75</sup> Kerber 2016, p. 859-860.

<sup>76</sup> Stucke – Allen P. 2016, p. 109, 230-232.

<sup>77</sup> Schweitzer – Patel 2013, p. 213, 220. However, as stated by *Schweitzer* and *Patel*, the difference to the Chicago School was that "the 'more economic approach' is not a monolithic theory or concept but rather a conglomerate of suggestions on how to make intensified use of economic insights in interpreting and applying competition law".

In the economic thinking of Chicago School, allocative efficiency (i.e. the efficient allocation of resources on the market, where goods are produced just in the right amount and prices near production costs) and consumer welfare are the same, since, in the end, everyone is a consumer. *Bork* defines this as the consumer welfare model.<sup>78</sup> However, the consumers' and the sellers' interests differ, since the sellers try to sell expensive and buyers buy cheap. And evidently, the price of a good is not irrelevant to the consumer. Even though the wins of the monopolist theoretically in time transfer into consumption for the benefit of consumers does not override the negative effects of market concentration.<sup>79</sup> In this regard, the Chicago School referred to the total welfare standard when using the term consumer welfare standard, which has been noted by academics later on.<sup>80</sup>

By the end of the 1980s, the Post-Chicago School emerged from the critique to the ideas of the Chicago School. For example, the proponents of the Chicago School were criticized for their view on simplifying market realities, relying too heavily on economic theory, having an overly narrow view of market power and having a too limited definition of the concept of efficiency.<sup>81</sup> Regarding consumer welfare, dimensions other than higher prices were introduced to the academic discussion. It was noted that consumers would also want optimal levels of quality, safety and variety in addition to competitively priced goods and that market power could lead to anti-competitive situations when it affected the decrease of consumer choice in the markets. It is noteworthy that in the U.S. antitrust law, which had mainly been price-centred, these points were made.<sup>82</sup>

In EU competition law, these non-price aspects have gained stronger recognition as a part of consumer welfare. In the current view of consumer welfare in the EU, consumer choice is noted as one of the non-price components of the welfare assessment.<sup>83</sup> Also, in this connection, it is important to note that U.S. antitrust law and EU competition law aren't theoretically fully comparable since the intervention benchmarks in the EU have to be seen in the context of the wider normative values of the EU treaties, institutional design and stable jurisprudence.<sup>84</sup>

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<sup>78</sup> For example, a merger should be prohibited if allocative efficiency loss is bigger than the increase in productive efficiency. In a situation where productive efficiency is bigger, the cost-benefit analysis leads to permitting the merger. See *Bork* 1978.

<sup>79</sup> *Kuoppamäki* 2003, p. 32, 67-68.

<sup>80</sup> *Budzinski* 2008, p. 300; *Orbach* 2011, p. 147. More on total welfare standard in chapter 5.1.

<sup>81</sup> *Jickeli* 2000, p. 177-178.

<sup>82</sup> *Lande* 1999, p. 962-963.

<sup>83</sup> *Fatur* 2012, p. 48.

<sup>84</sup> *Ezrachi* 2018, p. 24.

### 3.2.2 Freiburg School and ordoliberalism

European competition policy is closely connected to the Freiburg School and ordoliberal economic and legal tradition.<sup>85</sup> Even though ordoliberal ideas form part of the basic structure of the current competition law framework in the EU, the goal of consumer welfare as such is not mentioned in ordoliberal literature. However, one of the main connections between the consumer welfare standard and ordoliberalism is the role of protecting consumers' choice as an object.<sup>86</sup> *Behrens*, in his paper, goes as far as arguing that German ordoliberalism, which has shaped EU competition policy and law, is based on a "consumer choice" paradigm.<sup>87</sup>

On the other hand, it has been stated that the rights-based approach to ordoliberalism, emphasizing the protection of economic and political freedom is not even comparable with the effects-based consumer welfare standard.<sup>88</sup> The more economic approach of EU competition law, which will be discussed further, focusing on the economic aspects of the consumer welfare standard was argued as being contradictory to the ordoliberal views of competition policy. Ordoliberalism has, by the advocates of the more economic approach, been criticized as "an unworkable, inefficient and formalistic paradigm that prevents the EU competition law from being fully efficient".<sup>89</sup> The interpretation of the consumer welfare standard could benefit from the value-basis of ordoliberalism, especially regarding the harms from the concentration of private economic power as discussed later.<sup>90</sup>

Contrary to the common belief, ordoliberals were in favour of competition law which also accommodated efficiency considerations. Connecting the economic and non-economic considerations, Freiburg School underlined that "efficiency-enhancing nature of competition must be reconciled with other goals ensuring a humane, free and democratic economic order".<sup>91</sup> *Behrens* argues that ordoliberalism is not out of touch with economic theory. However, the economic theory's criteria must be formulated to adequately inform competition policy and law. A single theoretical model cannot grasp the whole phenomena of economic competition. This realisation begs the inclusion of a variety of values into the goals of

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<sup>85</sup> Andriychuk 2017, p. 80. For a comprehensive discussion on the historical importance of ordoliberalism, see Gerber 1998.

<sup>86</sup> Interestingly, the significance of consumer choice is also recognized in the Post-Chicago School, as stated in the last chapter. See n 81.

<sup>87</sup> Behrens 2014.

<sup>88</sup> Ahlborn – Grave 2006.

<sup>89</sup> Deutscher – Makris 2016 182. Further discussion on the more economic approach in relation to the goal of consumer welfare in chapter 3.1.

<sup>90</sup> Behrens 2014, p. 32-33.

<sup>91</sup> Miksch 1947, p. 210.

competition law, such as the ordoliberal goals of protecting economic freedom within the market structure through the protection of consumers' choice, and the price and efficiency aspects of the consumer welfare standard.<sup>92</sup>

On the other hand, it has been argued that the competition policy in the EU has gone further away from ordoliberal goals since the objective of consumer welfare was introduced. This argument is backed by the notion that “[a]n ordoliberal approach considers that competition policy should protect competitors irrespective of the effects on efficiency rather than competition since its fundamental value is with the freedom of all ‘citizens’ to be able to enter and compete on markets.”<sup>93</sup> On this note, ordoliberal goals can be seen more from a total welfare<sup>94</sup> than a consumer welfare perspective, if the economic freedom of all citizens is taken into account as the objective.

However, I don't see that the views of ordoliberal competition policy conflict with the consumer welfare standard. The welfare of consumers could be seen through ordoliberal goals since many of the social goals of ordoliberalism affect consumers' well-being in the end. As noted before, even though consumer welfare *per se* isn't mentioned in ordoliberal literature, the need for a wider approach to consumer welfare in the digital economy allows the redefinition of the consumer welfare standard through ordoliberalism which emphasizes the protection of the society from the private concentration of power. This concentration will, in turn, threaten individual freedom due to pressure from powerful interest groups.<sup>95</sup> Thus, the consumer aspect is essential in the digital economy where the market power of tech companies is accumulating due to the collection of consumers' personal data and the monetization of it.

Social goals in a broader context of the economy and society played an important role in ordoliberalism. Eucken and Böhm saw that society should be integrated around democratic and humane principles, such as social security and social justice, which would only be attained if the competitive process in the economy was guarded against the interference from private organizations and groups.<sup>96</sup> From this point of view, ordoliberal values could be taken

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<sup>92</sup> Behrens 2014, p. 32-33.

<sup>93</sup> Jones – Sufrin 2008, p. 35; Akman – Kassim 2010, p. 127.

<sup>94</sup> Eucken 1952, p. 306.

<sup>95</sup> Vatiéro 2010, p. 373. The effects of concentration will be discussed further in chapter 5 in connection with other goals of EU competition law, consumer welfare and ordoliberal competition policy.

<sup>96</sup> Böhm 1937, p. 185; Eucken 1952, p. 185-193.

into account also in EU competition law, for example regarding the concentration of economic power which may even affect democracy and freedom of the citizens in the EU. Broadening the scope of the consumer welfare standard offers a basis from which to incorporate these ideas into competition policy.

The social function of ordoliberalism is important when assessing connections to the welfare of consumers. Alongside economic prosperity, the market competition must function in such a way that citizens' freedom can be guaranteed to the maximum. The central strength of ordoliberalism is that, at the goal level, the market economy is not viewed as an area isolated from other human interactions solely as a measure of economic and technical efficiency, but in the broader triangle of freedom, efficiency and justice. The role of the economy is to serve the people, not the other way around. Competition's social function is central to all of its functions.<sup>97</sup> As individual freedom was one of the main objectives of ordoliberalism, connections to the concept of consumer welfare as it is seen today in EU competition law can be drawn.

The current discussion of incorporating privacy and data protection measures into the assessment of consumer welfare and exploitative abuses under Art. 102 TFEU can be connected to the thoughts of ordoliberalism. Promoting the ordoliberal objectives of freedom and the social function of competition law could benefit consumers when it comes to self-determination regarding their personal data.<sup>98</sup> These objectives cannot be measured in direct economic terms. The other goals' role in connection to consumer welfare is discussed further in chapter 5 where I will illustrate the connections of consumer welfare and other goals and their relevance in protecting consumers against abuses of data-based power in the digital economy.

Ordoliberalism is central to this new kind of assessment where the goal of consumer welfare is connected to other goals of competition law to promote wider inclusion of values regarding the protection of consumers in the data-driven economy. Competition is also seen as an essential part of a democratic market economy in the ordoliberal thought.<sup>99</sup> Later in my research, I will elaborate on the connection between democracy and consumer welfare in data-driven markets, and the importance of protecting democratic values in a competition law

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<sup>97</sup> Kuoppamäki 2003, p. 197, 202.

<sup>98</sup> Ordoliberalism has had an impact on the formation of current regulation on the abuse of a dominant position. See Behrens 2018.

<sup>99</sup> Kuoppamäki 2003, p. 121.

framework. Since economic power is prone to translate into political power when consumers are intellectually captured under the influence of powerful tech companies, the importance of this connection should not be underestimated. Furthermore, I will also argue that the goal of consumer well-being should be the new goal for the protection of consumers from a variety of harms in the era of digital competition. The goal of consumer well-being would also take into account the effects of concentration of economic power in connection with ordoliberal views.

### 3.3 *Evolution of the consumer welfare standard in EU competition law*

#### 3.3.1 The shaping of the goal

The interests of consumers were mentioned in early European Commission (the Commission) reports before the introduction of the consumer welfare standard around the turn of the century.<sup>100</sup> As seen in the previous chapters, the consumer welfare standard in different schools of thought has been one-dimensional (Chicago School) or even non-existent (ordoliberalism). The goal, in its current form, has mainly been shaped by EU institutions and through the case law of the CJEU, which illustrates its importance as a European competition policy goal.

First references to consumer welfare were mentioned in soft law. However, consumer welfare is still not defined in any binding legal instrument.<sup>101</sup> This supports its flexibility and the inclusion of different values in its scope which is essential to be able to capture the different benefits and harms that may occur to consumers. The definition has evolved through Commission's documents and courts' practice, and thus there is the possibility of redefining it to capture the realities of the digital economy and different benefits and harms to consumers within its scope. The first references to consumer welfare were introduced in 1997 Green Paper on Vertical Restraints and soft law documents, such as guidelines and discussion papers, as a part of the modernization package in 2004.<sup>102</sup> The definition of consumer in the consumer welfare standard is not limited to the welfare of end-users of the product or service but encompasses both intermediate users of the products in question, for example, other

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<sup>100</sup> European Commission, First Report on Competition Policy, 1972, p. 12, 14, 187-200.

<sup>101</sup> Daskalova 2015, p. 134.

<sup>102</sup> European Commission, Green Paper on Vertical Restraints in EC Competition Policy, 1997, p. 17; European Commission, DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses 2005, para. 4, 54, 88, 210; European Commission, Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements, 2004 OJ C101/2, para. 7; European Commission, Guidelines on the application of Article 81(3) of the Treaty, 2004 OJ C 101/97, para. 13, 21, 33, 104.

businesses, and final consumers. Therefore, harms to intermediate users are also taken into account as a dimension in the consumer welfare assessment.<sup>103</sup>

From the 1980s onwards to the beginning of the 21<sup>st</sup> century there was a move to a more economic approach in EU competition policy. *Monti*, the European Commissioner for Competition for the first years of the 21<sup>st</sup> century, put this on the top of his agenda.<sup>104</sup> The move towards the more economic approach has been characterized as the Americanisation of competition policy since, in the Chicago School, a strictly economics-based definition of the consumer welfare standard was the central goal.<sup>105</sup> But as described in the previous chapter, this perception is faulty at a conceptual level, as consumer welfare in U.S. antitrust law refers to the total welfare benchmark. However, this Americanisation might merely describe the economics-based conception of consumer welfare regarding price-effects, as opposed to other non-price factors, such as quality, innovativeness and choice, that have been introduced in EU competition law as dimensions of consumer welfare.<sup>106</sup>

Consumer welfare in the goals of EU competition law is not limited to price-related aspects. Consumer welfare can be defined as the excess of the benefit of a good over the amount paid for the good. These benefits are brought to consumers in the market in three dimensions, which are prices (the consumer surplus element), product variety and consumer choice, quality and innovativeness.<sup>107</sup> Naturally, in digital markets, the focus should be on the other dimensions than the price.<sup>108</sup>

These dimensions of consumer welfare have emerged gradually through the case law of the CJEU. In *Post Danmark*, the court first referred to price, choice, quality and innovation.<sup>109</sup> This is the formulation used by the Commission to refer to consumer welfare.<sup>110</sup> Before the *Post Danmark* decision, the General Court in its cases *Österreichische Postsparkasse* and

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<sup>103</sup> Daskalova 2015, p. 146, 158; Akman 2009, p. 71; Akman 2010, p. 315. “The concept of ‘consumers’ encompasses all direct or indirect users of the products covered by the agreement, including producers that use the products as an input, wholesalers, retailers and final consumers, i.e. natural persons who are acting for purposes which can be regarded as outside their trade or profession.” See European Commission, Guidelines on the application of Article 81(3) of the Treaty, 2004 OJ C 101/97, para. 84; European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements 2011 OJ C11/01, para. 49.

<sup>104</sup> See, for example, Monti, Mario, EU competition policy after May 2004, Fordham Annual Conference on International Antitrust Law and Policy, New York, 24 October 2003.

<sup>105</sup> Weitbrecht 2008, p. 85.

<sup>106</sup> European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004 OJ C31/03, para. 8.

<sup>107</sup> Fatur 2012, p. 47-48.

<sup>108</sup> Mäihäniemi 2017, p. 23.

<sup>109</sup> C-209/10, *Post Danmark A/S v Konkurrenserådet*, ECLI:EU:C:2012:172.

<sup>110</sup> Daskalova 2015, p. 135.

*GlaxoSmithKline (Court of First Instance)* had referred to consumers in a way which could be interpreted to refer to the consumer welfare standard.<sup>111</sup> Noteworthy is that *GlaxoSmithKline (Court of First Instance)* judgment was overruled in 2009.<sup>112</sup> From this judgment, it can be interpreted that the court, *inter alia*, rejected a narrow definition of consumer interest that related only to price, which for its part strengthened the wider value-base of the consumer welfare standard.

From the year 2010 onwards, the Commission has been more inclined to define consumer welfare through price, quality and choice. However, fewer statements by the commission have been made where it is stated that consumer welfare is “*the (ultimate)*” goal of EU competition law.<sup>113</sup> This development is desirable as I further present how the plurality of goals in EU competition law can strengthen the reach of competition law to capture the variety of harms to consumers in the digital economy. Subsequently, the relevance of the more economic approach, presented at the beginning of the 21<sup>st</sup> century, has diminished during the last 10 to 15 years.<sup>114</sup>

The inclusion of other components than price to consumer welfare assessment and transcending the strictly economic consumer surplus calculation support the evaluation of consumer welfare in consensus with a variety of goals and values in EU competition law. My point is to assert that consumer welfare should be kept as the basis for assessing harms to consumers. However, the goal of consumer well-being, which is still undefined in EU competition law, should be the new overarching goal for EU competition law that is based on the consumer welfare standard but also includes other relevant goals that affect the long-term interests of consumers in the digital economy.

### 3.3.2 Significance in the digital economy

One of the big questions regarding the definition of consumer welfare is whether data protection and privacy aspects should be included in its scope. This relates to the wider

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<sup>111</sup> T-213/01 and T-214/01, *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v Commission*, ECLI:EU:T:2006:151, para. 115; T-168/01 *GlaxoSmithKline Services Unlimited v Commission*, ECLI:EU:T:2006:265, para. 134, 147.

<sup>112</sup> C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v Commission*, ECLI:EU:C:2009:610. For comprehensive analysis of the judgement regarding consumer welfare, see Daskalova 2015, p. 153-154.

<sup>113</sup> Daskalova 2015, p. 48. Commissioner *Almunia* has emphasized innovation and efficiency over consumer-related themes. See *Almunia, Joaquín, Competition policy for the post-crisis world: A perspective*, Bruges, Belgium, 17 January 2014.

<sup>114</sup> Daskalova 2015, p. 158.

discussion on the role of data, especially of big data and big data analytics, in competition law assessment. In the last years, there has been some research into to this subject<sup>115</sup>, and it is, for example, stated that privacy could be seen as a parameter of non-price, quality competition in connection to consumer welfare.<sup>116</sup> I will not discuss these questions thoroughly in my research, but rather agree with the argument that privacy and data protection should be paid more attention to when assessing harms to consumers in the digital economy. This is because consumers' privacy is connected to the tech companies' business models that depend on data collection. This data collection subsequently raises the level of concentration of data-based power and causes wide-ranging harms to consumers and society.<sup>117</sup>

The question of including privacy and data protection into consumer welfare assessment also relates to the choice between economic and non-economic goals in EU competition law.<sup>118</sup> A consensus exists that economics has an important role in competition enforcement and intervention.<sup>119</sup> However, economic theory shouldn't be used to undermine the wider goals, constitutional values and moral norms of EU competition law or marginalise competition law's social role.<sup>120</sup> Since these are important factors also in ordoliberal competition law theory, I have taken the approach to consider the goals of EU competition law in the digital economy through ordoliberal viewpoints. Also, the concerns relating to competition dynamics in the digital economy challenge the dominance of economic assessment and emphasize the significance of other goals.

It has been argued, for example, that since competition law has traditionally ignored other dimensions of consumer welfare than economic efficiency concerns, a wider interpretation of competition rules is essential in the digital economy.<sup>121</sup> For my part, I will discuss the concentration of economic power in the digital economy and its relation to different harms to consumers in a broader sense. I will also show, regarding ordoliberal competition law tradition, that neither the concerns for the concentration of economic power nor the call for a wider interpretation of competition rules to capture the social realities are historically a new phenomenon.

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<sup>115</sup> Burri 2019; Wasastjerna 2019a and 2019b; Ezrachi – Robertson 2018; Graef 2016; Stucke – Allen P. 2016; Ezrachi – Stucke 2016.

<sup>116</sup> Stucke – Grunes 2016, p. 260-261.

<sup>117</sup> For a well-founded discussion on consumer welfare in the digital economy in relation to privacy and data protection, see Wasastjerna 2018. In relation to promoting consumers' privacy interests as a part of quality competition, see Stucke – Grunes 2016, p. 260-263. For a thorough discussion on quality in competition analysis, see OECD, *The Role and Measurement of Quality in Competition Analysis*, 2013, p. 5.

<sup>118</sup> Gerber 2012, p. 85.

<sup>119</sup> Kovacic 1992; Kovacic 2007; Kovacic – Shapiro 2000.

<sup>120</sup> Ezrachi 2018, p. 22.

<sup>121</sup> Graef 2016, p. 375-376.

For example, in the first meeting of the European Consumer Organization (BEUC) consultation process in December 2018, consumer organizations, academics and competition agency representatives from the EU and the U.S. came to the consensus regarding the need to move away from price-centric tools in competition law assessment. Therefore, wide support for a change of outlook exists.<sup>122</sup> Also, a definition for (economic) science doesn't always serve the purposes of law enforcement.<sup>123</sup> When utilizing the results of economics research, it must also be borne in mind that economics is not an exact science. As in other social sciences, the underlying value choices are already reflected in the research subject and the choice of research method. Also, economic goals are distinct from other goals since the tools of economics present their criteria and methodological tools that must be incorporated into the legal assessment.<sup>124</sup> The integration of economic methods into competition law does not mean that competition law becomes objective. On the other hand, economics has an undeniable advantage in clarifying questions and in exposing the effects of legislation and government decisions.<sup>125</sup> What I propose is an approach of combining the economic and non-economic aspects of consumer welfare and other goals of EU competition law.

Also, it should be stated that the economic goals of EU competition law, in addition to consumer welfare, are not separated nor independent from each other. For example, the goals of efficiency, consumer welfare (its price-related aspects) and the protection of the competitive process are all economic goals and intertwined with each other.<sup>126</sup> I have included all these goals into this research since they serve an important purpose in the assessment of the full picture of competition law enforcement in the digital markets.

An interesting aspect of the use of consumers' personal data is the distribution of wealth through profiling, discrimination and asymmetries in bargaining power.<sup>127</sup> Distribution of wealth in digital markets could be seen deriving from the indirect economic exploitation of consumers' privacy since companies in a dominant position can economically benefit from consumers' personal data. This phenomenon is complex and cannot be thoroughly assessed in this research. However, the connection between consumers' privacy and the accumulation of

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<sup>122</sup> In reference to the strictly economic approach, *Ezrachi* clarifies that “under EU competition law, what counts extends beyond what is commonly countable under economic models”. See *Ezrachi, Ariel, Enforcing European Competition Law in a Global Digital Economy, Oxford Business Law Blog, 1 May 2019.*

<sup>123</sup> *Daskalova* made this statement in context with the assessment of the consumer welfare standard and the total welfare standard in EU competition law. It was noted that the “inquiry into the economic definition of consumer welfare, has failed to produce exhaustive answers as to what kind of injury and to whom a consumer welfare standard would seek to prevent”. See *Daskalova 2015, p. 140.*

<sup>124</sup> *Gerber 2012, p. 93.*

<sup>125</sup> *Kuoppamäki 2003, p. 208.*

<sup>126</sup> *Gerber 2012, p. 92.*

<sup>127</sup> *Ezrachi 2018, p. 7.*

companies' economic power can be drawn when interpreting the consumer welfare standard in the digital economy. Non-price elements, such as quality, are important in online markets since services are offered for free.<sup>128</sup> In this evaluation, a strictly economic view will lead to false negatives in competition law enforcement. Thus, quality is one of the most important elements of consumer welfare and also related to the goals of efficiency and innovation which will be discussed further.

In interpreting the consumer welfare standard in the digital economy, especially in platform markets, the following aspects must be taken into account. Consumer welfare can address multi-sided markets, as the definition of consumer encompasses also other than the final users of the product, such as retailers.<sup>129</sup> For example, Amazon Marketplace is a digital platform in which sellers and buyers are connected, and Amazon as the platform provider arranges for them to meet.<sup>130</sup> Even though the sellers are not final consumers, in multisided platforms they are unavoidably under the influence of the platform and thus affected by its conduct, for better or worse. The consumer welfare approach in which the sellers' benefits are also taken into account, could foster a more balanced market also for the benefit of final consumers. The overall benefits would be distributed to different parties, not only to the platform.

In two-sided platforms, on the other side of the platform prices are free or low, and on the other, higher. Usually, consumers are attracted by these low or free prices, which subsequently attracts paying business customers due to the number of consumers on the other side of the platform. This must be taken into account by competition authorities, especially when considering price-effects and their emphasis on different sides of the platform. One downside of two-sided platforms is the possibility that the platforms may try to extract economic rent from the consumer side, by abusing advertising or with low-quality services. This may also be realised on the business side in the form of excessive sales commissions.<sup>131</sup> The harms to consumers are more difficult to analyse if no benchmarks for comparing the value of the extracted personal data to the quality of the services exist.

Subsequently, when assessing competition law cases in the digital economy, it is challenging to evaluate the value of data since its economic value is inherently different for consumers

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<sup>128</sup> *Microsoft/Skype* (Case COMP/M.6281), Commission Decision C(2011)7279, para. 81.

<sup>129</sup> European Commission, Guidelines on the application of Article 81(3) of the Treaty, 2004 OJ C 101/97, para. 84.

<sup>130</sup> See Wikipedia, Amazon Marketplace. The European Commission has opened an investigation on Amazon due to alleged unfair terms and conditions imposed on the sellers in the marketplace. See European Commission, Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon, Brussels, 17 July 2019.

<sup>131</sup> Tirole 2017, p. 392-395.

and businesses. For example, consumers can't monetize their data in the same way that companies can. In my view, the monetary value of data for companies should be acknowledged and taken into account in assessing free services' competition law dimension. Since consumers' personal data is collected, the services are not free, even though no monetary price is charged. Without transcending the strictly monetary view of traditional goods and services, the evaluation under competition law principles cannot evolve to what is necessary for the digital economy.

First, what should be evaluated are how the companies collect and use consumers' personal data; for example, what types of data is collected, the restrictions in the collection and how this data is connected from different sources to form patterns of consumer behaviour and so on. Also, the focus should be on the fact that data can be sold to third parties and monetized through, for example, advertising. The bigger the scale of the data collected and the smaller the restrictions in its collection, the bigger the price that the consumer pays for the free services.

Subsequently, providing personal data in exchange for useful services is a transaction, but not a financial transfer in the form of traditional currency. The economic value is still at the heart of the services provided, since the company has invested money in them, and on the other side, monetizes consumers' personal data for revenue.<sup>132</sup> When conducting this simple assessment of how the digital economy works, the value of data can't be contested and thus, shouldn't be left out of the competition law assessment. It is out of the scope of my research on how this assessment should practically be realised in EU competition law enforcement.

Therefore, I will not contest the economic assessment as the basis for the consumer welfare, but rather make the point that the characteristics of data in this evaluation are rightly adhered to in competition situations where data is an important evaluation parameter. In the next chapter, I will discuss the wider implications of the concentration of private power from the historical point of view of ordoliberalism and its connections to the current situation. This comparison will underline the argument that the welfare of consumers should be defined comprehensively when it comes to assessing the negative effects of unrestricted competition in data-driven markets.

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<sup>132</sup> Ibid., p. 407-408.

## 4 ORDOLIBERALISM AND DATA-BASED POWER IN THE DIGITAL ECONOMY – SHARED CONCERNS

### 4.1 *The concentration of private power*

#### 4.1.1 Concerns in the 20th century ordoliberalism

Restricting the harmful concentration of private economic power was the main emphasis of ordoliberalism. Competition policy on economic terms was needed to make the control of power and the preservation of democracy possible.<sup>133</sup> Even though the underlying principles of competition policy were economic, ordoliberalism was based on humanist values rather than purely economic concerns.<sup>134</sup> So the basis to which the markets should be tied was economic, but from this strong foundation also other values, such as democracy and political freedom, could be pursued.

In ordoliberalism, enforcing competition was therefore seen as a constitutional element of the market economy and as the guarantee and instrument for the decentralization of economic and political power.<sup>135</sup> By securing decentralization, the main political objectives of ordoliberalism, individual freedom, economic welfare and justice, were protected.<sup>136</sup> The autonomy of individuals from the economic tyranny of certain power blocks was the ideal to be strived for. Preventing the concentration of market power was important. Mergers, which would lead to market control, should be restricted and structural demerger powers could be authorized.<sup>137</sup> Also, it was important to promote *capacity competition* (in other words, *performance competition* or *competition-on-merits*) in contrast to *impediment competition* (in other words, *prevention competition*).<sup>138</sup>

The idea behind the terms of capacity competition and performance competition is improving the company's performance, for example, in the form of better goods and services for consumers in contrast to trying to lower the performance of competitors without attaining absolute improvement (impediment competition and prevention competition). The current concept of abuse of a dominant position in EU competition law is seen to reflect this objective. This idea can be linked to the quality and price aspects of consumer welfare since increased competition-on-merits will increase overall consumer welfare in these dimensions. On this account, *Vatiero* offers a new practical alternative for the evaluation of a dominant market

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<sup>133</sup> Kuoppamäki 2003, p. 190.

<sup>134</sup> Gerber 1998, p. 239.

<sup>135</sup> Kuoppamäki 2003, p. 197. *Böhm* called competition “the most ingenious instrument of disempowerment” (“genialste Entmachtungsinstrument”). See Walter Eucken Institut, Franz Böhm.

<sup>136</sup> Mestmäcker 1975, p. 414.

<sup>137</sup> Kuoppamäki 2003, p. 191-192.

<sup>138</sup> *Vatiero* 2015, p. 296.

position and the abuse of such position, through the ordoliberal distinction between performance and impediment competition. One of the main points in his paper is the recognition that the evaluation of a dominant position through an ordoliberal standard includes not only the economic dimension but also the impact of private economic power on the political domain. This re-evaluation of abuse of a dominant position is in line with the core of my research which focuses on the connections between economic and political power on the level of goals of EU competition law.<sup>139</sup>

A strong and neutral state was needed to ensure the protection of individual freedoms since the private concentration of power would otherwise lead to threats to these freedoms in the form of interest group pressures.<sup>140</sup> Competition law was seen as the main tool to protect individual freedom and create wealth in a society where the economic order was based on competition.<sup>141</sup> The market had to function to provide equal opportunities for participation and excessive economic power was seen as a major obstacle to social justice and social integration.<sup>142</sup>

One of the main assumptions of ordoliberalism regarding economic power is that every power accumulation becomes the means for new accumulation; this path-dependence leads to a polarization of power. Also, economic power will affect political power which can have effects that reduce competition in the market.<sup>143</sup> This process is theoretically interesting when connecting it to the characteristics of data in the accumulation of market power, which is discussed in the next chapter. By drawing this connection, I will present how the accumulation of market power through ordoliberal theory is amplified in the digital economy due to the characteristics of personal data and its importance in tech companies' business models. The concerns of economic power transcending into the sphere of political power are also present in the 21<sup>st</sup> century and will be discussed further. The negative effects of the accumulation of power in society will affect consumers in the end, and therefore a comprehensive outlook is required in redefining the consumer welfare standard.

*Kuoppamäki*, in his doctoral thesis, makes an illustrative note on the current importance of ordoliberal thoughts. He states that the importance of ordoliberalism is not in the time-bound policy recommendations, but rather in the systematic perception of the social importance of competition law that is not found in the American, strictly economics-based, competition

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<sup>139</sup> Ibid.

<sup>140</sup> Vatiéro 2010, p. 373-374.

<sup>141</sup> Gerber 1998, p. 16, 241.

<sup>142</sup> Ibid., p. 240.

<sup>143</sup> This accumulation is illustrated in ordoliberal theory through exploitative and exclusionary powers. The increase in the power of exploitation leads to the accumulation of resources for the company in the dominant position, which it can use to increase its power of exclusion. This determines a path-dependence process of cumulative causation of power. See Vatiéro 2010, p. 379-381.

policy. Ordoliberalism offers a point of view in which the markets are seen as a tool for promoting more important social objectives.<sup>144</sup> Hence, the competition policy recommendations regarding the concentration of private power have a historical dimension which is not restricted to a specific era and its political climate.

In this context, the current EU competition policy could benefit from looking back to its roots, where ordoliberal thoughts have had substantial influence, without abandoning the current economics-based approach completely. A historical approach can aid in evaluating how the social realities in the digital markets should be studied and what kind of knowledge will help to improve the functioning of the EU as an economic community which takes into account the well-being of consumers. This stems from the fact that data's economic characteristics don't conform to the mould of traditional price-effects based assessment.<sup>145</sup>

#### 4.1.2 Data and concentration of market power

At the beginning of the digital era, there was a more allowing approach to competition enforcement, since the positive outcomes, such as the dynamic efficiency benefits and the freedom of information were seen as the main characteristics of the new form of economy. Also, the regulation of information markets was seen as difficult to realise in practice, since these markets were changing rapidly and unpredictably.<sup>146</sup> However, it is now noted that several characteristics of online platforms can affect the increase in companies' market power, leading to negative market effects.

Online platforms form network economies in which supply-side economies of scale are present. In this context, as the production increases, the average costs of providing products and services decline. Network effects, on the other hand, are referred to as demand-side economies of scale, the effects of which occur when the benefits that a consumer gets from using a service increase with the number of others using the service. These network effects are visible in social network platforms, where the companies benefit from network effects in the form of increased advertisement sales and users benefit socially from more and more people using the platform.<sup>147</sup> The growing benefits to users as the number of other users increases is referred to as direct network effects. On the other hand, indirect network effects occur when the benefits on one side of the platform increase as the number of users increase

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<sup>144</sup> Kuoppamäki 2003, p. 193, 202.

<sup>145</sup> On the economic characteristics of data, see Graef 2015; Wasastjerna 2019a and 2019b.

<sup>146</sup> Kuoppamäki 2018, p. 20.

<sup>147</sup> Graef 2016, p. 32-34.

on the other side of the platform.<sup>148</sup> For example, advertisers benefit from an increased user-base on a platform.

As opposed to traditional markets, the scope of these economies of scale isn't constrained by location and transport costs, which leads to concentration on a global rather than national or regional scale. These economies of scope are derived through the sharing and merging of consumer data. Economies of scale and scope are strong especially when it comes to the accumulation and use of data relating to consumer behaviour. Companies which have numerous sources from which to gather data, an extensive database to which they can compare new data, or who possess developed and unique data analysis and synthesis tools, are more likely to enjoy a competitive advantage. Economies of scope also help large tech companies to build ecosystems across several adjacent markets.<sup>149</sup>

Operating systems (OS), such as Apple's iOS and Google's Android, are a classic example network effects, since "the more there will be invested in developing products [such as mobile apps] compatible with that platform - - [the more it] reinforces the popularity of that platform with users".<sup>150</sup> Also, in the network economies, users can become locked-in to specific services due to high switching costs. This is illustrated best in social networks, the central feature of which is the personal information provided by users and the connections with other users.

All these characteristics protect the companies that have gained a foothold in the market and make it more difficult for entrants to get a position therein. Thus, multi-sided network effects can lead to markets where 'winner-take-most' or 'few-winners-take-all' as illustrated aptly by *Graef*.<sup>151</sup> The substantive competition law assessment of these elements is still subject to differing opinions. For example, it is debated whether the data to which an incumbent has access gives rise to entry barriers. Opponents of this view claim that data is non-rivalrous, widely available and the costs of data-collection are low and that competition in the platform

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<sup>148</sup> Furman, Jason – Coyle, Diane – Fletcher, Amelia – McAuley, Derek – Marsden, Philip, Unlocking digital competition. Report of the Digital Competition Expert Panel, 2019, p. 35.

<sup>149</sup> *Ibid.*, p. 23; Rubinfeld – Gal 2017, p. 342.

<sup>150</sup> T-201/04, *Microsoft Corp. v. Commission*, ECLI:EU:T:2007:289, para. 1061.

<sup>151</sup> *Graef* 2016, p. 40, 43, 47, 121. *Graef* has illustratively listed some circumstances which may point towards market power in relation to markets defined around data: "(1) data is a significant input into the end products or services delivered on online platforms; (2) the incumbent relies on contracts or on intellectual property and trade secret law to protect its dataset as a result of which competitors cannot freely access the necessary data; (3) there are few or no actual substitutes readily available on the market for the specific information needed to compete on equal footing with an incumbent; (4) it is not viable for a potential competitor to collect data itself to develop a new dataset with a comparable scope to that of the incumbent (for example, due to network effects or economies of scale and scope)". See *Graef* 2016, p. 267.

economy is driven by more than just data.<sup>152</sup> On the other hand, it is recognized that if the necessary information is not available to entrants, the user data collected by online platforms may cause barriers to entry.<sup>153</sup>

Even though the subject is debated, it can be argued that data can act as a barrier to entry in digital markets, for example, due to feedback loop effects. These can happen in the form of user feedback loops when companies improve their services through collected data, and monetisation feedback loops where revenues generated from business users, for example through advertising, are reinvested to attract more users.<sup>154</sup> Connected to the subject on whether data can act as a barrier to entry, few powerful companies, mainly digital platforms, have an advantage in accessing data and analysing it to observe consumer trends and competing for business ventures before others. This advantage to monitor consumers and business models in real-time wasn't available to monopolies before the digitalization of markets. The monitoring benefits the dominant firms by providing information on when to acquire entrants through mergers before they become competitive threats.<sup>155</sup>

Especially when considering these characteristics of the digital economy in light of the above-mentioned accumulation of market power and path-dependence process of ordoliberalism, it can be argued that the concerns of concentration of economic power have gained new dimensions in the 21<sup>st</sup> century, in the form of digital platforms and their data-based power. Before the digitalization of the economy, monopolies and powerful firms lacked these powerful tools. The path-dependence of the power concentration process is highlighted in the digital economy since the collection and analysis of data leads to a snowball effect. When dominant companies target customers better, their power is reinforced by attracting additional users.<sup>156</sup> This leads to the gathering of even more valuable data and further improving the services for consumers and visibility for advertisers.<sup>157</sup>

The companies which have gained the dominant position benefit in several ways. They will capture greater value from the data, use the profits to expand their business and thereby attract additional users and advertisers and in the end promote or disrupt the competition at their will.<sup>158</sup> The accumulative effects of concentration of power are substantial in the digital

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<sup>152</sup> Lerner 2014, p. 20-34.

<sup>153</sup> Autorité de la Concurrence – Bundeskartellamt, Competition Law and Data, 2016, p. 25-27.

<sup>154</sup> OECD, Big Data: Bringing Competition Policy To The Digital Era, 2016, para. 22.

<sup>155</sup> Stucke – Allen P. 2016, p. 285-286.

<sup>156</sup> Stucke – Ezrachi 2017, p. 87-89.

<sup>157</sup> OECD, Data-Driven Innovation: Big Data for Growth and Well-Being, 2015, p. 185.

<sup>158</sup> Ezrachi – Stucke 2016, p. 239.

economy when companies pursue growth through data-driven business practices. In the data-collection arms race that the leading companies have entered into, privacy concerns of consumers will be of little interest.<sup>159</sup>

As a more recent development in the companies' data collection practices, smart-home devices have arrived in our homes, such as *Nest*<sup>160</sup>, Google's smart thermostat. These devices share information with other smart devices, unnamed personnel and third parties.<sup>161</sup> To get a full picture of all of these connections, one should read nearly a thousand so-called contracts.<sup>162</sup> Hence, it is practically impossible for consumers to keep track of how their personal data flows to third parties. This is one example of how Google can derive vast amounts of data and connect them with their already comprehensive data flows from search engines, mobile applications, operating system platforms and maybe even self-driving cars<sup>163</sup> in the future. In conclusion, the accumulation of economic power is inevitable.

All in all, powerful players in the digital economy can, due to their position, in practice exercise subtle coercion which can exclude other participants from the market. An interesting connection can be drawn to ordoliberalism, according to which the Weimarian state failed since it "allowed the private market participants to decide on the 'rules of the game'".<sup>164</sup> This was due to the incapability of *laissez-faire* liberalism to control powerful market participants at the time, but similar effects are happening today in the digital economy due to the concentration of data-based power and the lack of proper competition enforcement.

## 4.2 *Harms to competition and beyond*

### 4.2.1 Harms to the society from an ordoliberal point of view

Ordoliberal scholars thought that the excessive concentration of economic power could, in addition to causing negative market effects, corrupt political decision-making. The companies with market power could gain special rights for themselves which would further diminish competition in the markets. In extreme cases, the power blocks in the market would succeed in influencing the enactment of laws in their favour. The outcome would be the exclusion of

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<sup>159</sup> Menn, Joseph, Data Collection Arms Race Feeds Privacy Fears, Reuters, 19 February 2012.

<sup>160</sup> More information available at <nest.com>.

<sup>161</sup> Hernandez – Arias – Buentello – Jin 2014.

<sup>162</sup> Walden – Noto La Diego 2016.

<sup>163</sup> Ezrahi – Stucke 2016 , p. 152.

<sup>164</sup> Knortz 2010, p. 32, 81; Eucken 1952, p. 35-55.

potential competitors which would further strengthen the power of the dominant companies.<sup>165</sup>

In the Weimar Republic, this led to the situation where companies could not freely participate in the market and citizens' economic rights, freedoms and opportunities were violated.<sup>166</sup> Thus, in addition to having negative effects on the competitive process, the concentration of market power also harmed the legitimacy of the political system by reducing the procedural guarantees of equal participation in the sphere of politics.<sup>167</sup>

The concentration of power due to the unrestricted competition will therefore ultimately harm the basis of modern societies, democracy itself. It could at first hand seem far-fetched to extend the competition law assessment to political dimensions. However, the emphasis seems more relevant when looking back at the origin of ordoliberalism during the Third Reich in Germany, where the economy was suppressed to a fascist government and the concentration of economic power in its worst manifestation was not just a concern but rather the reality.

Today the concentration of data-based power can lead to significant negative results on the economy and the political freedom of consumers. The role of data in the economy is from a historical perspective a completely new phenomenon, whereas the concentration of economic power and its harms are not. Therefore, one should not directly implement the ordoliberal policy choices to the current framework of competition policy, but rather draw connections between the different societal situations, which could aid in defining a theoretically well-founded competition policy. My contribution to this is to redefine the goal of consumer welfare to meet the requirements of the digital era.

#### 4.2.2 Harms in the digital economy

As stated above, the threats which the accumulation of data-based economic power in the digital economy poses has connections to the concerns of the ordoliberal tradition in the 20<sup>th</sup> century. The defining point in the digital economy is that the accumulative economic power is achieved through consumer exploitation, i.e. collection of personal data, which further supports the competition law assessment from the perspective of consumers.

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<sup>165</sup> Kuoppamäki 2003, p. 191.

<sup>166</sup> Deutscher – Makris 2016, p. 186.

<sup>167</sup> Böhm 1980, p. 68.

The above-mentioned argument is based on the fact that revenue streams in the digital markets depend on consumers' personal data, which has to be acquired constantly as the value of data may decrease over time.<sup>168</sup> Due to data's nature as the new oil of the digital economy<sup>169</sup>, the business models depend on consumers' actions. Therefore, we are more and more drawn in by tech companies' products and services since they will try to capture our attention to extract as much personal data as possible.<sup>170</sup> Consumer choice and privacy already suffer from the concentration of power in digital markets.<sup>171</sup> However, due to the absence of price-effects, these harms are more difficult to grasp at the level of an individual.

An important factor regarding the concentration of market power in the digital economy is the impact of data-driven mergers on consumers. A good starting point for evaluation is the merger guidelines in the EU and the U.S., in which the importance of non-price parameters, such as, product or service quality and variety and innovation is acknowledged.<sup>172</sup> If data-driven mergers are ignored by the competition agencies since the price-centric elements are not at hand, mergers that significantly harm consumers in other dimensions may be allowed. If only the mergers' price effects are assessed since, for example, a solid analytical framework for evaluating free services in multi-sided platforms is lacking, many data-driven mergers will pass through without significant scrutiny.

Thus, price centric tools are not suited for analysing free services through which consumers' personal data is collected in exchange for permission to use the service. The data-driven mergers together with network effects in the digital economy and passive competition law enforcement will likely lead to highly concentrated markets. Consumers will, in the end, pay the price for this. Therefore, the tools and guidelines for competition law assessment must be revised. The recognition of non-price parameters in the merger guidelines is a step in the right direction. Ignoring these factors will lead not only to market power but monopoly power, which is not quickly corrected by market forces.<sup>173</sup> Shifting the focus to the goals of EU competition law in connection with the concentration of economic power is the first step in changing the outlook on competition enforcement.

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<sup>168</sup> Ezrachi – Stucke 2016, p. 174.

<sup>169</sup> “Personal data is the new oil of the internet and the new currency of the digital world.” See Kuneva, Meglena, Keynote Speech at the Roundtable on Online Data Collection, Targeting and Profiling, Brussels, 31 March 2009.

<sup>170</sup> For an analysis on the topic of attention economy and the law, see Wu 2017.

<sup>171</sup> Furman, Jason – Coyle, Diane – Fletcher, Amelia – McAuley, Derek – Marsden, Philip, Unlocking digital competition. Report of the Digital Competition Expert Panel, 2019, p. 4, 43.

<sup>172</sup> European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004 OJ C31/03, para. 8.

<sup>173</sup> Stucke – Allen P. 2016, p. 229-231, 252.

One distinct point made by *Ezrachi* regarding the new competitive dynamics in digital markets is that digital competition has led to situations where companies try to extract as much benefit as possible from consumers, mainly in the form of data and then compete over it. Thus, the market dynamic moves from consumer welfare/surplus competition to producer welfare/surplus competition, where attributes of the competitive market may exist, but consumers do not benefit.<sup>174</sup>

When looking at the competition law regulations under Art. 102 TFEU, my argument is that exploitative abuse is more likely to be realized in a market where the price paid is personal data since it is in reality more difficult for consumers to assess the price paid in data as opposed to when the price charged is monetary. Harms to consumer welfare should be evaluated not just in monetary terms but also in terms of privacy. The decision of the German Competition Authority, *Bundeskartellamt*, regarding Facebook is a good example of taking privacy and data protection matters into account in competition law assessment in a novel manner.<sup>175</sup> However, the current situation is that Facebook appealed to the Dusseldorf court, which granted a suspension delaying the application of the order of the *Bundeskartellamt*. This will likely turn the matter into a long legal battle.<sup>176</sup>

One way to see the dynamic between businesses and consumers in the digital economy is that the consumer is both the customer and the good in the digital markets. In this situation, the price of the digital service is the contractually accepted restrictions to the consumers' privacy. However, a consumer may not have any other option than to accept these contractual terms or not use the service at all.<sup>177</sup> A more defined viewpoint to the position of consumers in the digital markets is that consumers are the resources of surplus for the companies; the objects of the "raw-material extraction operation", meaning the evolving ways of collecting personal data and tracking behaviour. Thus, the real customers are the companies that trade in the behavioural data collected from us.<sup>178</sup>

Excessive collection and combining of personal data can be a form of exploitative abuse, as illustrated in the above-mentioned Facebook decision. If dominant players in the market can without restrictions exploit consumers, negative effects on product variety and quality,

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<sup>174</sup> *Ezrachi – Stucke* 2016, p. 233-234. The definitions of producer and total welfare are explained in chapter 5.1.

<sup>175</sup> *Bundeskartellamt*, 6<sup>th</sup> Decision Division, B6-22/16, Decision under Section 32(1) German Competition Act (GWB).

<sup>176</sup> *Bundeskartellamt*, *Bundeskartellamt prohibits Facebook from combining user data from different sources*, 7 February 2019; *Lomas, Natasha*, *Facebook succeeds in blocking German FCO's privacy-minded order against combining user data*, *Techcrunch*, 26 August 2019.

<sup>177</sup> *Kuoppamäki* 2018, p. 20.

<sup>178</sup> *Zuboff* 2019, p. 10.

consumer choice and in the long run, innovativeness, will be realized. One could argue that since competition law has been able to tackle these problems before, it should be able to do so in the future. However, due to the characteristics of the digital markets where companies constantly develop ways to target unsuspecting users, harvest their data, and use it for more defined behaviour targeting, these practices mostly remain unnoticed; in stealth.<sup>179</sup> Thus, their omission from competition law assessment leaves the markets open to the increasing concentration of market power.

In the future, harms from the accumulation of data-based power can expand from privacy and data protection concerns into affecting the society as a whole, as described in connection with the concerns of the concentration of private power in ordoliberalism. This concern will be discussed further in the chapter on democracy and economic freedom in EU competition law.

### *4.3 Drawing connections to consumers*

Taking into account the characteristics of tech companies' business models, my argument is that the interests of consumers and tech companies will not meet in the digital economy. Without a change of direction in EU competition policy, long-term negative effects on consumers are likely to be realized. The extent and the severity of these effects are likely to be unprecedented and unpredictable. Even though services in the digital economy are free, such as mobile apps and search engines, consumers pay with their personal data and privacy. Often, they do not know what kind of information is collected about them and how this data is used since the processes are not transparent.<sup>180</sup>

The disparity of bargaining power between a consumer and a digital platform is considerable and contributes to the increase in platforms' data collection possibilities and the scale of these actions. Terms and conditions are often one-sided and usually not even paid attention to by the consumers.<sup>181</sup> The network effects further reinforce the platforms' control over the consumer. Simply put, the companies' business models that are centred around data collection, accumulation and merging, are in stark contrast with consumers' privacy considerations. Thus, companies are not interested in fostering technologies that promote

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<sup>179</sup> Ezrachi 2018, p. 18.

<sup>180</sup> Stucke – Grunes 2016, p. 9, 325-334.

<sup>181</sup> Infranca – Smorto 2018, p. 22.

privacy.<sup>182</sup> The market forces have not yet yielded the privacy protections that consumers desire since there is an absence of meaningful competition.<sup>183</sup>

A change is needed in competition law enforcement. The long-term effects of data-based competition should be taken into account. Other goals of EU competition law that reflect the different dimensions of consumer welfare are essential in capturing the negative effects of the concentration of data-based power. This approach enforced with an ordoliberal outlook on competition law's social importance will guide competition law enforcement to a direction in which consumers will benefit in the end.

The risks of not paying attention to competition law enforcement in the digital markets can lead to effects that are more difficult or even impossible to correct through ex-post measures. When compared to the situation in the U.S., where price-centric antitrust has been the main focus from the 1970s onwards, poverty, economic insecurity, the stagnant living standards and the income and wealth inequality have all been on the rise.<sup>184</sup> Even though the connection of competition law enforcement to these social harms is hard to prove<sup>185</sup>, if no attention is paid to the problems that digital economy brings in the form of economic power concentration, similar effects may start to appear in the EU. The focus on consumers' overall well-being by combining different goals of EU competition law in the digital economy is needed to grasp the different dimensions of harms that concentration of data-based power can cause.

As mentioned in the previous chapter, consumers are directly linked to tech companies' market power due to the companies' data collection practices. This puts them at the centre stage when choosing the tools for reducing the harms caused by the accumulation of data-based power. Privacy and data protection, as the suggested new dimensions of consumer welfare standard, can connect ordoliberal ideas of protecting social goals to the situations in the digital economy. This can be achieved by limiting the excessive accumulation of data-based power by concentrating on privacy and data protection aspects of digital services, which would give the control back to consumers when it comes to the use of their personal data. This would in the long run also progress the economic freedom of consumers to choose

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<sup>182</sup> Stucke – Grunes 2016, p. 54. On the same note, the author reflects that “[i]t would be like asking a broadcaster or cable company to support a device that allows consumers to fast-forward through ads”.

<sup>183</sup> *Ibid.*, p. 61.

<sup>184</sup> Stucke – Allen P. 2016, p. 249.

<sup>185</sup> Scholars are studying the connections between weak antitrust and wealth and income inequality. See Stucke – Allen P. 2016, p. 250. It is noteworthy that the growing wealth and income inequality is not the natural by-product of a market economy, but the result of policy decisions. See Stiglitz 2012.

the services that focus on privacy protection since competition law would be structured in a way which promotes these alternatives. However, the practical enforcement strategies to achieve this goal is out of the scope of my research.

One example of ordoliberal ideas' connection to the market realities in the digital economy is the operating system platforms' dominance in the mobile device markets. The ordoliberal idea that in competitive markets no firm should have the power to force other firms' conduct in that market<sup>186</sup> fails when examining the operations of the main operating system platforms, Apple's iOS and Google's Android. Operating system platforms determine through their terms and conditions what kind of apps can be made available in their platforms. For example, *Disconnect*, an application that helps users to protect their privacy in the online environment, was banned from Google's app store with ambiguous arguments. In summary, *Disconnect* prevented Google from utilizing its advertisement revenue model due to the built-in advertisement blocking features in the app.<sup>187</sup> This showcases that since the business models in the digital economy are based on data collection and the infringement of users' privacy, the individual companies trying to do the opposite will be hindered by the incumbents. This is a prime example regarding my argument that in the digital economy the interests of consumers and companies will not meet.

Social goals of ordoliberalism that would extend the outlook to the long-term social harms to consumers should be incorporated in EU competition policy since the market power of big tech companies can affect consumers and society in a variety of dimensions; economic freedom, choice and quality of products and services, privacy and even political freedom and democracy in the long run. Ordoliberalism promoted the idea that the basic principles would be provided by the law and the government could intervene in the economy only to enforce those principles.<sup>188</sup> This idea transferred to the sphere of competition policy would serve the interests of consumers in the digital economy by incorporating a wider range of goals to the competition policy in the EU. The substantive provisions would be applied with these goals in mind and the consumers' well-being as the overarching objective. In the next chapter, I will go through the most relevant goals of EU competition law in the digital economy.

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<sup>186</sup> Gerber 1998, p. 245.

<sup>187</sup> For the full story on the clash between Google and Disconnect, see Ezrachi – Stucke 2016, p. 178-190.

<sup>188</sup> Gerber 1998, p. 246.

## 5 GOALS OF EU COMPETITION LAW – CONNECTIONS TO CONSUMER AND CONCENTRATION OF POWER

In this chapter, I will discuss some of the goals of EU competition law which are significant in the digital economy and have also connections to ordoliberalism. First, I will go through the total and producer welfare standards, to indicate their connections to the consumer welfare standard. Then, I will go through some of the goals of EU competition law keeping in mind the link between the ordoliberal ideas and the current concern of the concentration of power in the digital economy. The multiplicity of goals in EU competition policy can be seen in unison to create a strong foundation to combat the challenges in the digital economy. I will go through the harms that unrestricted competition poses to consumers regarding these goals, and on the other hand, the benefits to consumers of protecting these goals in the digital economy.

At the end of the chapter, I will present why a variety of values should be protected under the goal of consumer well-being. The accumulation of data-based power could amount to unimaginable negative effects on society in the future, illustrated by the connections to historical concerns of ordoliberalism and the predictions of the increasing role of data in the economy as presented in the forward-looking research *Virtual Competition*.<sup>189</sup> Consumers are at the centre of this new type of power accumulation due to the collection of personal data being in the core of many tech companies' business models. Competition law is one of the regulatory frameworks which can be used with timely and careful intervention to avoid the worst outcomes of concentration of private economic power. Although intervention is possible in the later stages of concentration of economic, data-based power, the implementation of measures such as breaking up companies could prove more difficult and are not included in the preventative enforcement policies, on which the framework of EU competition law is mostly built around.<sup>190</sup>

Since economic power and the consequences of its concentration affect the lives of virtually everyone, it is crucial to evaluate the historical standpoints and subsequently attempt to predict the future. This is possible to an extent, for example in the case of how new technologies could affect us. For example, self-driving cars will be a phenomenon in the future as many of the biggest tech companies are currently researching and pushing money to

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<sup>189</sup> Ezrachi – Stucke 2016.

<sup>190</sup> Szczepanski, Marcin, EU Competition Policy: Key to a fair Single Market. European Parliamentary Research Service, October 2019, p. 1.

the development of these technologies. Tech companies can use these cars to further extend their reach to the private lives of people.<sup>191</sup>

The practical enforcement of these goals should appear in commission decisions and guidance and, in the long run, in court judgments, for example, on the application of TFEU Articles. There will be more pressure on competition authorities to regulate the practices of tech companies as data collection and other privacy-invasive practices framed in the abundance of free, often high-quality, products and services increase in peoples' lives. On this note, quality is one of the aspects which is difficult to assess in the data-based markets. Companies in the technology sector are among the fastest-growing companies in the world<sup>192</sup> and even if they didn't push for the best possible product or service, they would likely still pass their smaller competitors by such a wide gap, that degradation of quality, in absence of concrete evidence of intent, would possibly remain invisible.

### *5.1 Total and producer welfare standards*

As stated above in chapter 3, the definition of consumer welfare in economics refers to consumer surplus, which is the price-effects dimension of consumer welfare also in EU competition law. However, an alternative standard to consumer surplus would be the total welfare standard. The difference is that total welfare also includes the assessment producer surplus in addition to consumer surplus. Therefore, when the producers' share is taken into account, total welfare can increase in situations where consumer welfare decreases if producers' profits increase more than the profits of consumers.<sup>193</sup>

In EU competition law, the discussion hasn't been as much on the choice between consumer and total welfare standard, but on the divide between different visions of competition and questions which are more important for the goals of EU competition law. One question is whether non-economic, political goals should be seen side by side the economics-oriented goals, which is the question I have focused on in this research.<sup>194</sup>

Also, the difference between the consumer and total welfare standard is more complicated in EU competition law since the definition of the consumer includes both intermediate

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<sup>191</sup> Ezrachi – Stucke 2016, p. 151-155.

<sup>192</sup> Among the top 100 fastest growing companies in 2019, the technology sector placed most companies in the list. See Fortune, 100 Fastest-Growing Companies.

<sup>193</sup> Albæk, Svend, Consumer Welfare in EU Competition Policy, DGS. 2013, p. 71.

<sup>194</sup> Blair – Sokol 2013, p. 2510.

consumers, which can be companies, and end consumers.<sup>195</sup> When the definition of the consumer includes individual consumers and companies, the usefulness of the debate on choosing the welfare standard diminishes. From a practical standpoint, since companies are more and more owned by investment and pension funds, the division between consumers and producers becomes blurred.<sup>196</sup> On this account, the distinction between the consumer and total welfare standard becomes partly futile in EU competition law.

I will not go further in discussing the choice between the consumer and total welfare standard, since the division is mainly economic, and as stated, the definition of the consumer welfare standard in EU competition law includes also other than strictly economic factors. I will not contest the benefits of the theoretical assessment of whether consumer or total surplus should be the best alternative in situations where the definition of the consumer includes only the final consumers.<sup>197</sup> As said, if the distinction between producers and consumers isn't precise, the discussion becomes unclear. From a competition law point of view, when looking only at the economic definition of the consumer welfare standard, it is not possible to answer the questions of what is protected by it and what kind of injury is sought to be prevented.<sup>198</sup>

In summary, it is recognized that consumer welfare standard in EU competition has an economic component of consumer surplus, in which the definition of a consumer includes also the intermediate consumers.<sup>199</sup> To continue, I will proceed to assess other goals of EU competition law and their relevance in connection with consumer welfare, which is more important for my research, than the assessment of different welfare standards. Also, when turning to other goals of EU competition law and their relevance in assessing the consumer welfare standard, fairness as a goal in EU competition law moves the target to consumer welfare and surplus over total welfare.<sup>200</sup> I will present other connections in addition to this in the next chapter.

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<sup>195</sup> See n 103.

<sup>196</sup> Albæk, Svend, *Consumer Welfare in EU Competition Policy*, DGS, 2013, p. 71.

<sup>197</sup> For some insight into this conversation, see *ibid.*, p. 71-74.

<sup>198</sup> Daskalova 2015, p. 141.

<sup>199</sup> See n 103.

<sup>200</sup> Ezrahi 2018, p. 11.

## 5.2 EU competition law goals and the digital economy

*“[G]oals of European Competition law centre around, and are primarily consistent, with consumer welfare, but are not limited to it.”*<sup>201</sup>

The above quote is from *Ezrachi’s* paper on the goals of EU competition law in the digital economy, which serves as a good starting point for this chapter. The paper provided the basis for a discussion and consultation process, initiated by BEUC, to explore the scope and limits of EU competition law and its applicability to the digital economy.<sup>202</sup> I will further analyse the relevance of some of these goals and their connections to the values in ordoliberalism and their link to the concentration of data-based economic power in the digital economy.

As EU competition law supports a variety of goals, it is not relevant, or even possible, to distinguish which goal should be the most important one. Rather, the importance and connections of different goals should be assessed in different situations. As stated, consumer welfare has been the overarching goal in EU competition law, but without protecting goals such as competitive structure and economic freedom, to name a few, competition law enforcement, especially in the dynamic digital markets, falls short of its potential. Therefore, other goals should be seen through consumer welfare since harms to consumers can occur in a variety of dimensions.

My point is that the effects on consumers in the digital markets stem from market realities and should be paid attention to through the various goals of EU competition law. Thus, these goals should be seen together with the consumer welfare standard. For example, the effects on the competitive process should not be detached from consumer welfare and strict selections between which effects to take into account and which not, should be avoided. Ordoliberal goals, which align to an extent with the current goals of EU competition law, should be incorporated into the current approach. This is necessary due to the structural negative effects that the concentration of economic power has on markets and consumers’ position therein. In this way, I argue that EU competition law should stick to an effects-based approach, but the scope of these effects can be defined by incorporating other goals of EU competition law and values from ordoliberalism to the assessment.

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<sup>201</sup> *Ibid.*, p. 4

<sup>202</sup> Ezrachi 2018. In the context of BEUC discussion and consultation process, see BEUC, Discussion paper: EU competition law and digital economy, 23 August 2018.

There's a variety of goals in EU competition law that are linked to consumer welfare and important in the digital economy. Due to the scope of my research, I will focus on the most important goals, from the perspective of the concentration of economic power, and their connections to concerns in ordoliberalism. For example, fairness and market integration are important goals in EU competition law but are not assessed here separately. Fairness reflects the distributive dimension of EU competition law; the passing of fair share to consumers.<sup>203</sup> Fairness is seen more as a guiding goal to express overall goals and benefits of EU competition law rather than an independent enforcement benchmark to be applied in cases. The goal of fairness also intertwines with the goal of consumer welfare since the focus on consumers underscores the distribution ethos of EU competition law, mandating "a fair share for consumers".<sup>204</sup> Also, market integration is an inherent goal in EU competition law as "the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers".<sup>205</sup>

Efficiency and democracy are invaluable objectives since they can pave the way from concentrated markets to more competitive markets. Innovation, for its part, fosters the functioning of competitive markets which helps to prevent the risks for democracy from the concentration of private economic power. Also, the wider normative values of the EU can be taken into account when implementing union policies.<sup>206</sup> These include, for example, equality considerations<sup>207</sup>, consumer protection<sup>208</sup> and social protection<sup>209</sup>. Inclusion of these values can be taken into account in assessing the competition law regulations of EU competition law. In the digital economy, as purely economic considerations don't offer the full picture of the harms to society and consumers, an approach taking all of the EU's objectives into account is warranted.

It is noteworthy that almost all these goals are also part of the ordoliberal tradition's view of competition law. It is, therefore, possible to draw connections between the concentration of economic power, ordoliberalism and the goals of EU competition law to point out the direction in which EU competition law should aim in the digital economy to protect consumers and society comprehensively.

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<sup>203</sup> European Commission, Guidelines on the Application of Article 81(3) of the Treaty, 2004 OJ C101/97, para. 85-86.

<sup>204</sup> Ezrachi 2018, p. 11.

<sup>205</sup> On market integration as a goal in EU competition law in the digital economy, see Ezrachi 2018, p. 19-21.

<sup>206</sup> Art. 7 TFEU.

<sup>207</sup> Art. 8 TFEU.

<sup>208</sup> Art. 12 TFEU; Charter of Fundamental Rights of the European Union, 2016 OJ C202/389, Art. 38.

<sup>209</sup> Art. 9 TFEU.

### 5.2.1 Effective competition structure and process

EU competition law protects “not only the interests of competitors or consumers, but also the structure of the market and, in so doing, competition as such.”<sup>210</sup> Thus, there is a connection between consumer welfare and an effective competition structure. Also, the European courts have held that competition law “is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure.”<sup>211</sup> This arguably offers a wider consideration of the effects on consumers.<sup>212</sup> In the context of Art. 102 TFEU regarding companies in a dominant position, such as digital platforms in their respective markets, protection of the effective competition structure imposes a responsibility to dominant firms not to distort competition.<sup>213</sup>

For example, the operations of the biggest operating system platforms, Google’s Android and Apple’s iOS, affect the mobile application markets in the sphere of their respective operating systems by controlling which applications can survive. The terms and conditions are set by them, and many of the practices aim at collecting as much personal data as possible from the users of their services.<sup>214</sup> If effective competition structure is not paid attention to, the evolution of the digital economy may come to a point where digital platforms have amassed economic power to an extent that they will take control of consumers’ lives at an accelerating pace. In these situations, *ex-post* intervention may already be too difficult, since the companies are inseparably attached to our daily lives and social structures. This level of dominance will cause distortions in the competitive structure and pose widespread risks to consumers and society. In these situations, *ex-post* intervention may already be too difficult.

Related to consumers’ choice, OS platforms can also increase consumers’ switching costs by degrading functionality of independent apps or making it harder for consumers to find certain services or products in their search engines or app stores.<sup>215</sup> This is especially relevant when it

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<sup>210</sup> C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v Commission*, ECLI:EU:C:2009:610, para. 63; C-8/08, *T-Mobile Netherlands and Others*, ECLI:EU:C:2009:343, para. 31, 36, 38-39; European Commission, Green Paper on Vertical Restraints in EC Competition Policy, 1997, para. 180.

<sup>211</sup> C-6/72, *Europemballage Corporation and Continental Can Company v Commission of the European Communities*, ECLI:EU:C:1973:22, para. 26; C-95/04, *British Airways Plc v Commission*, ECLI:EU:C:2007:166, para. 106; T-340/03, *France Telecom SA v Commission*, ECLI:EU:T:2007:22, para. 266; C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, ECLI:EU:C:2011:83, para. 24; C-468/06 to 478/06, *Sot. Lélos kai Sia and Others*, ECLI:EU:C:2008:504, para. 68; and C-280/08, *P Deutsche Telekom v Commission*, ECLI:EU:C:2010:603, para. 176. See chapter 2.1 on the link between ordoliberalism and the judgment in the *Continental Can* case.

<sup>212</sup> Ezrachi 2018, p. 9.

<sup>213</sup> C-322/81, *Nederlandsche Banden-Industrie Michelin NV v Commission of the European Communities*, ECLI:EU:C:1983:313, para. 57.

<sup>214</sup> Ezrachi – Stucke 2016, p. 178-190.

<sup>215</sup> *Ibid.*, p. 156.

comes to privacy-enhancing services and applications which would undermine platforms' advertising revenues by blocking the collection of personal data.<sup>216</sup> The focus on the competitive process could, therefore, draw the attention to digital platforms' actions that lead to possible barriers to entry or expansion and mechanisms used by them to raise rivals' operating costs. This relates to the significance of data in shaping markets and influencing their development. The competitive structure also connects to the consumer choice aspect of consumer welfare, since dominant players' may be able to "use manipulation to limit consumer choice while maintaining a façade of abundance" when it comes to services and applications in the online markets.<sup>217</sup>

From an ordoliberal point of view, the abuse of market power leads to the arbitrary exclusion of market actors, which in turn harms the functioning of the competitive process.<sup>218</sup> The point is to get to a situation where only the less efficient market players get excluded. This should be the result of different economic performance and not the outcome of the use of arbitrary power.<sup>219</sup> Promoting undistorted innovation can be seen as a tool to support the process of competition beyond specific violations. *Ezrachi* states that "[c]ompetition agencies should look at the effects that various strategies may have on the nature and scale of innovation, and the incentives and ability to bring new products, processes and services to the market". Thus, innovation should be supported by an effective competition structure, in a way that all market participants can bring new inventions to the market.

For example, if a dominant player controls the market, it has the power to control the pace in which new, technological inventions are introduced to consumers, to maintain a stable revenue stream on a long-term basis, without having to worry about competitive pressure from outside companies. These situations can be difficult to uncover if the interaction between the goals of innovation and effective competition structure is not recognized in the legal assessment.<sup>220</sup> Next, I will assess the roles of efficiency and innovation and their relation to the consumer welfare standard and ordoliberalism.

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<sup>216</sup> For a discussion on why privacy technologies represent a real threat to super-platforms, see *ibid.*, p. 186-188.

<sup>217</sup> Ariel Ezrachi 2018, p. 9. *Ezrachi* refers to the discussion regarding the commission decision on *Google Search (Shopping)*. See *Google Search (Shopping)* (Case AT.39740), Commission Decision C(2017) 4444 final.

<sup>218</sup> Böhm 2013, p. 274.

<sup>219</sup> Böhm 1946, p. 141, 147.

<sup>220</sup> Ezrachi 2018, p. 9.

### 5.2.2 Efficiency and innovation

When it comes to efficiency as a goal, the benefits to consumers are seen as the underlying objective, since the efficient allocation of resources for the benefit of consumers is a part of competition policy in the EU.<sup>221</sup> Consumer welfare and efficiency are often mentioned together.<sup>222</sup> In this context, the goal of fairness in EU competition law reflects the alignment of efficiency and consumer welfare. For example, Art. 101(3) TFEU requires that the overall benefits should be passed on to “compensate consumers for any actual or likely negative impact caused to them by the restriction of competition”.<sup>223</sup>

Innovation and efficiency are a part of the consumer welfare standard in EU competition law.<sup>224</sup> There are three types of efficiencies in economics; *allocative*, *productive* and *dynamic*. The price-centred aspect of consumer welfare, namely consumer surplus, is measured in the allocative efficiency dimension.<sup>225</sup> In measuring productive efficiency, the realization of production in the most profitable way is the objective.<sup>226</sup> On the other hand, dynamic efficiencies refer to innovation.<sup>227</sup> Therefore, efficiency has a close connection to innovation closely and both are also seen as dimensions of consumer welfare.

From different schools of thought, Chicago School, as presented by *Bork*, emphasizes the economic efficiency the most, but in the total welfare dimension. The Chicago School leans on the allocative and productive efficiencies<sup>228</sup>, and innovation, i.e. dynamic efficiency, is left out of scope. As stated in the respective chapter, the Chicago School’s original definition of consumer welfare described the total welfare standard, which combines producer and consumer surplus.

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<sup>221</sup> European Commission, Guidelines on the Application of Article 81(3) of the Treaty, 2004 C101/97, para. 13; European Commission, Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009 OJ C45/02, para. 1, 5-7; European Commission, Guidelines on Vertical Restraints, 2010 OJ C130/01, para. 7.

<sup>222</sup> Parret 2010, p. 349.

<sup>223</sup> European Commission, Guidelines on the Application of Article 81(3) of the Treaty, 2004 OJ C101/97, para. 85-86.

<sup>224</sup> Fatur 2012, p. 47-48.

<sup>225</sup> Daskalova 2015, p. 143.

<sup>226</sup> International Competition Network, Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies, 2007, p. 12.

<sup>227</sup> Ezrachi 2018, p. 10.

<sup>228</sup> “These two types of efficiency up the overall efficiency that determines the level of our society’s wealth, or consumer welfare. The whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare.” See Bork 1978, p. 91.

In contrast to the Chicago School, in ordoliberalism, the goals of competition policy include efficiency but are not limited to it.<sup>229</sup> The goals of economic freedom and democracy and their connections to the concentration of private economic power are discussed in the next subchapter. This shows that the goals of EU competition law include a combination of values which are visible also in different schools of thought. With a historical approach to the goals of EU competition law, it is revealed that EU competition policy has not been developed in a vacuum, driven by market integration goals, but has absorbed influences from different theories, also from the U.S. With this realization in mind, these connections can be harnessed to re-enforce consumer welfare's position within the goals of EU competition law. Recognizing this would promote the ability to align the evaluation to respond to the market realities in the digital economy which are constantly changing and developing.

In summary, innovation is a significant goal in the digital economy.<sup>230</sup> However, there's a distinction between innovation that benefits consumers and innovation that is used for the development of exploitative technology or to pose harmful exclusionary effects.<sup>231</sup> On a theoretical basis, an *Arrowian* assumption on innovation has been supported by modern economic literature. On this account, significant market power is seen to disincentivize further innovation. Competitive pressure is a necessity since a monopoly is likely to under-invest in new technologies.<sup>232</sup> The concentration of economic power in ordoliberal thought can be connected to this theory.

Since regulatory intervention can be difficult in the dynamically changing digital markets, promoting innovation that benefits consumers could be seen as one of the main goals of EU competition law when it comes to fostering competition in the digital markets. The focus should be on promoting innovation which would foster the entry of new players to the market. For example, in the case of search engines which work as gatekeepers to the internet, the likely entry of new players or new technology could restrain the incumbents' behaviour and promote an all-around more competitive internet environment. Intervention by competition authorities should be considered in light of these dynamics.<sup>233</sup>

As stated in the chapter on consumer welfare, competition in digital markets focuses on innovation instead of price competition. Also, due to the concentration of data-based power in

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<sup>229</sup> Kuoppamäki 2003, p. 215-216.

<sup>230</sup> Ezrachi 2018, p. 10-13.

<sup>231</sup> For more discussion on the topic, see Ezrachi – Stucke 2018.

<sup>232</sup> Arrow 1962.

<sup>233</sup> Ezrachi – Stucke 2016, p. 143.

digital markets, tipping towards a dominant position is more common.<sup>234</sup> Promoting innovation will foster the invention of new technologies which could disrupt incumbents' position. The long-term effects of mergers and acquisitions on the innovativeness of specific markets should be taken into account. These actions would lead to more competitive and dynamic markets and to the emergence of innovators which would challenge the dominant players.

On the other hand, in a non-competitive market, the level of innovation can stagnate, and the dominant player can even artificially hinder the launching of new technologies to maintain a façade of competition. For example, in *Bundeskartellamt's* Facebook decision, it was stated, that the claim on the innovative power of the internet without concrete proof is not a proper defence against allegations of abuse of market power in the case of an internet company. Furthermore, it was stated that innovation had stagnated, and that Facebook had been able to fight off competitors' innovations.<sup>235</sup> In the decision, consumer welfare or consumers' interests were hardly mentioned. However, since innovation is an important part of consumer welfare standard in the digital markets, mentioning it connects the court's assessment to the degradation of consumer welfare implicitly.

On the level of EU competition law regulation, an efficiency defence can be used by companies in the case of mergers to show that the benefits to consumers outweigh the anticompetitive effects of the merger.<sup>236</sup> Also, in the case law of the CJEU, it is among other things stated that "anticompetitive effects may be counterbalanced, or outweighed, by efficiencies which also benefit the consumers".<sup>237</sup> Subsequently, since mergers can also have positive effects on dynamic competition, it should be ensured that intervention doesn't become unrestricted due to the lack of defined principles. Even though the scope of the consumer welfare standard should be broadened by taking the accumulation of data-based power into account, it is necessary to make sure that this doesn't undermine competition-on-merits based efficiencies and innovations.

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<sup>234</sup> Mäihäniemi 2017, p. 65.

<sup>235</sup> Bundeskartellamt, Case Summary, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing, 2019, p. 7.

<sup>236</sup> "Efficiencies should be substantial and timely, and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur." See European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2004 OJ C31/03, para. 79.

<sup>237</sup> C-95/04, *British Airways Plc v Commission*, ECLI:EU:C:2007:166, para. 86.

For example, consumer welfare can be improved through better-quality products as a natural result from the combined resources of the merging companies.<sup>238</sup> In digital markets, market power is necessary to achieve dynamic efficiencies and to make innovations. A temporary monopolistic position makes it possible to invest in research and product development. In this context, in *Schumpeterian* competition theory, the role of innovations is to direct the competitive process forward.<sup>239</sup> The EU competition regulation in which these principles are substantiated is Art. 101(3) TFEU, in which it is stated that if, for example, a restrictive contract can be allowed if it improves efficiency and the benefits are transferred in reasonable amounts to consumers.

Efficiency arguments can also be made in the alleged abuse of dominant position cases where the actions improve efficiency in a way which benefits consumers. However, it is difficult to prove the efficiency arguments since competition law evaluation is always connected to concrete benefits to consumers. Thus, it should be demonstrated that the benefits in question are acquired through concrete actions of the companies that are under the competition law allegations.<sup>240</sup> Therefore, in data collection situations, the firm in the dominant position should prove that the concrete benefits to consumers (for example, increase in product quality or consumer choice) outweigh the harms from data collection (for example, privacy harms).

Regarding my argument that consumer welfare should be seen beyond the current benchmarks, the values of privacy and data protection should also be included in the efficiency defence arguments that are available to tech companies in connection with the potential competition law proceedings initiated against them. In connection with the goals of political and economic freedom and democracy, better privacy and data protection safeguards should be enacted by tech companies. This would help to ensure that, for example, social media platforms are not captured to distort views of the consumers, as has been seen in Facebook's connections to different elections.<sup>241</sup>

Arguably, it is difficult to extend efficiency defence to cover the long-term harms to consumers' political and economic freedom and democracy which can be realized due to the concentration of economic power to the hands of a few digital platforms in a dominant position. On the other hand, taking privacy and data protection into account in tech companies' efficiency defence arguments could have a preventative role in the excessive

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<sup>238</sup> Kuoppamäki 2018, p. 15-16.

<sup>239</sup> Ibid., p.16-17.

<sup>240</sup> Ibid., p. 18-19.

<sup>241</sup> For more on the topic, see Epstein – Robertson 2015.

accumulation of economic power due to collection of data. This relates to the dilemma of whether companies' and consumers' benefits can coincide in the digital economy, since companies will, at least from an economic point of view, always benefit from extracting as much as data as possible from consumers. Subsequently, regulatory measures are needed to shift the companies' attention at least partly to the well-being of consumers.

### 5.2.3 Economic freedom and democracy

Deriving from the ordoliberal tenets is the notion that competition is needed for the economic freedom of individuals and that the economic order should protect individuals from private economic and political power.<sup>242</sup> Another main goal of EU competition policy, also connected to ordoliberalism, is protecting the democracy of a state. Both economic freedom and democracy are connected to the concentration of private power, as described in chapter 4.1.

The ordoliberals perceived the link between competition and democracy as “the normative underpinning of competition law”.<sup>243</sup> In ordoliberal thinking, there is also a connection between economic freedom and democracy, since economic freedom is necessary for the realization of other fundamental and political rights. An individual cannot enjoy the democratic fundamental rights if her economic autonomy is limited by other citizens or the state.<sup>244</sup> In summary, the concentration of power in the economic sphere can lead to concentration of political power, whereas economic freedom makes political freedom possible.<sup>245</sup>

Also, connection to the consumer welfare standard in EU competition policy is visible since economic freedom reflects the consumer choice aspect of consumer welfare. Concerning ordoliberalism, *Böhm* emphasized the importance of consumer choice, since it “steers the economy in the same way as citizens' votes influence political processes”.<sup>246</sup> Connected to the EU's policy as a whole, the freedom of choice enhances the realisation of the EU's democratic values and freedoms.<sup>247</sup> These goals are important when the concentration of economic power and its harms are assessed. A healthy competitive process safeguards against the political and regulatory capture by powerful firms and other risks from the concentration

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<sup>242</sup> Parret 2010, p. 348.

<sup>243</sup> Deutscher – Makris 2016, p. 181.

<sup>244</sup> Böhm 1946, p. 141; Mestmäcker 1975, p. 385.

<sup>245</sup> *Mestmäcker* noted that the dispersal of economic power is important since, in the end, it guarantees both economic and political freedom. See Mestmäcker 1975, p. 384.

<sup>246</sup> Böhm 1980, p. 305.

<sup>247</sup> BEUC, Why Competition Law Must Protect Democracy – A European Perspective, Contribution to the OECD Global Forum on Competition – Competition and Democracy, 2017.

of power.<sup>248</sup> In summary, as *Talbot* argues, competition law in the EU has over time been calibrated to “harness the benefits of an open capitalist economy within the context of a democratic society”. Thus, the objectives of EU competition law go beyond economic or legal standards that are applied in individual cases.<sup>249</sup>

However, concerns are visible especially in the context of concentration of economic power to digital platforms and their influence on consumers in aspects that transcend the boundaries of traditional competition law assessment, such as influence on the political decision-making and democracy in the civil society, elections and free speech. Connections to the concerns of ordoliberalism are also apparent when observing the lobbying of government officials and in the alleged manipulation of different elections.

The alleged conduct of Facebook is an example of algorithmic influencing of voters in elections. For example, in the U.S. in 2016 elections there were concerns by conservatives that Facebook manipulated rankings of news stories to suppress conservative viewpoints. Facebook denied doing this.<sup>250</sup> These actions are connected to *stealth* as a feature in online services which affects the unsuspecting users. Firms can harvest data, manipulate user behaviour and reinforce existing or desired viewpoints without any of these actions being visible to the user.<sup>251</sup> Also, search engine manipulation has been under scrutiny due to the potential connections to the outcome of different elections.<sup>252</sup> When Google was under scrutiny by the U.S. Federal Trade Commission for monopolistic abuses, it increased its lobbying expenses in 2012 by 88 per cent, becoming one of the firms that spend the highest amounts of money to influence the federal government.<sup>253</sup>

Users’ reliance on these super-platforms, such as Google and Facebook, is connected to trust. For example, consumers expect to get the relevant search results and relevant news in their

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<sup>248</sup> Parret 2010, p. 324.

<sup>249</sup> Talbot 2016.

<sup>250</sup> See Seetharaman, Deepa, Facebook Rebuts Criticisms About a Bias Against Conservatives, Wall Street Journal, 10 May 2016. More on Facebook’s ability to influence elections, see Zittrain, Jonathan, Facebook Could Decide an Election without Anyone Ever Finding Out— The Scary Future of Digital Gerrymandering— and How to Prevent It, The New Republic, 2 June 2014. Similar points on Google, see Epstein, Robert, How Google Could End Democracy, U.S. News & World Report, 9 June 2014; Epstein, Robert, How Google Could Rig the 2016 Election, Politico, 19 August 2015.

<sup>251</sup> See Ezrachi 2018, p. 18; Zeynep Tufekci, Facebook’s Surveillance Machine, New York Times, 19 March 2018.

<sup>252</sup> Epstein – Robertson 2015.

<sup>253</sup> Salant, Jonathan D, Google’s Increased Lobbying Belies Cut in Total Spending, Bloomberg Technology, 30 January 2013. Google’s representatives have also paid visits to White House meetings more than once a week, on average, from the beginning of Obama’s presidency through October 2015 and nearly 250 people have changed from government service to Google employment and vice versa during his administration. See Dayen, David, The Android Administration, The Intercept, 22 April 2016. See chapter 2.2 for more discussion on Google’s political influence in the U.S.

social media feeds, that are based on objective algorithmic calculation rather than manipulation with political objectives.<sup>254</sup> As mentioned before, the inclusion of privacy concerns to the assessment of the consumer welfare standard has featured in academic and political discussion. The inclusion of privacy to the definition of consumer welfare is further supported by these potential harms to democracy through manipulation of consumers' personal data to affect political opinions, for example, in platforms that feature news articles. When drawing connections to the concerns of ordoliberalism, the lobbying by tech companies may amount to similar effects than in the beginning of 20<sup>th</sup> century Germany, where monopoly companies could together with their interest groups turn the government to serve their benefits.<sup>255</sup> Thus, the economic power of tech companies can turn into political power and to the aim of preserving the status quo.<sup>256</sup>

An interesting case regarding the goal of democracy in competition law comes from as far as New Zealand. The high court blocked a merger between two media giants on the basis that the merger would risk the functioning of democracy in the country.<sup>257</sup> I find that an interesting analogy could be drawn regarding digital platforms, especially social media platforms, as they provide important access to news from external sources. A study showed that there are risks to news diversity if platforms get the economic rewards from the content, and at the same time publishers are dependent on platforms to get their news to reach the audience.<sup>258</sup> Adding the fake news<sup>259</sup> phenomenon to these concerns shows the variety of characteristics of social media platforms that could undermine consumer choice, democracy and free speech. These factors should be taken into account regarding mergers of digital platforms and in cases of abuse of dominant position since there is the possibility of negative effects on consumer choice and political and economic freedom.

Even if the link between economic freedom and consumer welfare is criticized<sup>260</sup>, it is accepted that there will be positive effects on consumer welfare in the long run when the competitive process is protected. The defining point here is the scope, *in the long run*. This argument stems from the recognition that the negative effects of data-based power appear

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<sup>254</sup> Ezrachi – Stucke 2016, p. 198.

<sup>255</sup> Kuoppamäki 2003, p. 193.

<sup>256</sup> Frieden 2007, p. 102; Bush 2010, p. 277, 286.

<sup>257</sup> Ainge Roy, Eleanor, New Zealand: merger of two largest print media companies blocked by high court, *The Guardian*, 19 December 2017.

<sup>258</sup> Newman – Fletcher 2018.

<sup>259</sup> Solon, Olivia, Facebook's failure: Did fake news and polarized politics get Trump elected?, *The Guardian*, 10 November 2016.

<sup>260</sup> On the conflict between economic freedom and consumer welfare in the modernisation of Article 82 EC, see Gormsen 2007.

gradually as the economic power concentrates to a few players that control the markets. However, the critique is pointed to the notion that the competitive process is protected to achieve individual economic freedom, which is linked to civil liberties and social justice, not to the protection of consumer welfare.<sup>261</sup> As said before, my point is not to disregard the effects-based consumer welfare approach to the competition law assessment, but rather to redefine the scope of this assessment to be in line with the current market-realities in the digital economy. Thus, the notion of protecting the competitive process is a supporting objective attached to the effects-based assessment of the individual competition law cases.

By accepting these connections between ordoliberalism and consumer welfare in the digital economy, it is possible to redefine the consumer welfare standard in a theoretically well-founded manner to capture the risks posed by the concentration of data-based market power. In a way, all the goals discussed in this research support economic freedom and democracy. Focusing on efficiency and innovation in digital markets promotes the invention of new technologies which will create competitive pressure on the incumbents. When the competitive structure is protected, entry barriers will not unduly restrict innovators' fair changes in competing in the respective market. Also, consumers gain the benefits of unrestricted competition through better-quality products and services. When abuses of a dominant position by privacy infringements are controlled more effectively, less space is left for the personal data of consumers being used in, for example, the manipulation of political views.

Competitive markets will serve consumers in the end only when consumers can effectively pursue their rights in the digital economy. As economic freedom and democracy are two of the main objectives also in ordoliberalism, the goals of EU competition law, ordoliberal ideas and consumer welfare can all theoretically be tied together to promote a more effective approach to competition policy in the digital economy. Next, the goal of consumer well-being as a combination of these goals is discussed.

### 5.3 *Consumer well-being*

Consumer well-being is undoubtedly a broader and more ambiguous concept than consumer welfare.<sup>262</sup> In the case law of the CJEU, it has been stated that “the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase

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<sup>261</sup> Ibid., p. 335.

<sup>262</sup> In the Treaty for the European Union (TEU), Article 3(1), it is stated that “[t]he Union's aim is to promote peace, its values and the well-being of its peoples”.

the well-being of consumers - -".<sup>263</sup> Also, it has been said that consumer well-being can be harmed directly or indirectly, but the definition of consumer well-being is left unclear.<sup>264</sup> Since the definition of consumer well-being was ambiguous, the consumer welfare benchmark was introduced.<sup>265</sup> For example, former European Commissioner *Monti* referred to the consumer welfare benchmark as an objective reference to competition enforcement due to its core in economic assessment.<sup>266</sup>

However, as *Ezrachi* puts it, “the normative concept of well-being encompasses the more narrow, economically oriented, concept of consumer welfare”.<sup>267</sup> As said before, the definition of the consumer welfare standard has evolved since the introduction of the more economic approach of EU competition policy at the beginning of the 21<sup>st</sup> century and is today seen to cover aspects such as quality, choice and innovation.<sup>268</sup> *Ezrachi* notes the discrepancy between the goals of consumer well-being, consumer welfare and the economic benchmark of consumer surplus.<sup>269</sup> Regarding the harms to consumers in the digital economy, the consumer welfare standard as a goal is a better choice since it is more comprehensive than the narrow consumer surplus benchmark. However, privacy and data protection could be new, non-price quality parameters which are assessed under the consumer welfare standard in addition to, and together with, price, choice, (other) quality parameters and innovation. As noted in the chapter on consumer welfare, there have been pieces of research in favour of the inclusion of these aspects in consumer welfare assessment.

It is essential to include the aspects of privacy and data protection to the consumer welfare standard, due to the role of data as one of the most important economic factors in the business models in the digital economy. However, the scope of consumer welfare still lacks the possible harms to political and economic freedom of consumers and the competitive structure.

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<sup>263</sup> T-213/01 and T-214/01, *Österreichische Postsparkasse and Bank für Arbeit und Wirtschaft AG v Commission of the European Communities*, ECLI:EU:T:2006:151, para. 115.

<sup>264</sup> C-209/10, *Post Danmark A/S v Konkurrencerådet*, ECLI:EU:C:2012:172, para. 20; C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, ECLI:EU:C:2011:83, para. 24.

<sup>265</sup> Weitbrecht 2008, p. 81, 85.

<sup>266</sup> CCLP, Conference on Online Markets and Offline Welfare Effects – The Internet, Competition, Society and Democracy, Session on Policy and Enforcement Choices, May 2017. *Monti* also reflected that the reason for the adoption of the consumer welfare benchmark was “to fight the emerging economic nationalism in the European Single Market which was coming up in those years” and the desire to increase convergence and harmonious cooperation with the U.S.

<sup>267</sup> *Ezrachi* 2018, p. 5.

<sup>268</sup> Still, consumer welfare does not embody universally agreed properties and different views exist regarding its scope, measurement and the means to promote it. More on these questions, see *Ezrachi* 2018; *Ezrachi* 2017; International Competition Network, Competition Enforcement and Consumer Welfare – Setting the Agenda, 2011; *Werden* 2011; *Baker – S. C. Salop* 2015. On the concept of consumer welfare, see *Orbach* 2011; *Lianos – Geradin – Lianos* 2014.

<sup>269</sup> *Ariel Ezrachi* 2018, p. 6.

These risks stem from the concentration of power to digital platforms. I present that consumer well-being should be the main goal in EU competition law in the evaluation of anticompetitive harms in the digital economy. As the definition of consumer well-being is still ambiguous in its scope, I will attempt to shape its definition by keeping the consumer welfare standard as its basis.

Therefore, consumer well-being would, in addition to the current consumer welfare standard, include the objectives of political and economic freedom and competitive structure from the perspective of consumers. In this way, the multitude of effects that digital platforms' actions pose to consumers and society can be considered. Considering political freedom, these actions include, for example, the distortion of public opinion relating to elections through search engine result hampering and the manipulation of social media feeds of consumers.

Economic freedom, and subsequently consumer choice, is connected to the concentration of power through data accumulation to digital platforms in the everyday internet-use of consumers. A high degree of concentration leads to a lower number of alternatives for consumers, thus limiting consumers' freedom of choice.<sup>270</sup> This concentration can subsequently negatively affect competitors' chances to challenge the incumbents which would otherwise lead to increased consumer choice in digital services. Thus, the ordoliberal views on protecting consumers' choice are even more relevant in the digital economy where the concentration of data-based power is ubiquitous.

If these harms are not considered, false negatives will no doubt occur in the competition law enforcement in the long run, as negative effects on for example consumers' political and economic freedom cannot be captured by a short-term market analysis in competition law cases. Also, an effective competition structure matters in the digital economy regarding the protection against unrestricted algorithmic control of the markets. In the future, algorithms can be set to determine the competitive level of prices. This can lead to a situation where the prices are kept at a higher level due to algorithmic collusion, which is already beyond the control of humans.<sup>271</sup>

By introducing consumer well-being as the main goal in the digital economy, the different kinds of harms that occur to consumers will be more comprehensively considered by keeping

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<sup>270</sup> Behrens 2014, p. 23.

<sup>271</sup> For more discussion of the collusion scenarios in the digital economy, see Ezrahi – Stucke 2016, p. 35-82.

the consumer at the centre stage in the competition law assessment of individual cases. In the next chapter I will analyse the goal of consumer well-being further and in a wider context regarding the historical standpoints of EU competition law in connection with current concerns in the digital economy.

## 6 FROM HISTORICAL CONTEXT TO NEW APPROACHES

### 6.1 *Goals of EU competition law and concentration of power – remembering the historical standpoints*

*Gerber* points out the importance of the “time factor” when discussing European competition law goals, even though the historical context may seem irrelevant especially to those who support an economic approach to competition law.<sup>272</sup> I have for my part introduced the relevance of the historical approach when it comes to the need for changes that the digital economy poses to the goals of EU competition law. As discussed in my research, in the last few years, the strictly economics-based approach has been questioned especially when it comes to privacy and data protection aspects of companies’ business practices.

The proponents of the more economic approach questioned the influence of ordoliberalism in EU competition law, even though the arguments were based on limited knowledge of the historical role of ordoliberalism.<sup>273</sup> With this pitfall in mind, it is possible to include both the ordoliberal, privacy-related and economics-based goals to EU competition policy. The emphasis of these goals will vary on a case-by-case basis and therefore specific goals should not be categorically excluded from competition law assessment altogether.

*Deutscher* and *Makris* have come to similar conclusions in their research on the connection between ordoliberalism, competition law and democracy. They propose that “ordoliberal thinking could guide and delimit the more economic approach by proposing a framework capable of accommodating the concept of efficiency and attributing to it its due value”. Hence, they approach the subject from the perspective of efficiency as a concrete economical goal of EU competition law, which can work side by side with the deontological goals of ordoliberalism.<sup>274</sup>

In assessing the historical significance of ordoliberalism in connection with the concerns in the digital economy, the goals from the past shouldn’t be projected to the current situation without proper assessment of their value to the present concerns.<sup>275</sup> I have avoided this by

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<sup>272</sup> Gerber 2012, p. 85-86.

<sup>273</sup> Ibid., p. 86.

<sup>274</sup> Deutscher – Makris 2016, p. 184.

<sup>275</sup> Gerber 2012, p. 87-88. In chapter 7, I further reflect my research in light of *Gerber’s* comments on the issues and limitations that sometimes highlight the discussion on goals of EU competition law.

analysing the characteristics of digital competition, the role of data and concentration of power in a manner that connects the current situation to the concerns of ordoliberalism.

With the historical context of competition law in mind, the goals and values of ordoliberalism could be seen together with the consumer welfare standard as non-economic parameters which are evaluated in a case-by-case assessment.<sup>276</sup> In this way, the economic welfare assessment of harms to consumers should remain as the default. In the data-driven markets, as seen for example in the German competition authority's decision on Facebook, even in the absence of direct economic, price-related harms to consumers, the potential harms are connected to privacy and data protection concerns.<sup>277</sup> Even though it is still debated whether this approach should be included in the consumer welfare standard, the fast evolution of data-driven markets serves as a clear indication that these harms cannot be left without notice in the long run. Of course, data protection and privacy laws will deal with the respective breaches of consumer rights, but if the competition law dimension is not taken into account, and big tech companies can increase their market power in the shadows, the harms to consumers and the structure of the markets will increase.

Thus, combining the current approach to consumer welfare to the social values of ordoliberalism, a more comprehensive benchmark for assessing consumer and market harms in the digital economy will be achieved. It should be noted that there is also an economic dimension to privacy, even though this will not be uncovered through short-term market analysis. Tech companies benefit economically from data collection, and even if the collection of personal data by tech companies is legal under respective regulations, it still degrades consumers' privacy and leads to the concentration of companies' economic power. The lock-in effects will gradually amount to limited consumer choice and even though dominant companies have innovative power due to the abundance of resources, the actual level of innovation would be higher if there were more competitive pressure from the outside. Then, the companies would have to strive for innovations to keep their market position, not just to keep consumers locked-in to their services.

Therefore, the possible degradation of the level of innovation, which at worst is not transparent if the level of innovation is being controlled by a company in a dominant position, harms the quality of the services. Getting lower quality products or services for the same amount of money, or in this case, collected personal data, causes economic harm if data is

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<sup>276</sup> Anchustegui 2017, p. 173-174.

<sup>277</sup> See n 194.

referred to as the new currency in the digital economy. Increase in innovation can only be realized in markets where competition is protected in a multidimensional approach, combining economic, price-related and non-economic, qualitative values.

My point is, that even in the digital markets, the focus is on private *economic* power, even though direct harms of consumers may not be realized in strictly price-related terms. The overall social effects will be of economic importance, but in the new market reality, the competition law assessment must go beyond these direct price-effects. Ordoliberal values point to the other side of the coin in assessing the importance of competition in society. The values of ordoliberalism combined with the current consumer welfare assessment will result in a more comprehensive approach to competition law assessment in the digital economy which can be used, for example, in assessing cases under Art. 102 TFEU. The effects on consumers' welfare can thus be taken into account in assessing cases of abuse of a dominant position, barriers to entry and exclusionary approaches but the practical enforcement of these competition law regulations is well beyond the scope of my theoretically oriented research considering the suitable goals for EU competition policy in the digital economy.

It is also possible to form a general timeline in the context of different harms to consumers caused by the changes that digital competition brings to the markets. First, due to the extraction of personal data by different means, companies form extensive profiles of consumers and can use price and behavioural discrimination to price products and services based on this information.<sup>278</sup> Negative effects due to these practices have been recognized, but the scale of them is still debated. Behavioural discrimination which leads to higher prices affects consumers directly as a negative change in their wealth. What complicates the assessment, is that the harms regarding privacy are inherently different to price-related effects and thus difficult to give a specific value to. Even the economic concept of consumer surplus relies on a single consumer's preferential price. The value of privacy is therefore much more complicated to approach analytically.

The second point is that due to the concentration of market power and subsequent harms regarding prices and privacy in the digital economy, risks to economic and political freedom of consumers will increase. Tech companies have accumulated wealth due to behavioural discrimination and algorithm-driven pricing practices and by the extraction of data from consumers. To keep their dominant position, they will try to affect enforcers' opinions and in

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<sup>278</sup> For a list of potential welfare gains and concerns, see Ezrachi – Stucke 2016, p. 118-119.

worst cases, manipulate public opinion through their platforms to which consumers are already locked-in.<sup>279</sup> This timeline from price-related harms to harms to political freedom and democracy is admittedly incomplete and oversimplified. However, the underlying facts on how the characteristics of data can affect the increase of market power are real and already present in the economy.<sup>280</sup>

Combining the goals of political and economic freedom and effective competition structure to the consumer welfare standard to form the goal of consumer well-being, will create a comprehensive and flexible framework to the goals of EU competition, which is lacking at the moment. This framework can subsequently be connected to the competition law assessment of individual cases. The concern of the concentration of private economic power is not a historically new phenomenon, as shown in the comparison to the concerns of ordoliberalism. Also, the reality is that legal enforcement usually lags behind the development of society. In the digital economy, this is even more visible, which begs for the adoption of a more comprehensive framework to the goals of EU competition law.

## 6.2 *Towards comprehensive consumer well-being in the digital economy*

The European Commissioner for Competition recently spoke about the possibility that large tech companies accused of anti-competitive behaviour could in the future find that the burden of proof is on them to show that their conduct benefits consumers.<sup>281</sup> This would be a step in the right direction for a comprehensive approach in a procedural aspect and lead to a situation where tech companies would better evaluate their conduct and its effect on consumer benefits. Involving tech companies in the assessment of their conduct would promote a shift towards a more comprehensive competition law regulation in the digital economy.<sup>282</sup>

Competition policy which captures the different consumer harms in its scope, through the goals it actively promotes, for example, in the enforcement of Art. 101 and Art. 102 TFEU, would aid the tech companies in defining what values regarding consumers they should take into account in the course of their business. This change is needed urgently since EU

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<sup>279</sup> Ibid., p. 244-246 for more discussion on the theme.

<sup>280</sup> See chapter 4.1.2.

<sup>281</sup> Competition Policy International, EU: Vestager considers toughening ‘burden of proof’ for Big Tech, 30 October 2019.

<sup>282</sup> Also, in a specialist report on competition policy for the digital era, the authors state that “- - even where consumer harm cannot be precisely measured, strategies employed by dominant platforms aimed at reducing the competitive pressure they face should be forbidden *in the absence of clearly documented consumer welfare gains* [emphasis added].” See De Montjoye, Yves-Alexandre – Schweitzer, Heike, Competition policy for the digital era, Report for the European Commission, 2019, p. 3.

competition policy is still grasping to get a hold of the new market realities and fails to communicate the right signal to the market in this regard.

At the moment, the market for services that afford great privacy protections is weak, regardless of the risks to the privacy of individuals.<sup>283</sup> Furthermore, the rise of the Internet of things can even expand the scale on which human behaviour is tracked and merchandised.<sup>284</sup> A change in the focus of competition law goals together with the burden of proof on companies would be a step in the right direction in fostering the market for privacy-protecting services or at least services where consumers would be aware of how their personal data is used and subsequently make more informed choices.

As introduced in chapter 5.3, the goal of consumer well-being would integrate the consumer welfare standard, in which the privacy and data protection aspects are included, and consumers' economic and political freedom and the protection of the competitive process. This framework would control the unrestricted and harmful accumulation of economic power due to tech companies' data collection practices. The outlook of EU competition policy should be directed to the future with the fast development of the digital economy in mind. This would communicate to the general public and the market that the traditional competition law framework will not grasp the constantly evolving market realities comprehensively and that the EU as a political and economic union is bearing its responsibility to adapt to the developing society.

The term well-being has also been mentioned in OECD's (Organization for Economic Co-Operation and Development) initiatives and other documents. The starting point is that competition policy should improve our welfare or well-being.<sup>285</sup> Taken from the publication of OECD, *Evaluation of Competition Interventions*, the dimensions in which well-being can be promoted are listed. These dimensions include (1) material well-being (income and wealth, housing, and jobs and earnings) and (2) quality of life (health status, work and life balance, education and skills, social connections, civic engagement and governance, environmental quality, and personal security).<sup>286</sup> The defining point here is that, in a post-industrial economy where consumers' material well-being is mainly on a good level, competition policy focusing

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<sup>283</sup> 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, 2014, p. 8.

<sup>284</sup> Halpern, Sue, The Creepy New Wave of the Internet, The New York Review, 20 November 2014.

<sup>285</sup> OECD, *Evaluation of Competition Interventions*.

<sup>286</sup> OECD, *Compendium of OECD Well-Being Indicators*, 2011.

solely on promoting consumer surplus has little role in maximizing overall well-being.<sup>287</sup> This notion and the fact that a price-centric approach fails in markets where services are free, i.e. where consumers data is collected in exchange of the services, begs for the adoption of a more comprehensive well-being screen<sup>288</sup> to the competition law assessment. However, it should be noted that the term well-being has different meanings in different contexts and fields of research.

Academic literature on the extension of harms to privacy to competition law assessment<sup>289</sup> has been recently on the rise and reasonable statements in this regard have been made also by the EU institutions.<sup>290</sup> In my view, this is just the first step in acknowledging the changes in the competitive landscape of the digital economy. The concentration of data-based power has its intrinsic characteristics which competition authorities are still trying to grasp, and at the same time tech companies are growing faster than any other industry in the world.<sup>291</sup> The nature of the business practices of these companies will lead to an increasing concentration of economic power if competition policy doesn't reasonably address these practices. Focusing on the goals discussed in this research aids in restricting the undue concentration of data-based power and its abuse. Also, these goals are all connected, with the focus being on the protection of consumers as the connecting, underlying factor in the realization of unrestricted competition in the digital markets.

The increasing data-based market power must be taken seriously, and competition law can be seen as the defining instrument in controlling the accumulation of private economic power which can have consequences that are outside the influence of nations and organizations. The starting point is to capture the harmful effects on individual citizens, i.e. on the well-being of consumers. When harms to consumers are viewed comprehensively, effective competition policy can mediate the broader goals assessed in this research, for example, economic and political freedom, as they already have a strong basis in EU competition law.

Since the goal of consumer welfare has strong roots in EU competition policy, it should be enforced more comprehensively and taken as the starting point. One should take into account, through a historical approach, the thoughts of ordoliberalism in which problems analogous to the concentration of private power in today's digital economy have been recognized.

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<sup>287</sup> Stucke 2013, p. 2575, 2626-2628.

<sup>288</sup> This term is used in Stucke – Grunes 2016, p. 271-273.

<sup>289</sup> See the list of research in n 79.

<sup>290</sup> See, for example, European Parliament resolution of 31 January 2019 on the Annual Report on EU Competition Policy 2018/2102(INI), 2019, para. 10.

<sup>291</sup> Fortune, 100 Fastest-Growing Companies.

Subsequently, the regulator can take into account the evolution of the markets and avoid the fallacy of seeing today's issues detached from history. The ordoliberal approach for its part would ensure that economic values don't override the wider social harms which may occur if competition law is not enforced properly.

On this account, *Deutscher* and *Makris* argue that the ordoliberal paradigm emphasizes the procedural dimension of competition which is connected to deontological values such as equality of opportunity, freedom and autonomy. It doesn't ignore the welfare-enhancing qualities of competition but states that the economic, output-oriented mechanisms (which are, in turn, consequentialist values) are inadequate to legitimize the system. Therefore, input-oriented, deontological values should delimit them. In summary, the ordoliberal approach doesn't solely rely on assessing the welfare-maximizing or -reducing effects of business practice, but also considers its conformity with other values of the competitive process and thus carries out a balancing test of conflicting individual rights, freedoms and interests.<sup>292</sup>

The practical application of the revised consumer well-being goal is probably the most difficult task. Harmful effects on values such as political and economic freedom may be hard to measure with current benchmarks. This begs for the adoption of new kinds of theories of harm to competition law assessment of, for example, mergers and abuse of dominant position cases. Enacting new legislation that incorporates the concerns of the fast-changing digital economy may prove to be too inflexible. Thus, the change of approach will move to the level of goals and objectives of competition law. The change should be a paradigmatic one since without incorporating the under-appreciated values of economic and political freedom and competitive structure to the assessment consumers' well-being, false negatives will occur in the future enforcement of EU competition policy as digital platforms will continue to gain more and more economic power.

## 7 CONCLUSIONS

The change of approach on the level of goals would also have a positive effect on the expectations and accountability of EU competition policy since the policymaker and the legislator are expected to conform legal rules to the objectives that they strive for.<sup>293</sup> The objective should be to get to a point where economic goals are not the only measures in

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<sup>292</sup> Deutscher – Makris 2016, p. 191, 195; Mestmäcker 2010, p. 48.

<sup>293</sup> Parret 2010, p. 341.

evaluating the success of a competition law system.<sup>294</sup> With this in mind, for example, the protection of consumers' privacy and long-term effects on consumer choice, market structure and political and economic freedom could be seen as new evaluation parameters in the digital economy. Subsequently, the redefined approach to the goals of EU competition law in the digital economy would have a more far-reaching and trust-establishing effect on the EU as a policymaker and legislator, when the future threats of the digital economy to the markets are taken into account. This would have a positive effect on a global scale since modelling has been the most important mechanism of globalization of competition law since global attempts on competition law regulation have mostly failed.<sup>295</sup>

As consumerism is already a global phenomenon<sup>296</sup>, actors with global influence, such as the EU, should be in the forefront of transferring the ideas of consumerism to the sphere of competition law in a more comprehensive manner. Also, the consumer movement, which has influenced domains such as health and motor vehicle safety, could be a strong voice in addressing the issues discussed in this research.<sup>297</sup> Consumers should be the main force of the counterpower for the surveillance economy since it is their personal data that is the source of surplus which sets the wheels of the data-driven economy into motion. However, as discussed earlier, consumers are mainly oblivious to the harm from tech companies' data collection practices. This shifts the responsibility to the EU since it has the political and economic power to combat these practices through, for example, competition law enforcement.

This goal-oriented approach to EU competition law promotes a more flexible choice of assessing the current market realities. Subsequently, the future changes on a legislative level can be tied to the basis of the overarching goals of EU competition law in a more theoretically plausible manner. Even better, in most cases, the current legislation can be interpreted through the redefined goals of EU competition law without the need to enact new legislation. For example, in the U.S., the changes in the direction of competition policy have been possible because the goals have not been locked into the level of legislation.<sup>298</sup> I hope to present this research as a starting point for further discussion on the role of the consumer welfare standard and other goals in EU competition law in the digital economy. In practice, what I would like to see is that the Commission would update their guidance on Art. 102 TFEU to reflect the

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<sup>294</sup> *Ibid.*, p. 376.

<sup>295</sup> Braithwaite – Drahos 2000, p. 187-189, 215-217.

<sup>296</sup> See n 37.

<sup>297</sup> Braithwaite – Drahos 2000, p. 623-628.

<sup>298</sup> Kuoppamäki 2003, p. 212.

variety of non-economic factors to be taken into account in the assessment of harms caused by, *inter alia*, abuse of dominant position cases in the digital economy.

It is no exaggeration to say that there is an ongoing, paradigmatic techno-economic change in the economy due to the evolution of technology and the rise of digital platforms. However, the question is how competition law should respond to this change, and if there should be a paradigmatic change in competition law to that end, or if adjusting the current principles is enough. First, competition law should be flexible in reacting to these changes. Then, the special circumstances of a new field of operations (such as digital platforms) should be analysed in detail and accurately enough.<sup>299</sup> My point is that without a structured, theoretically well-founded and future-oriented approach to competition law assessment in the digital economy, the market realities will be shaped by the powerful tech companies to the point that intervening, by the means of the current legal framework, may be too difficult. This could lead to rushed policy-choices which would distort EU competition law from its starting points and lead to increasingly unstable economic prospects.

A starting point to the new approach regarding tech companies would be to look beyond the current situation. One could start by building the competition policy on the current framework of EU competition law goals, with consumer welfare as the foundation, and be forward-looking regarding the ongoing development in technology. In this case, a technology-oriented approach when it comes to competition law in the digital economy is essential. Without realizing the speed of the development of technology and how it affects the concentration of economic and political power, the policy choices will inevitably turn out to be ineffective and over- or under-regulative. Recognizing the importance of promoting innovation as a gateway to challenge incumbents' position will shift the focus of competition policy in the right direction. When it comes to merger control, the future dimensions of harms to consumers should be comprehensively taken into account. Also, the implications on consumers from the acquisition of potential competitors at an early stage by powerful tech companies should be evaluated more thoroughly.<sup>300</sup> In the evaluation, the benefits of big tech companies must not be overshadowed by the harms and hence a balancing test should be conducted.

As stated in chapter 5.2.2 on innovation, in *Schumpeterian* competition theory, monopolies are a natural occurrence and necessary for boosting innovation and technical development.

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<sup>299</sup> Kuoppamäki 2018, p. 21.

<sup>300</sup> For more discussion on the topic, see De Montjoye, Yves-Alexandre – Schweitzer, Heike, Competition policy for the digital era, Report for the European Commission, 2019, p. 110-124.

Achieving a dominant position is the natural objective and beneficial from a techno-economic point of view. This position will also be replaced by new innovators, and thus the evolution of the markets is an ongoing process. However, for this ‘creative destruction’ to be realized smart competition law regulation is required. This relates to the promotion of competition policy that will take into account the concentration of data. If left without attention, this concentration will lead to lock-in effects for consumers, limited consumer choice and barriers to entry for the innovators. For example, in the case of operating systems platforms, these effects can become so strong, that even the most innovative competitors may eventually become consumed by the super-platform.<sup>301</sup> The downsides of this cumulation of innovation are the restrictions on the economic freedom of smaller companies and subsequently the rights of the citizens.

Even though the realization of *Schumpeterian* competition is theoretical, it opens new ways to see the current situation where tech companies’ economic power accumulation brings both negative effects, such as limited privacy and choice, and positive effects, such as new technologies due to innovation, for consumers. Therefore, the contestability of the markets is in the focus. Even though this theory cannot be discussed further in my research, interesting connections to the importance of tech companies of today can be drawn. Regardless of the negative effects on consumers, these companies are without a doubt important when it comes to the invention of new technologies that benefit consumers.<sup>302</sup> It is essential to find a balance where the concentration of power stays at an optimal level and the benefits outweigh the harms.

It should also be noted that economic ends are always essential in the development of new technologies. Thus, in a capitalist society, technology will always be an expression of the economic objectives of the dominant players in the market.<sup>303</sup> Connecting this to the objective of the leading tech companies to extract as much personal data as possible from consumers through behavioural analysis and other practices, the welfare of consumers is likely not paid attention to. Thus, not all innovation is beneficial to consumers, and this fact should be distinguished also in the goals of EU competition law. Innovation, like all the other goals discussed in this research, should be connected to the well-being of consumers.

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<sup>301</sup> On the power of super-platforms, see Ezrachi – Stucke 2016, p. 173-177.

<sup>302</sup> On *Schumpeterian* competition and dynamic competition in general, see Kuoppamäki 2003, p. 151-152, 155.

<sup>303</sup> Weber 1978, p. 67.

On this note, it is too restrictive in EU competition law to divide different goals based on their importance since they are all connected. Even though I have focused on the definition of the consumer welfare standard that includes privacy matters, the scope will still be too narrow, if effects on effective competition structure, economic and political freedom and democracy are overlooked in the long run. Consumer welfare, including price, choice, quality, privacy and innovation benchmarks is a step into the right direction and adequate in traditional markets, but challenges posed by digital platforms go further into the future. Thus, I have presented the goal of consumer well-being to combine these different aspects.

If the Commission wants to nominate a prime goal for EU competition law enforcement in the digital economy, it should be consumer well-being, as defined in this research. The outlook to the harmful effects imposed by digital platforms should be wide and assessed comprehensively for the well-being of consumers, final and intermediate, to capture the market realities. However, the legal assessment of future harms will most likely in practice prove to be challenging. Therefore, the companies should be given a chance to present their efficiency defences from a wider perspective. The Competition Commissioner Vestager's suggestion of giving the companies' the burden of proof in harmful effects, could boost the reciprocal relationship with enforcement agencies and the digital platforms. *Drahos* and *Braithwaite* promoted the application of the principle of continuous improvement in competition law compliance as one of the main points in driving the consumer-oriented competition law.<sup>304</sup> This compliance principle connected to the goal of consumer well-being would drive the tech companies' actions to a direction where the interests of consumers would be better taken into account.

In digital markets, driven by advertisement revenues and other income derived from the exploitation of consumers' personal data, the companies' and consumers' benefits are difficult to combine. By advocating the values included in the consumer well-being goal, the enforcers of EU competition law can signal to the companies what is emphasized in the assessment of anticompetitive practices. If the current trends of consumer exploitation in the digital economy continue in the same manner, harmful effects to consumers and society in the longer term are warranted. Without a change in direction, the interests of consumers and companies in the digital economy will not align.

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<sup>304</sup> Braithwaite – Drahos 2000, p. 622.

To conclude, I will point out a few limitations in my research due to its limited length.<sup>305</sup> The goal-oriented method that I have used is more detached from the practical enforcement of competition law than a traditional legal dogmatic method. However, this higher-level assessment of EU competition law goals in the digital economy is essential to grasp the current paradigmatic techno-economic change in the markets. More value could be added to the research on the goals of EU competition law, by focusing on the decision-making process which has led to the current goals.

Also, as discussed in chapter 2, the pace of evolution in the current surveillance capitalism is so fast and unprecedented that by focusing only on the existing categories and terminology we will fall short of the objective to contest the negative effects stemming from the unprecedented nature of the regime.<sup>306</sup> Bringing new concepts and naming from the research on the characteristics of power in the digital age to the sphere of competition law would connect legal research more firmly to the state-of-the-art research in, for example, social sciences.

The role of ordoliberalism in EU competition law could be traced back more thoroughly and related to the context of institutional decision making in the EU. The institutional framework of the EU is highly complex, and the interactions among institutions shape all competition law decisions, as well as influencing the goals of EU competition law.<sup>307</sup> The way I see it, I have opened the discussion on the concern of concentration of economic power and its historical dimensions. By taking into account how the discussed goals relate to the EU's institutions that apply and articulate them, more value could be provided for the decision-makers to embark on the change in direction of EU competition law in the digital economy.<sup>308</sup>

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<sup>305</sup> For a discussion on the issues that often relate to and distort the discussions of the goals of competition law in Europe, see Gerber 2012. I have reflected my approach in light of what the author has stated on the pitfalls and fallacies in the discussion of goals in EU competition law and drawn connections to the need for further research.

<sup>306</sup> Zuboff 2019, p. 14.

<sup>307</sup> Gerber 2012, p. 88, 90.

<sup>308</sup> *Ibid.*, p. 89.