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Enter the quagmire – the complicated relationship between data protection law and consumer protection law

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A B S T R A C T

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This article examines the complex relationship between consumer protection law and data protection law, particularly within the EU's online environment, and highlights the problems that stem from this complexity. It suggests that, while there are significant similarities between their respective sources, tools and purposes, there are also arguable differences between consumer protection law and data protection law. One such arguable difference is found in that, while consumer protection law can be seen to merely set a floor in its pursuit of a sufficiently high level of consumer protection, data protection law – due to its clearly articulated dual purposes of (a) protecting individuals with regard to the processing of personal data and (b) providing for the free movement of such data – sets both a floor and a ceiling.

Having discussed the relationship between consumer protection law and data protection law in more detail, the argument is made that it seems possible to conclude that the balance struck in the Data Protection Directive, and soon in the General Data Protection Regulation, places limitations on consumer protection law. The implications of this conclusion are then examined briefly in the context of some matters currently coming before the CJEU and the contours of a framework are presented, addressing situations where a data protection-based liability claim is pursued against a third-party non-controller under consumer protection law.

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The area of data protection law has matured and is now doubtless a distinct field of law. It is a special discipline, often taught as a distinct subject. Conferences are devoted specifically to data protection, and it is a discipline discussed in books and journals specifically addressing data protection law, and data protection law only.

Yet, it is also clear that data protection law is interrelated to, and indeed entwined with, several other fields. Most

obviously, there is a clear overlap, and connection, between data protection and privacy.¹ Yet, many other examples of overlapping disciplines may be found. For example, data protection law is often discussed together with cyber security²; and it is not always clear where data protection law starts and cyber security ends, not least given that keeping data protected is central to both fields. The overlap between defamation law and data protection law is also well documented. Furthermore,

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¹ See further e.g.: Orla Lynskey, 'Deconstructing data protection: the "added-value" of a right to data protection in the EU legal order' (2014) 63 Int Comp Law Q 569–97.

² See e.g.: Andreas Mitrakas, 'Assessing liability arising from information security breaches in data privacy' (2011) 1(2) Int Data Priv Law 129–136.

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Bygrave has examined the relationship between data protection and copyright and concluded that 'both sets of rights are aimed essentially at regulating the flow of information in order to preserve certain values and interests.'³ To this, we may add that there is an undeniable and important overlap between competition law and data protection law.⁴

Another way to look at how data protection law relates to other areas of law is to consider the rights with which data privacy commonly is juxtaposed: that is, with what areas of law is data protection law seen to compete, or indeed clash. Most obviously, we may here point to the right of freedom of expression and the right to access to information.⁵

The relationship between, on the one hand, consumer protection law, and data protection law, on the other hand, has not featured so prominently to date. To be clear, there is a wealth of materials that discuss matters falling within the overlap between consumer protection law and data protection law.⁶ However, not much attention has been directed specifically at that overlap as such, at least not in English language literature.⁷ Furthermore, there is a paucity of materials directed at the extent to which data protection law clashes, or at least competes, with consumer law.

In the light of this argued gap in the literature, this article examines the relationship between consumer protection law and data protection law; and in doing so, focus is placed on EU law, in particular in the online environment.

³ Lee Bygrave, 'Data Protection vs. Copyright' in Dan Jerker B Svantesson and Stanley Greenstein (eds), *Nordic Yearbook of Law and Informatics 2010-2012: Internationalisation of Law in the Digital Information Society* (Ex Tuto Publishing 2013) 55.

⁴ Christopher Kuner, Fred H Cate, Christopher Millard, Dan Jerker B Svantesson and Orla Lynskey, 'Editorial: When two worlds collide: the interface between competition law and data protection' (2014) 4(4) *Int Data Priv Law* 247-8. See further: Francisco Costa-Cabral and Orla Lynskey, 'Family ties: The intersection between data protection and competition in EU law' (2017) 54(1) *Common Mark Law Rev* 11-50.

⁵ See e.g.: Muge Fazlioglu, 'Forget me not: the clash of the right to be forgotten and freedom of expression on the Internet' (2013) 3(3) *Int Data Priv Law* 149-57.

⁶ See e.g.: Irene Kamara and Eleni Kosta, 'Do Not Track initiatives: regaining the lost user control' (2016) 6(4) *Int Data Priv Law* 276-90. Indeed, the term 'consumer privacy' is common in US literature (see e.g.: Morgan Hochheiser, 'The Truth Behind Data Collection and Analysis' (2015) 32 *John Marshall J Inf Technol Priv Law* 32), and in some jurisdictions the term 'consumer data protection' is used (see e.g.: Kash Leng Ter, 'Information Management: Towards Consumer Data Protection Legislation in Singapore' (2012) 24 *Singap Acad Law J* 143).

⁷ See, however: European Data Protection Supervisor, *Preliminary Opinion of the 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* (March 2014) <https://edps.europa.eu/sites/edp/files/publication/14-03-26_competition_law_big_data_en.pdf> accessed 8 July 2017. While consumer protection is part of the coverage here, it must be said that the main focus is placed on the interaction between data protection and competition law. See also: Francisco Costa-Cabral, 'The Preliminary Opinion of the European Data Protection Supervisor and the Discretion of the European Commission in Enforcing Competition Law' (2016) 23 *Maastrich J Eur Comp Law* 23(3) 495-513.

Having discussed the nature of the relationship between consumer protection law and data privacy law, this article seeks to provide the contours of a framework for how we may approach this relationship, and how we may address clashes between consumer protection law and data privacy law. The presented framework is specifically focused on the topical issue of situations where a data protection-based liability claim is pursued against a third-party non-controller under consumer protection law. However, while care must be taken when transferring solutions between different types of situations, it is hoped that aspects of the thinking presented may usefully guide how we approach such clashes in other settings. However, to prepare ground for that discussion, I first discuss the implications of the current disorder, as well as the respective purposes, and sources, of data protection law and consumer protection law.

1. The consequences of disorder

The EU seeks to ensure adequate consumer protection through a patchwork of partly overlapping Directives and Regulations.⁸ The same holds true for data protection.⁹ Each of these fields is difficult to navigate, and especially data protection law is often expressed in language containing vague, general wordings that actually mean very little unless read in a specific context.¹⁰ This adds further to the complexity.

Like any regulatory uncertainty, the lacking clarity as to the relationship between data protection law and consumer protection law comes at a cost; regulatory uncertainty makes predictable legal compliance an impossibility, also for the biggest 'players',¹¹ and the need for reform is widely recognised.¹²

⁸ Consider e.g. Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, Article 3(2) and Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29).

⁹ Consider e.g. how the forthcoming Regulation is supplemented by a Directive specifically addressing the protection of personal data processed for the purpose of criminal law enforcement.

¹⁰ Christopher Kuner, Dan Jerker B Svantesson, Fred H Cate, Orla Lynskey and Christopher Millard, 'Editorial: The language of data privacy law (and how it differs from reality)' (2016) 6(4) *Int Data Priv Law* 259-60.

¹¹ In fact, already comments from around the turn of the millenia, discussing consumer protection and data protection, observed that 'it is very easy to trip over these rules inadvertently.' (David Coupe, 'Consumer Protection and Privacy: the UK Perspective' (2001) 29 *Int Bus Law* 397, 399.

¹² See e.g.: Commission, *Towards a thriving data-driven economy. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions COM (2014) 442 final*, 2 July 2012 noting that the EU must 'make sure that the relevant legal framework and the policies, such as on interoperability, data protection, security and IPR are data-friendly, leading to more regulatory certainty for business and creating consumer trust in data technologies' (at 3).

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