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The implication of German Facebook case: big data, privacy and EU competition law

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Abstract: German Facebook case, which is built on the German national law, has aroused awareness with academia regards to its interplay between data privacy concerns and competition law. This article will study the three decisions the Facebook case has been going through. The Bundeskartellamt (German Federal Cartel Office, hereinafter "FCO") gives its consideration to data access and network effects when defining market power of Facebook. However, the normative causality where the abusiveness rises from the data protection law infringement is held highly contentious. The appellate decision of Düsseldorf Higher Regional Court goes completely against FCO regards whether existing anti-competitive effect derived from data protection law infringement. The latest decision from the German Federal Court of Justice confirms that Facebook commits the abuse of dominant position but gives another theory of harm that Facebook's behavior deprives the consumer's freedom of choice as to whether or not to choose the personal targeted ad service. This article will look over if the excessive data collection behavior could consist in the exploitative abuse under EU competition law, i.e. Art.102 TFEU; where is the boundary of EU competition law; whether the violation of GDPR can integrate a form of abuse of dominant position under Art.102 TFEU. Based on the existing adopted EU method, a full view will be given about how the data related competitive concern in advertisement market and sensitive privacy issues in user side of market are separated under EU practice. The article advocates that data (or even privacy) concerns should not be precluded by the EU competition law analysis, and the zero price market which belongs to the multi-sided market business mode should not be deemed as competition unrelated as there is no conception of monetary price within the market functionality of zero price market. Rather, the privacy and personal data flowing in the zero price market could give rise to huge market powers pertaining to the dominant companies. To protect the consumer welfare of private users in the zero price market, the excessive and unrestricted data collection behavior of dominant companies should remain within the competition law's radar.

Keywords: EU competition law, data collection, privacy, multi-sided market, free service, user side, market power, network effects, exploitative abuse, causality, entry barriers, lock-in effect, unfair trading conditions, excessive price, anti-competitive effects, Art.102 TFEU, GDPR

Summary

1. Introduction

German Facebook case has aroused awareness with the academia concerned with its assessment of abuse of excessive data collection which, however, gave prominence to the legal principles of data protection laws.[1] Many discussions about the interdisciplinary work of competition authorities and data protection authorities have been lasting for years. European Data Protection Supervisor (EDPS) advocates the proposal of Digital Clearing House to use data protection and consumer protection standards to determine 'theories of harm' relevant to merger control cases and to cases of exploitative abuse under Article 102 TFEU.[2] These approaches, however, have also run the risk to the sign of 'antitrust imperialism' which might give rise to an unjustified expansion of Article 102(or national competition law in the issued case), which should be considered.[3]

This article will study the three decisions the Facebook case has been going through. A clearer vision will be given about how excessive data collection/third party tracking and the competition law take combined effects in the issued case. In section 2, the analysis is given regards the focal points of FCO's innovative theory of market power in the sphere of data access and network effects, and vis-à-vis the contentious normative causality where the abusive conducts rise from the data protection law infringement. The section 3 will introduce the harsh but noteworthy views from Düsseldorf Higher Regional Court which are completely against FCO's decision on the lack of causality and controversial existence of anti-competitive effect derived from data protection law infringement. The section 4 focuses on the latest decision from the German Federal Court of Justice where the Court confirmed the abuse of dominant position of Facebook while altered the theory of harm of FCO. The Court, instead, motivated the abusiveness arguing that Facebook's behavior deprives the consumer's choice as to whether or not being provided personal targeted ad service by the means of wide range of data collection. This will be followed by section 5, which discusses if the excessive data collection behavior could constitute an exploitative abuse under EU competition law, i.e. Art.102 TFEU. The consideration is given to the new type of unfair trading conditions in the data economy where the excessive data is collected without proportionality, necessity and transparency. Also, this section analyzes the contestable argument of data "price" in digital economy to establish on the Art.102(a) TFEU as the analogue to the excessive price. In the section 6, the writer explores, under EU practice and Article 102, where is the boundary of EU competition law, and whether the violation of GDPR can consist in the abuse of dominant position. Based on the existing adopted EU method dealing with data privacy concerns in the merger cases, this section will also provide the full view about how the data related competitive issues in advertisement market and sensitive privacy issues on user side of market are separated under EU practice. The conclusion of each section will provide suggestion on optimizing present theories of the Facebook case and provide conceptions to instrumentalize the data privacy theories as competition law enrichment if the case goes under the charge of CJEU. The article advocates that data (or even privacy) concerns should not be precluded by the EU competition analysis, and the zero price market should not be deemed as competition unrelated as there is no price to be paid. The privacy and personal data flowing in the zero price market could give rise to the huge market powers of the dominant companies. To protect the consumer welfare of private users in the zero price market, the excessive and unrestricted data collection behavior of dominant companies shouldremain within the competition law's radar.

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[1] Bundeskartellamt, Case B6-22/16, Case Summary of February 2019, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing, page7-11, available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html?nn=35915684;
see Bundeskartellamt, Case B6-22/16, Facebook, Press release of February 2019, page 3, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html;jsessionid=8A581062B36687451A3D1E7A5C256390.2_cid378?nn=3600108

[2] EDPS Opinion 8/2016 on coherent enforcement of fundamental rights in the age of big data of 23 September 2016, page 15, available at https://edps.europa.eu/sites/edp/files/publication/16-09-23_bigdata_opinion_en.pdf; EDPS Preliminary Opinion "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 page 29-32, available at https://edps.europa.eu/sites/edp/files/publication/14-03-26_competitition_law_big_data_en.pdf.

[3] Bailey, D. (2018). The new frontiers of Article 102 TFEU: antitrust imperialism or judicious intervention?. Journal of Antitrust Enforcement, 6(1), 25-53.

2. FCO's decision and the prominence of data protection law within the anti-trust analysis

2.1 Facebook's excessive data collection

FCO's survey to Facebook initiated in 2016. After 3 years, on its decision of 6 February 2019, the FCO decided to prohibit Facebook from providing its service to private users conditional on the collection of users' and device related data gathered from third parties.[4] Based on the investigation of FCO, users can only have access to the social network under the precondition that Facebook could collect their data, even when users visit outside of the Facebook website whether in the internet or on smartphone apps and furtherly assign these data to the user's Facebook account.[5] In this respect, not only the behavior on the Facebook pages is recorded but through corresponding interfaces (Facebook Pixel) and the analytical and statistical functions of "Facebook Analytics"[6], private users' visits to third-party websites are tracked without them knowing it. The transfer of data will start even if the user will not scroll over the website or click on the Facebook button.[7] The terms and conditions of service under review have a considerable reach as consumers' data are collected whenever they use the internet.[8] Facebook therefor receives large amount of aggregated data from various devices, platforms, and websites. This type of behavior serves to get the private Facebook users' thorough profile to facilitate advertisers' needs of tracking potential consumers, if more data Facebook can gather, more accurately the ads, which generate from the advertisers' sponsorship, could target, accordingly, more profit Facebook could gain from the advertisement side of market.[9]

However, should data related conduct be regulated by the virtue of competition law? From traditional view of competition law theory, as long as the data accumulation could facilitate new services that satisfy consumer needs and wants, it is hard to show that it leads to an anticompetitive effect as there is no clear reduction of consumer welfare. [10] On the other hand, this would not stand if any privacy-related arguments could establish grounds for the application of the antitrust theory of harm.

The evolution of EU competition law since the mid-1980s is characterized by an increasing effort to set out a plausible link between negative effects on "competition as such" and harm to consumers, i.e. to specify a "theory of harm".[11] Accordingly, from the hypothesis perspective, the theory of harm related to data privacy issue forms in two-fold aspects: Firstly, the harm is caused to the consumer welfare. Kerber advocates that competition law should take into account negative effects on privacy, as long as they can be interpreted also as a reduction of consumer welfare.[12] Revealing more personal data can lead to higher objective risks for consumers about getting harmed, and it is clear from an economic perspective that these risks reduce

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[4] Third-party sources include Facebook-owned services such as Instagram or WhatsApp, but also third-party websites which embed Facebook interfaces such as the "Like" or "Share" buttons. See supra note 1, Press release, page 3

[5] Ibid, page 1

[6] This happens, for example, if the website operator uses the "Facebook Analytics" service in the background in order to carry out user analyses, user data will flow from many websites to Facebook. See ibid, page 3

[7] Ibid, page 3

[8] Bundeskartellamt (2019), supra note 1, Case summary, page 12

[9] About the interaction between data and advertising, see Lorenzo-Rego, I. (2019). The Perspective of the Bundeskartellamt in the Evaluation of Facebook's Behaviour: Prior Considerations and Possible Impact. Eur. Competition & Reg. L. Rev., 3, 100.

[10] Colangelo, G., & Maggiolino, M. (2018). Data Accumulation and the Privacy-Antitrust Interface: Insights from the Facebook Case for the EU and the US, StanfordVienna TTLF Working Paper No. 31, available at http://ttlf.stanford.edu.

[11] J Crémer, A-Y de Montjoye and H Schweitzer, Competition Policy for the Digital Era (Luxembourg, Publications Office of the European Union 2019), page 40, available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf

[12] Kerber, W., & Zolna, K. K. (2020). The German Facebook case: The law and economics of the relationship between competition and data protection law, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3719098

consumer welfare.[13] However, the expansion interpretation of the notion "consumer welfare" has nevertheless always been resisted by competition experts and Commission on the grounds that the consumer welfare standard is guided by economic principles and that competition authorities lack the legal competence and technical expertise to incorporate non-economic concerns within their remit.[14]

The second hypothetic theory of harm related to data privacy is the harm caused to the effective competition structure. A joint report by the French Autorité de la Concurrence and the German Bundeskartellamt (FCO) deems that data processing could result in entry barriers when new entrants are unable either to collect data or to buy the same kind of data.[15] According to the FCO, the direct and indirect network effect work to reinforce the dominant positions through self-reinforcing feedback loops[16] and thus lead to market-tipping process which will be further discussed in the following sections.

Social networks are data-driven products where access to the personal data of users is inevitably essential for the market position of undertakings.[17] In the perspective of FCO, monitoring the data processing of companies with dominant position is therefore "an essential task of a competition authority, which cannot be fulfilled by data protection officers".[18] German legislator also reacted to the difficulties of assessing market power in digital platforms at an early stage: The 2017 amendment to the German Competition Act[19] introduced a provision to facilitate the assessment of market power in multi-sided markets and platforms.[20] From the indication of German Competition Act (GWB) Section 18(3a), in terms of online platforms and networks, it is recognized that the access to data serves as a relevant factor for market dominance.[21] To put it differently, it is also noted the dilemma that by referring to such parameters, the conclusions reached by the FCO with regard to Facebook's dominant position in the zero-price side would be sensitively different from

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[13] Ibid.

[14] Costa-Cabral, F., & Lynskey, O. (2017). Family ties: the intersection between data protection and competition in EU Law. Common Market L. Rev., 54, 11.; Ohlhausen and Okuliar, "Ohlhausen, M. K., & Okuliar, A. P. (2015). Competition, consumer protection, and the right [approach] to privacy. Antitrust LJ, 80, 121. 37-38; Tucker, D. S. (2015). The proper role of privacy in merger review. CPI Antitrust Chronicle, May; Commissioner Vestager stated that 'I don't think we need to look to competition enforcement to fix privacy problems', see Vestager, M. (2016). (speech) Competition in a big data world. Przemówienie komisarz ds. konkurencji, 17, 2014-2019., https://ec.europa.eu/commission/2014-2019/vestager/announcements/competition-big-dataworld_en

[15] Autorité de la Concurrence & Bundeskartellamt. (2016) Competition Law and Data, page 11. https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier. pdf?__blob=publicationFile&v=2

[16] Bundeskartellamt, Decision No. B6-22/16 of 16 February 2019, para 424, available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4

[17] Bundeskartellamt, Case B6-22/16, Background information on the Facebook proceeding of December 2017, page 1-2, available at, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2017/Hintergrundpapier_Facebook.html.

[18] Bundeskartellamt, Case B6-22/16, Bundeskartellamt prohibits Facebook from combining user data from different sources-Background information on the Bundeskartellamt's Facebook proceeding (February 2019), page 7, available at, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=6.

[19] BGB IS 1416, 1 June 2017, modifying Gesetz gegen Wettbewebbeschränkunge(GWB) German act on restraints of competition.

[20] Robertson, V. H. (2020). Antitrust Law and Digital Markets: A Guide to the European Competition Law Experience in the Digital Economy, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3631002.

[21] Section 18(3a) of the German Competition Act (GWB) has stipulated that assessing the market position of an undertaking, particularly in the case of multi-sided markets and networks, it shall also be taken into account of: direct and indirect network effects, the parallel use of several services and the switching costs for users, the undertaking's economies of scale arising in connection with network effects, the undertaking's access to data relevant for competition and competitive pressure driven by innovation.

the ones reached by the Commission in its prior decisional practice.[22]

2.2. Market definition in the multi-sided market

FCO defines the product market as a private social network market with private users as the relevant market side.[23] In terms of Facebook's business model, with its special characteristics, it is a multi-sided network market with free services.[24]

2.2.1 Multi-sided market and free service

Based on the multi sided market model, online platforms generally operate on multiple markets and facilitate interaction between multiple parties for a fee.[25] Network effects or externalities are a key aspect of two-multi sided markets: a two-sided market is a market in which a firm acts as a platform, it sells two different products to two groups of consumers, while recognizing that the demand from one group of consumers depends on the demand from the other group and vice versa.[26] Usually, only one side (in this case the advertisement market) pays monetary remuneration.[27] These two sides of market are connected through the indirect network effect: a large user amount leads to increasing advertisement income and furtherly reinforces the dominant company's strong market position in the relevant market.[28] Radically, Facebook relies on a multi-sided structure by keeping its monetary income on the advertising side of market, while establishing the abundant user base on zero price market. It is apparent that the user groups will not receive any monetary compensation.

It is widely accepted that the free service is paid by the personal data[29] and data performs as the counterpart of the digital content or a digital service.[30] The term of "free" used in Facebook commercial activity has attracted sanction as misleading practice failing to provide adequate information to consumers on how Facebook commercially exploit users' data collected from the social network.[31]

2.2.2 User side demand substitutability

The relevant geographic market is national (Germany), as German users primarily use social networks to stay in touch with friends and acquaintances within Germany.[32] This market includes Facebook and some smaller German providers of social networks. Nevertheless, networks like LinkedIn, which is designed to meet professional requirements, and the instant messaging service like WhatsApp are not included. The investigations have shown that although YouTube's business model has some overlaps with those of social networks, the service

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[22] Schneider, G. (2018). Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's investigation against Facebook. Journal of European Competition Law & Practice.

[23] Bundeskartellamt (2019), supra note 1, Case summary, page 3

[24] Ibid, page 4

[25] Mandrescu, D. (2017). Applying EU Competition Law to Online Platforms: The Road Ahead. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3117840

[26] Filistrucchi, L., Geradin, D., Van Damme, E., & Affeldt, P. (2014). Market definition in two-sided markets: Theory and practice. Journal of Competition Law & Economics, 10(2), 293-339.

[27] Körber, T. (2016). Is Knowledge (Market) Power?-On the Relationship Between Data Protection,'Data Power'and Competition Law. (January 29, 2018). NZKart, 303; supra note 11, page44

[28] Volmar, M. N., & Helmdach, K. O. (2018). Protecting consumers and their data through competition law? Rethinking abuse of dominance in light of the Federal Cartel Office's Facebook investigation. European Competition Journal, 14(2-3), 195-215.

[29] Ezrachi, A., & Stucke, M. E. (2015). Online Platforms and the EU Digital Single Market. University of Tennessee Legal Studies Research Paper, (283). para 2.13

[30] Article 3(1) and recital 24 of Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, [2019] OJ L136/1

[31] Autorità Garante della Concorrenza e del Mercato, decision of 29 November 2018. The decision was recently upheld on appeal (Tribunale Amministrativo Regionale Lazio, judgement no. 261/2020 of 10 January 2020). AGCM investigated Facebook's slogan "sign up, it's free, and always will be" as breached several provisions of the Italian Consumer Protection Code and fined Facebook EUR 10 million.

[32] Bundeskartellamt (2017), supra note 17, Background information, page 3.

is not sufficiently comparable to a social network and their function is complementary. [33] The same function analysis applies to Twitter, Pinterest and Instagram, accordingly, which are not the parts of the relevant market.
Facebook contends to define the market as a market for the users' time or attention.[34] It will expand the relevant market to the whole advertisement market where the market share of Facebook will be diluted largely. FCO takes a different approach by looking at the demand of the opposite market side to define the relevant product market, and it deems that private users can be considered customers in the context of the concept of demand side substitutability, even if the services are available free of charge.[35] Without resorting to the hyper-technical SSNIP test, the FCO instead describes a concept of demand side substitutability analysis to examine whether products are "reasonably interchangeable."[36] The price-focused SSNIP test has many shortcomings, but it most obviously fails when confronted by zero-price products like Facebook.[37] The interchangeability standard, coupled with a focus on functional similarities and differences, is deemed as "flexible enough to meet the challenges posed by zero-price markets".[38]
The question can be rephrased as whether there are two markets to be defined or only one market encompassing the two sides.[39] When related to the multi-sided market, considering the indirect network effects, FCO endorses that the two sides of a platform should not be separated, and the platform service should be treated as one product. There can only be one market if both user groups view the functional substitutability of the platform service alike and therefore have a largely uniform demand.[40] Furtherly it is proposed one should define one or two markets therefore needs to be decided on a case-by-case basis. It is also indicated that that the choice between a single and multiple relevant markets depends on whether the case concerns a transaction or non-transaction platform.[41]
Admittedly, as globalization and digitalization raised the challenge to "defining the market", the traditional economic tools for market definition cannot apply in a straightforward manner[42] and Commission has recently declared to put these tools under review.[43] Nevertheless, neither the European Commission nor the Court of Justice of the European Union (CJEU) has properly incorporated multi-sided market theory into their market definition framework.[44]

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[33] Bundeskartellamt (2019), supra note 1, Case summary, page 5.

[34] Bundeskartellamt Decision (2019), supra note 16, para 245

[35] The fact that the users do not pay a monetary compensation for the private use of Facebook does not change the fact that they use the service to satisfy a certain economic demand, which makes them customers of Facebook's product in an economic sense. Ibid, para 245-246,

[36] Ibid, para 245-248

[37] A SSNIP analytical framework loses its coherence in zero-price markets where the basic unit of value extracted from customers is not expressed as a price. And Newman proposed whether a hypothetical monopolist would likely impose an "SSNIC"-a small but significant and non-transitory increase in (exchanged) costs-on customers. In zero-price markets, analysts must tailor their focus to the appropriate cost(s)-i.e., the cost(s) most likely to be increased by a hypothetical monopolist, see Newman, J. M. (2016). Antitrust in zero-price markets: applications. Wash. UL Rev., 94, 49; see also ibid, decision para 248.

[38] Newman, J. (2019). The Bundeskartellamt's Facebook Decision: Good, Bad and Ugly, available at: https://leconcurrentialiste.com/2019/02/11/bundeskartellamt-facebook/ (31.07.2019).

[39] Filistrucchi (2014), supra note 26.

[40] Bundeskartellamt (2016), Working paper- The market power of platforms and networks, executive summary, page 5-6.

[41] Filistrucchi (2014), supra note 26.

[42] Robertson, V. H. (2020). Competition Law's Innovation Factor: The Relevant Market in Dynamic Contexts in the EU and the US. Bloomsbury Publishing; see also Robertson, V. H. (2020), supra note 20.

[43] Vestager, M. (2019). Defining Markets in a New Age. Speech. 9.12.2019. Available at https://ec.europa.eu/commission/commissioners/2019- 2024/vestager/announcements/defining-markets-new-age_en

[44] In several cases, the Commission merely referred to a market's multi-sidedness rather than incorporating this knowledge into the market definition. This points to a lack of a coherent market definition framework as far as platforms are concerned, see Robertson, V. H. (2020), supra note 20.

2.2.3 Publisher and developer as additional market sides

Based on the assessment of FCO, Facebook added more market sides to its core product Facebook.com.[45] One of these market sides is publishers who use Facebook.com to promote their businesses,[46] and developers becomes a new side of the market either.[47] Publishers use Facebook.com to promote and publish their businesses on their own Facebook pages and developers can integrate Facebook into their own websites or apps by using "Application Programming Interfaces" (APIs) to integrate Facebook Products like social plugins ("Like" button), Facebook Login and other Facebook based services. Indirect network effects exist between developers and private users: The developers' benefits always increase when existing the growing number of private users on the social network.[48] While the benefits for private users with regards to a growing number of developers are less pronounced, which is similar in the case of advertisers.[49] FCO deems the private user group is for assessing substitutability for Facebook's social network service, as the interests of the private users significantly differed from those of advertisers, developers, and third-party businesses.[50] Since publishers and developers are attributed to other markets, and will not discussed further in the case.[51] Höppner criticized that FCO should have identified more competition concerns with respect to the negative effects of Facebook's conduct on publishers, developers, and potential competitors, instead of focusing solely on private users.[52]

2.3 Market share analysis to the free service market

Compared with the usual analysis of market share, a calculation of market shares based on turnover figures, a common practice in many cases, will reach its limits in an assessment under competition law of online platforms like Facebook, because one or several sides of the platform are available free of charge. A purely value-based calculation would neglect competition from free services.[53] In the present case, practically all competitors included in the assessment offer their services free of charge to private users of social networks as this market is predominantly based on financing through advertising. A turnover-based assessment thus cannot be carried out on the users' side of market, but only on the advertising side. However, as the user side of a platform is qualified as a market based on Section 18(2a) GWB,[54] market dominance cannot only be established on the basis of the adverting side. In current practice, a volume-based assessment of market shares must in any case be carried out if it is not possible to determine turnover-related market shares.[55] On this regards, the number of users, the intensity of use and also the identity of users, the number of users, as a kind of quantity-based market share, plays a much more important role than an assessment in terms of turnover volume.[56] Between these parameters, the share of daily active users of social networks is the most significant metric in the assessment of the market position.[57] Advertising related markets are "markets for time" which consider the users' time and attention to be a product[58], the amount of time spent when users on the network is also chosen to be an important indicator of the competitors'

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[45] Bundeskartellamt (2019), supra note 1, Case Summary, page 4-5.

[46] Bundeskartellamt Decision (2019), supra note 16, para 236.

[47] Ibid, para 237.

[48] Ibid, para 228.

[49] Ibid, para 228.

[50] Bundeskartellamt (2019), supra note 1, Case summary, page 4-5

[51] Ibid.

[52] Hoppner, T. (2019). Data Exploiting as an Abuse of Dominance: The German Facebook Decision. Hausfeld Competition Bulletin, 1.

[53] Bundeskartellamt Decision (2019), supra note 16, para 404.

[54] 18(2a) GWB The assumption of a market shall not be invalidated by the fact that a good or service is provided free of charge.

[55] Bundeskartellamt Decision (2019), supra note 16, para 404.

[56] Ibid, para 404

[57] Ibid, para 389, 392, 400

[58] Ibid, para 246

market position.[59]

FCO examined only the user-based market share of Facebook on the relevant market, which is of a very high amount of more than 95% (daily active users) and more than 80% (monthly active users).[60] Therefore, the services of the Facebook group would have a combined market share far beyond the market dominance threshold pursuant to relevant German law[61], also exceed the benchmark of EU law.[62] Even if YouTube, Snapchat, Twitter, WhatsApp, and Instagram were included in the relevant market the dominant position of Facebook, due to the highly excessive market share, even not change.[63]

The lack of the market share analysis on advertisement side of market is also criticized. In this regard, FCO should expand another turn-over based calculation on the market side of advertisement because the daily active user is no longer enough to reflect the ad market dynamic.[64] Is dominance on one side enough to define the dominance in a multi-sided markets, or it is necessary to establish dominance on both sides of market to assess the dominance?

From the experience of US case law, antitrust law should encompass both side of market (or all users) when demonstrating the abusive effect in a multi-sided market.[65] On contrary, the German federal court of justice holds it is not necessary to determine that there is a separate market for online advertising for social media and that Facebook has a dominant position also in this market. For it is in favor of Facebook if there is functioning competition on the other side of the market and therefore harmless that the FCO failed to define the market on this side of the market.[66] From the view of Court, the existing indirect network effect could make it possible to only calculate one-side and reflect the status of both sides,[67] to be specific, dominance on one side will be enough to determine the dominance in a multi-sided markets.

The presumption of Facebook's significant market power gained from the free service market (i.e. user side) in the case was not only decided upon Facebook's high market shares but also the specific market features i.e. direct and indirect network effects and data access. In this perspective, the analysis goes in line with the Commission's decision which indicates that a very high market share and degree of concentration on the narrow market, refers merely as a basis for antitrust analysis, are not the showcase of certain degree of market power which would

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[59] Ibid, para, para 256, 407; Bundeskartellamt (2019), supra note 1, Case summary, page 6.

[60] Ibidem case summary page 6, see also Bundeskartellamt (2019), supra note 1, Press release, page 2

[61] German Competition Act (GWB)Section 18 Market Dominance stipulate: An undertaking is considered to be dominant if it has a market share of at least 40 per cent.

[62] The CJEU presumes a dominant position from market shares of 50%. See Case C-62/86 AKZO Chemie v Commission EU:C:1991:286, para 60.

[63] Bundeskartellamt (2019), supra note 1, Case summary, page 6

[64] Regards to the empirical proof of Facebook's market power on advertisement market side, Facebook (including Instagram) has a [50-60]% share of online video display advertising and a [40-50]% share of online non-video display advertising. Facebook has been able to exploit its market power to earn significantly higher revenues per user than its competitors, increasing from an average of £[0-5] per user in 2011 to £[50-60] in 2019. See Competition, U. K., & Authority, M. (2020). Online platforms and digital advertising: market study final report. On the other hand, the Commission applied the market share analysis on advertisement market that Facebook's market shares are equal to or above [20-30]% in a number of Member States in a potential market for overall online advertising, as well as in potential sub-segments, such as online non-search advertising, see case M.7217 – Facebook/WhatsApp Commission decision of 3 October 2014, para 171

[65] the US Supreme Court's approach in Ohio v American Express, in which the majority decided that significant indirect network effects required the court to define the multi-sided platform market for credit card transactions as including all users. The court included both sides of the platform: merchants and cardholders when defining the credit-card market. It is endorsed that competition cannot be accurately assessed by looking at only one side of the platform in isolation. For all these reasons, in two-sided transaction markets, only one market should be defined. See Ohio v American Express 138 S.Ct. 2274 (2018)

[66] Bundesgerichtshof (Federal Court of Justice), Decision of June 23, 2020, no. 080/2020 KVR 69/19, ECLI: DE: BGH: 2020: 230620BKVR69.19.0, para 42.

[67] Ibid.

enable the entity to significantly impede effective competition in the internal market.[68]
The European Commission and the General Court have recognized that market shares may not adequately reflect the existence of market power in the digital market environment. In Cisco Systems (2013), the General Court agreed with the Commission that the consumer communications sector at issue was 'a recent and fast-growing sector which is characterized by short innovation cycles in which large market shares may turn out to be ephemeral. In such a dynamic context, high market shares are not necessarily indicative of market power and, therefore, not necessarily indicative of lasting damage to competition which competitional law seeks to prevent.[69]

2.4 Market power in sphere of data access and network effects

When assessing market power, FCO adopted the innovative theories from 18(3a)GWB,[70] it is related to: 1) Direct network effect and indirect network effect raise entry barrier and cause market tipping process[71], 2) The lack of multi-homing leads to the significant lock-in effect and creates high barriers for users wishing to switch,[72] 3) The access to user data creates an additional barrier to market entry and contributes to the further consolidation of the tipping process,[73] 4) The innovation-driven competitive pressure and its connection to market power.[74]

2.4.1 Network effects lead to entry barrier and market tipping process

From the Facebook users' perspective, they choose social networks dependent on its size and the possibility to find their acquaintance or persons they want to be in contact with, this direct network effect are defined as "identity-based network effects".[75] In relevant market of social networks, competition is threatened by the market tipping effect which means that if the size of a network is exceeded due to the self-reinforcing feedback loop for this network, no customers will be left for other competing networks.[76] Due to the benefit provided by network effects users prefer large networks and will finally gather in a single large network.[77] Users who previously used other networks will switch to the largest one, which will result in a monopoly or quasi-monopoly situation.[78] In the case of issue, the fact of competitors vanishing in the market and the downward trend of the user-based market shares of the remaining competitors strongly indicates a market tipping process.[79]
The entry barrier theory is based on the direct network effect with its self-reinforced feedback loop and indirect network effect. According to FCO, the development of user numbers and "installed base" can be used as approximation for calculating the self-reinforcing feedback process of direct network effects.[80] Facebook's

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[68] Case Cisco Systems Inc. and Messagenet S.p.A. v. Commission, T-29/12, ECLI:EU:T:2013:635. Para 74.
as the Commission says in paragraph 13 of its Guidance on Article 102 Enforcement Priorities, market shares are only a 'useful first indication'.

[69] Case T-79/12 Cisco Systems v Commission, EU:T:2013:635, para 69. However the case discussed was merger decision in the digital environment, in which an ex ante assessment of the proposed merger was carried out. In Google Search (Shopping) (Case AT.39740) Commission Decision of 27 June 2017 [2018] OJ C9/11, for instance, the Commission emphasized that very large market shares were 'evidence of the existence of a dominant position.' Thus, it is also contested that the logic of Cisco Systems does not seem to have been applied in ex post assessments.

[70] Supra note 21.

[71] Bundeskartellamt Decision (2019), supra note 16, para 423-451.

[72] Ibid, para 452-476.

[73] Ibid, para 481-500.

[74] Ibid, para 501-521.

[75] Ibid, para 218.

[76] Ibid, para 424.

[77] Ibid, para 425.

[78] Ibid, para 424.

[79] Ibid, para 432-440.

[80] Ibid, para 428.

number of daily active users as well as monthly active users continued to increase[81] and the number of daily active users has increased more significantly than the number of monthly active users[82] which denotes the fact that users have been using the network more and more actively and with significant intensity.[83] Under this backdrop, it is of key importance for new suppliers entering the market to quickly reach a critical mass which will enable them to benefit from direct network effects that create or increase their networks' benefit.[84] Direct network effects and their self-reinforcing feedback loop thus represent a significant market entry barrier.[85]

On the other hand, indirect network effects reflect the phenomenon where the benefits of social network for advertisers increase with an increasing number of users. The larger the group of users, the more sales opportunities exist for advertisers.[86] In view of the indirect network effects, a critical mass of users representing an attractive target group for advertisers which must be achieved in order to monetize a product through advertising.[87] For an advertising-financed platform, sustainable market entry is already more difficult as suppliers must be successful in entering at least two sides of the market.[88] By introducing case of social media "Vero", where the "Vero" gained a significant user base within a short period of the boosting of commercial promotion while no longer got constant increase of registering users after it,[89] FCO refers to the argument that sustainable market entry is considerably more difficult even in a market with a non-monetized, free services. [90] Very little chances exist for achieving monetization independently in the market as such.

The indirect network effects combine with the direct network effects increase the market entry barriers for social networks even further and thus strengthen the trend towards tipping.[91] Considering the direct and indirect network effect favorable to Facebook, the barriers to market entry are considerably high.[92]

2.4.2 Lack of multi-homing and lock-in effect

Parallel use of social networks in the market could prevent the elimination of competitors[93] even if the market shows a trend towards concentration. It can also lower the high barrier to market entry as extensive multi-homing helps new entrants to win over customers even if they are already using a large network.[94]

From the FCO's point of view, the concept of multi-homing as relevant under competition law only applies if networks are used in parallel on the same market.[95] In particular, it cannot be decisive whether Facebook.com users also use other social media that do not belong to the market for social networks.[96] It must first of all be

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[81] Ibid, para 430.

[82] Ibid, para 431.

[83] Ibid, para 431.

[84] Ibid, para 426; see also European Commission, "Microsoft/LinkedIn", decision of 6 December 2016, Comp/M. 8124, para. 346.

[85] Ibid, para 426.

[86] Ibid, para 221.

[87] Ibid, para 443.

[88] Ibid, para 443; see also Caillaud, B., & Jullien, B. (2003). Chicken & egg: Competition among intermediation service providers. RAND journal of Economics, 309-328.

[89] Ibid, para 445,446.

[90] Ibid, para 444.

[91] Ibid, para 441.

[92] Bundeskartellamt (2019), supra note 18, FAQ, page 4.

[93] Bundeskartellamt Decision (2019), supra note 16, para 453.

[94] Ibid, para 454.

[95] Ibid, para 457.

[96] Ibid, para 456.

investigated in accordance with the demand-side substitutability concept whether the differentiated social media are functional substitutes and thus fulfil the same functionality.[97] According to the FCO's investigations, users often use several social media in parallel, Twitter users e.g. often also use Facebook.com, Instagram, WhatsApp and Snapchat,[98] however, the parallel use of a product that fulfils different requirement is of no competitive relevance for the respective markets, apart from limited fringe competition due to the users' limited time and monetary budget.[99] Therefore, parallel use of Facebook.com and YouTube or other social media has no clear relevance to Facebook's market position.[100] Meanwhile, 90 percent of users use a specific service without any significant overlaps, the conclusion can be drawn that Facebook is single-homing and the market tipping process has in fact not been prevented by effective multi-homing.[101]

In the first level, lock-in effect is based on incompatibility of service and identity-based network effects.[102] FCO assumes that Facebook is not designed in a compatible way by which they can interact or cooperate with other social networks and thus become mutually substitutable in terms of their functions.[103] At the same time, the strong identity-based network effects makes it difficult for users or prevents them from switching to another social network:[104] If users want to switch ,they would have to convince their contacts in the original network to switch to another network as well. The more contacts a user has in the previous network, and the more closely these contacts are connected with other users, the more difficult to transfer these contacts to a new network.[105] Whether competitors offer better products or less advertisements become little relevant to users.[106]

In the second level, users are locked-in and switching is made difficult because of the lack of data portability.[107] Only the users' own content, as published by users themselves, can be exported while reactive activities of a user, i.e. likes or comments on content published by third parties, cannot be exported.[108] The data that is extracted by way of Facebook's export function cannot be used to import them into other networks. [109] The exported data can thus rather be used for archiving purposes instead of offering portability.

2.4.3 Access to relevant data raises entry barrier

Facebook has access to a large amount of different data sources and the practically unlimited range of data processing as such already represents a competitively significant action in the market for social networks according to 18(3a) (4) GWB.[110] A large data base of a market participant as such is not an indication of market power. It can, however, play an important role in the overall assessment of all circumstances.[111]

Facebook can use a large number of different data sources: Firstly, Facebook generate data from users activities on

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[97] Ibid, para 457.

[98] Ibid, para 456.

[99] Bundeskartellamt(2016), supra note 40, Working paper, page 62,101.

[100] Bundeskartellamt Decision (2019), supra note 16, para 458.

[101] Ibid, para 459.

[102] Ibid, para 460-468.

[103] Ibid, para 461.

[104] Ibid, para 460.

[105] Ibid, para 462

[106] Ibid, para 468

[107] Ibid, para 469

[108] Ibid, para 471

[109] Ibid, para 472

[110] Ibid, para 481

[111] Ibid, para 482

facebook.com and via the group owned products (Instagram, WhatsApp and so on).[112] The registration, login and the mobile or desktop use of Facebook start page already generate a large amount of data about users themselves which Facebook has access.[113] The activities on the social network, e.g. posts and other interactions, provide Facebook with information on the persons the user communicates with, the topics the user is interested in and their IP address and locations.[114] Secondly, Facebook also receives detailed data on the user behaviors from third-party providers which use the developer interfaces offered by Facebook (such as API, social plugins, and analysis and measuring tools).[115] These tools transmit to the Facebook servers the IP address, type of browser, the URLs of the websites visited and other information by means of combining the integrated interface and cookies. Most importantly, Facebook cookies contain the user's specific ID, the browser ID, the timestamp, the ID integrated in the cookies makes it possible to identify the Facebook user's profile.[116]

As to data's competitive relevance, FCO held that Facebook's data sources are highly relevant for competition because the product of a social network is driven by personal data in particular and the superior access to these data makes it possible to continuously update the products by further technical improvements and enhanced personalization.[117] On one hand, the diverse data sources facilitate the very detailed advertisement targeting procedures by establishing target groups according to specific personal criteria or individually identified persons.[118] On the other hand, data are used to optimize algorithms such as News Feed.[119] As far as the further development of the service and future business purposes and technologies are concerned, a diminishing marginal utility of the data volume is not evident.[120] As Facebook argued that the exactness and degree of personalization of a social network depended on the number and variety of data sources - the broader the database, the more effective the service.[121]

The access to data further indicates the establishment of entry barriers, due to the huge data advantage which most of its competitors, particularly new entrants, cannot become comparable.[122] Good targeting options and comprehensive "granular" user data to be an advantage of advertising on Facebook as compared to other media where competitors are unable to duplicate this data collection.[123]

2.4.4 Innovation-driven competitive pressure

In contrast to merger control, the issue here is not whether and to what extent the innovation-driven competition between companies is threatened, but to what extent innovations can put into perspective the market power of a company.[124]Innovative products and services can create and establish new digital markets within a short period of time, while the dark side is that these dynamics can also make online services rapidly losing their significance.[125]

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[112] Ibid, para 485

[113] Ibid, para 483

[114] Ibid, para 484

[115] Ibid, para 486

[116] Ibid, para 486

[117] Ibid, para 488

[118] Ibid, para 492

[119] Ibid, para 489-491

[120] Ibid, para 493

[121] Ibid, para 493

[122] Ibid, para 495

[123] Ibid, para 497, 498

[124] Ibid, para 501

[125] Ibid, para 502

The user behavior of private users is also subject to change, in particular with the presence of technical innovations.[126]

However, the innovative and disruptive potential of the internet cannot be used as a general argument against the market power of internet companies, instead, specific indications of a dynamic or disruptive process are required in each individual case.[127] An abstract challenge expected to take place at some unspecified point in the future will not be sufficient to interrupt existing market power.[128] According to FCO, based on the high market share, there is no sufficient innovation-driven competitive pressure, even from neighboring markets, that can threaten Facebook's market position in the market for social networks.[129]

First, the innovation-driven pressure could be ultimately released by Facebook's rapid respond. What is decisive in this respect is not the highly intense innovations from competitors, however, is the pressure that competitors can actually exert on the market position.[130] This pressure is weak if the innovative activities in fact cannot take effect because of a rapid response.[131] Facebook has the ability to immediately counter competitive moves from outside is also a manifestation of market power in the online sector.[132] On another fold, the threat from the benefit of the innovative technological progress which could have attracted users is further mitigated by the direct network effect, that is to say 70% of users are not willingly to change the social network if their acquaintance and friends are still stay in Facebook, in spite of the service with "better features" could be possibly supplied by another provider.[133]

Overall, according to FCO, there have been no indications of challenge to Facebook's market position and no trends of replacement or market share decrease for Facebook on current market situation.[134]

All the demonstrations above contribute to the huge market power of Facebook.com in the relevant market. And this result is not beyond expectation when most of us being users of Facebook ourselves. The reasoning given by FCO coincides with insight from Colangelo that "In order to consider Facebook's data accumulation as being anticompetitive, enforcers have to apply antitrust standards and hypothesis that data accumulation in itself constitutes harm."[135] It is also argued in the case that it is difficult to rely on antitrust provisions related to exclusionary effects for the reason that a third party website embeds Facebook's products does not necessarily prevent other competitors to accumulate data from the same website which also incorporates the products of other social networks.[136] Whereas this argument keeps unresolved in the decision of FCO. When come to the determination of abuse of dominant position, FCO did not want to further scrutinize the possibility of market foreclosure,[137] but chose an unorthodoxly different path.

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[126] Ibid, para 502

[127] Ibid, para 503

[128] Ibid, para 503

[129] Ibid, para 504

[130] Ibid, para 517

[131] Ibid, para 517

[132] Ibid, para 517

[133] Ibid, para 519,520

[134] Ibid, para 521

[135] Colangelo.G & Maggiolino.M (2018), supra note 10.

[136] Ibid; see also Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf), Order of 26 August 2019, Case VI-Kart 1/19 (V), para 24.

[137] The critical opinion focused on the problem that the FCO did not try to substantiate this claim through a deeper investigation and lack of evidence how the additional data would impede competition or raise entry barriers. See section 2.4; see also Kerber, W., & Zolna, K. K. (2020), supra note 12; see also Skopowska, L. (2019). Addressing Anticompetitive Data Aggregation: a Comment to Bundeskartellamt Decision B6-22/16. Yearbook of Antitrust and Regulatory Studies (YARS), 12(19), 139-171.

2.5 Abusive data policy and market power

FCO attributed the Facebook's abuse of the dominant position to its abusive data policy:[138] 1) Facebook imposes unfair terms of use to its consumers based on the fact that users could only use the social network with the precondition that Facebook can collect user data on the third party website both on the internet and on smartphone apps,[139] users must choose between accepting the whole Facebook service terms or leave it at all.[140] 2) Regards to the relevance of market power to assess freely given consent, what must be taken into account is that Facebook users can hardly switch to other social networks.[141] Combined with Facebook's market power, to agree to the company's terms of use seems not to be an adequate basis for comprehensive data processing.[142] Furtherly, FCO holds: if a dominant company makes the use of its service conditional upon users granting the company extensive permission to process their personal data, this can be taken up by the competition authorities as a case of "exploitative business terms".[143]

Nevertheless, FCO provides another clue of reasoning that refers to the case law of the German Federal Court of Justice with regards to 19(1) GWB:[144]

> "In its decisions taken in the VBL-Gegenwert cases the Federal Court of Justice considers the agreement of contract terms abusive if terms and conditions violating Sections 307ff. of the German Civil Code are applied, in particular if the fact that such terms and conditions are applied is a manifestation of market power or superior power of the party using these terms. The Federal Court of Justice held that it was necessary to balance all interests including constitutional rights in the Pechstein case. Accordingly, to protect constitutional rights, Section 19 GWB must be applied in cases where one contractual party is so powerful that it is practically able to dictate the terms of the contract and the contractual autonomy of the other party is abolished. If, the Court held, in such a case a dominant company handles constitutional rights of its contractual partners, the law had to intervene to uphold the protection of such rights[…]"[145]

FCO advocates that incompliance with GDPR[146] should be within the examination of antitrust enforcement. The legal causality between violation to GDPR and injury to competition is further unfolded as below: When analyzing abuse of dominant position, since the civil right and the constitutional right are assumed within the relevant parameters in the matter of competition law to reach the conclusion of the abuse of dominant positions,[147] for equality, the data protection law could also be amongst the possible cause to the competitional harm. It will help to counter asymmetries between organizations and individuals and ensure the balanced interests between data

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[138] Bundeskartellamt (2019), supra note 1, Case summary, page 7-9.

[139] Bundeskartellamt (2019), supra note 1, Press release, page 1.

[140] Ibid, page 2.

[141] See section 2.4.2

[142] Bundeskartellamt (2019), supra note 1, Press release, page 2.

[143] Bundeskartellamt (2019), supra note 18, FAQ, page 6.

[144] German Competition Act (GWB): Section 19 Prohibited Conduct of Dominant Undertakings (1) The abuse of a dominant position by one or several undertakings is prohibited. According to this general clause, the abuse of a dominant market position is prohibited.

[145] Bundeskartellamt (2019), supra note 1, Case summary, page 7-8.

[146] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ L119/1. Basic principles of the European data protection law are the principles of consent, data minimization, purpose limitation, the rights of data subjects (information, access, rectification, right to be forgotten and erasure, data portability) as well as restrictions for profiling, through this framework, data protection determines the boundary between permissible and impermissible personal data processing.

[147] Bundeskartellamt (2019), supra note 18, FAQ, page 6.

controllers and data owners,[148] consequently to balance the conflicting positions of the contractual parties.[149]
However, different voices are also heard as referral to the above-mentioned jurisprudence that the cases (VBL-Gegenwert and Pechstein) involved very different factual backgrounds as FCO articulated.[150] The appellate court deems that principle of decision VBL Gegenwert II, namely that inappropriate business conditions regularly lead to an abuse of market power, however, does not support the assumption that the requirement of as-if competition assessment should be abandoned, and that not every use of an unbalanced general terms and conditions by a dominant undertaking constitutes an abuse of market power.[151] FCO's reasoning relies heavily on decisions about values based on both fundamental rights and ordinary law to achieve the conclusion of abusive conduct, which has so far found no equivalent in European case law or application practice.[152]
Here FCO attempts to apply a methodology of normative causality[153] between antitrust law and data protection assessments: "Violation of data protection principles represents abusive practice"[154] and "European data protection provisions as a standard for examining exploitative abuse".[155] Based on its decision, the violation of data protection requirements in itself is a manifestation of Facebook's market power.[156] FCO contends that it is not necessary to prove the strict causality in terms of counter fact that violation was only possible because of market dominance and that other market participants did not have a chance to behave in a similar way.[157] It is sufficient of the normative causality that the violation of data protection rules as the restriction of the private users' right to self-determination is clearly linked to Facebook's dominant position.[158] The FCO therefore made a deep assessment whether Facebook's terms of use violate GDPR and derived directly from such violation their abusive character, rather than use the traditional theories of assessing excessive data-collection in analogy to excessive price or as "unfair business terms".[159]
The approach aroused criticization. Robertson argues that breach of data protection laws should not automatically be understood as an infringement of the competition rules, as the two sets of rules protect two different legal interests.[160] On one hand, although there might be cases where a privacy harm may represent an antitrust condition within the meaning of Article 102(a), while automatism unduly extends the scope of competition law should not be taken for granted,[161] unless one wants competition agencies to turn into an "auxiliary data protection

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[148] Bundeskartellamt (2019), supra note 1, Case summary, page 8.

[149] Bundeskartellamt Decision (2019), supra note 16, para 527.

[150] Heinz, S. (2018). Bundeskartellamt sends preliminary assessment to Facebook. Retrieved from: http://competitionlawblog.kluwercompetitionlaw.com/2018/01/09/bundeskartellamt-sends-preliminary-assessment-facebook/ (31.07.2019).

[151] Higher Regional Court of Düsseldorf (Oberlandesgericht Düsseldorf), Decision of 26 August 2019, Case VI-Kart 1/19 (V), para 37.

[152] Bundeskartellamt Decision (2019), supra note 16, para 914

[153] Normative causality is equal as the norm "causality of result", the meaning behind it is that harm to the competition is based on the normative one, i.e. "normative" damage to competition which is guided by the results. In the decision of FCO, the normative causality embodies in the justification that the legal infringements are committed by a dominant undertaking (here GDPR), and it is also blamed by the appellate court this "normative to damage" without taking into account any anti-competitive effect. See Düsseldorf Decision (2019), supra note 151, para 44.

[154] Bundeskartellamt Decision (2019), supra note 16, para 525.

[155] Bundeskartellamt (2019), supra note 1, Press release, page 3.

[156] Bundeskartellamt Decision (2019), supra note 16, para 879

[157] Bundeskartellamt (2019), supra note 1, Case summary, page 11.

[158] Bundeskartellamt Decision (2019), supra note 16, para 876; see also section 2.4.2

[159] Ibid, para 569-572.

[160] Robertson (2020), supra note 20.

[161] Wils, W. P. (2019). The Obligation for the Competition Authorities of the EU Member States to Apply EU Antitrust Law and the Facebook Decision of the Bundeskartellamt; see also Colangelo supra note 10; see also Schneider supra note 22; see also Bailey (2018) supra note 3.

authorities".[162] Therefore, FCO would have taken the view that a dominant firm exploits its market position when it asks for more data than is necessary and arrived at this conclusion without giving any consideration to the minimization principle[163] dear to EU data protection law.[164] On the other hand, one may argue if the violation of the law could be connected to competition as a direct reference. Here discussions split as distinct pros and cons: It seems to be hard to conclude that any harmful conduct, which is derived from dominant undertakings and deemed as unlawful to breach the legal provisions, should fall within the scope of competition law.[165] However, competition law shows its traditional power as the field of law that serves as a "repair service" for other fields of law that lack sanctioning mechanisms – at least as long as a dominant company is involved.[166]
The breach of sector provisions might be competition neutral, however the illegal conducts in its meaning leaves the space whether they indeed construed as anti-competitive. Consideration might be given to the notion that: "it should be solely a matter of whether the dominant company can indeed use the breach of the law for exclusion or exploitation".[167] It is regret that FCO cannot provide consolidated proof regards to the impediment effect to the competition derived from the violation to GDPR.[168]
Overall, FCO seems lose the point in terms of the theory of harm as the FCO essentially inferred the abuse from the fact that Facebook had violated the European Union's General Data Protection Regulation (GDPR).[169] Even though this might be sometimes a legitimate approach within the law, it would be helpful if we would have much clearer reasonings and evidence about the harm to privacy (and the welfare) of consumers.[170] The theory of harm has counted on the "normative causality",[171] but FCO did not define or explain this concept that was so central to the contested decision.[172]

2.6 Reflection
FCO's decision will be enforced in the following manner: (i) Facebook-owned services like WhatsApp and Instagram can continue to collect data. However, assigning the data to Facebook user accounts will only be possible subject to the users' voluntary consent. Where consent is not given, the data must remain with the respective service and cannot be processed in combination with Facebook data. (ii) Collecting data from third party websites and assigning them to a Facebook user account will also only be possible if users give their

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[162] Körber (2016), supra note 27.

[163] Article 5,6, GDPR, supra note 146.

[164] Colangelo, G. (2019). Antitrust über alles. Whither competition law after Facebook?. World Competition, 42(3); see also Colangelo.G & Maggiolino.M (2018), supra note 10.; see also Volmar, M. N., & Helmdach (2018) supra note 28.

[165] Körber (2016), supra note 27; see also Nazzini, R. (2019). Privacy and Antitrust: Searching for the (Hopefully Not Yet Lost) Soul of the Competition Law in the EU after the German Facebook decision. CPI EU News–Competition Policy International, which argues "if an EU institution were to use Article 102 to pursue extraneous objectives, this would be a misuse of power under Article 263 TFEU".

[166] Podszun, R. (2014). Can competition law repair patent law and administrative procedures? AstraZeneca (ECJ, 6.12.2012, C-457/10 P – AstraZeneca). Common Market Law Review, 51, 281-294.

[167] Monopolies Commission. (2015). Competition policy: the challenge of digital markets. Special Report, (68). para. 523

[168] See section 3.2

[169] Botta, M., & Wiedemann, K. (2019). Exploitative conducts in digital markets: Time for a discussion after the Facebook Decision. Journal of European Competition Law & Practice, 10(8), 465-478.

[170] Kerber & Zolna (2020), supra note 12.

[171] Witt, A. C. (2020). Exploitative Abuses in The Age of Dominant Digital Platforms: The German Facebook Case. Available at https://www.icon-society.org/conference_paper/exploitative-abuses-in-the-age-of-dominant-digital-platforms-the-german-facebook-case/

[172] Colangelo, G. (2019). Facebook and Bundeskartellamt's Winter of Discontent. Competition Policy International; see also Graef, I., & Van Berlo, S. (2021). Towards smarter regulation in the areas of competition, data protection and consumer law: Why greater power should come with greater responsibility. European Journal of Risk Regulation, 12(3), 674-698.

voluntary consent.[173]

The theory of entry barrier and lock-in effect is predominantly attributable to the direct and indirect network effects and the data's competitive value. However, network effects and data access as the innate character of the social media network services, one may assume any company which is leading competitor in the social network market with extraordinary market power which derived from the characteristic of the service itself, i.e., data access and network effects. However, "tipping" social platform markets into monopoly is not necessarily a "natural" market outcome,[174] but can instead be promoted or induced through certain practices of relevant actors in the market. From this perspective, FCO should take more investigation on Facebook's specific commercial practices related to unilateral behavior such as a strategic obstruction of multihoming, access to data, or the porting of data.

From the analysis of FCO, it could be assumed that antitrust intervention will have limited reliefs to the data related abuse of market dominance. The prohibition of third-party data collection of Facebook private users is rather limiting the data access instead of the effective interruption to the network effects and consumer lock-in. Furtherly, it is rather a remedy of data protection law instead of remedies from competitional instrument. If the data collection behavior in itself denotes anti-competitive effect, requiring a platform to be completely transparent about an abusive practice, in a sense, may have little effect in making the practice less abusive.[175]

It is also advocated that in the case as such, a violation to data protection law can be one factor within a much more comprehensive reasoning about balancing interests between the dominant firm and the consumers, instead of automatically leading to the abusive character of the behavior, and the former should be more flexible and moderate, which can be close to the traditional assessment approach of exploitative abuse.[176] The exploring of a new antirust instrument is needed in the scenario as such. The data barrier to entry argument does not have workable antitrust remedies. FCO leaves alone resorting to "data portability"[177] or "essential facility doctrine"[178] as enforcement measures also shows the dilemma which an antitrust office faces when dealing with the data privacy related anti-competitive issue. In EU, the case-law makes it hard to succeed in arguing a refusal to grant access to data as an abuse of market dominance under Article 102 TFEU.[179] Manne argues that the absence of workable remedies is in fact a strong indication that data and privacy issues are not suitable for antitrust.[180] Hence, it is proposed a better approach consisting of sector specific competition-oriented regulation. In this respect, the European Commission introduced DMA ('Digital Market Act')[181] directed towards large platform service providers named 'gatekeepers'(Art. 3). The background of DMA is based on the unsatisfactory output of traditional ex-post measure. It is upheld that art.101 and art.102 cannot adapt well to the peculiar features of

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[173] Bundeskartellamt (2019), supra note 1, Press release, page 1.

[174] Lundqvist, B. (2021): The EU Regulation of the Data -Driven Economy. Faculty of Law, Stockholm University Research Paper No. 90. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3830058.

[175] See also Jin, G. Z., & Wagman, L. (2021). Big data at the crossroads of antitrust and consumer protection. Information Economics and Policy, 54, 100865.

[176] Kerber, W., & Zolna, K. K. (2020), supra note 12; Schneider, G. (2018), supra note 22.

[177] The discussion about the lack of "data portability" of FCO only refrains from the analysis of market power which will reinforce the lock-in effect on Facebook (see section 2.4.3). And it does not cover the "data portability" as a remedy of enforcement in the decision.

[178] The discussion about essential facility doctrine is around whether the mere denial of access for competitors to this "data trove" could be construed as an abuse of dominance prohibited by Art. 102 TFEU. According to settled CJEU case law, access to an essential facility exists only under "exceptional circumstances" (ECJ, 4 April 2004, case C-418/01, ECR 2004, I-5039– IMS Health GmbH, para. 34), for the application of the essential facilities doctrine represents a massive infringement of property rights and the freedom of contract.

[179] Lundqvist, B. (2021), supra note 173.

[180] Manne, G., & Sperry, B. (2015). Debunking the Myth of a Data Barrier to Entry for Online Services. Truth on the Market Blog. March, 26. Available at: https://truthonthemarket.com/2015/03/26/debunking-the-myth-of-a-data-barrier-to-entry-for-online-services/

[181] European Commission, Proposal for a Regulation of the European Parliament and of the Council on fair and contestable markets in the digital domain (Digital Markets Act), 15 December 2020 COM(2020) 842 final. *

digital markets.[182] DMA has shifted the center of gravity of the application of the principles of competition from ex-post to ex-ante. The Commission is also exploring the introduction of a "New Competition Tool",[183] as complementary to DSA.[184] It is initiated to be applied by competition authorities to impose remedies on firms in case of structural problems without the need to establish a violation of the competition rules and potentially even without having to assess dominance in case of intervention may come too late in markets as issued case where monopolization strategies are applied by even non-dominant companies with market power.[185]

3. The appellate decision of the Regional Higher Court in Düsseldorf: Interim order against FCO

The decision of the FCO has been appealed before the Düsseldorf Higher Regional Court. Such court, however, did not decide on the appeal, instead, it granted Facebook injunctive relief with suspensive effect due to serious doubts as to the legality of the decision.[186] As is stipulated, the competent national court could make a request for a preliminary ruling to the European Court of Justice,[187] any court may make such reference,[188] a last-instance Court that has questions on the correct interpretation of a provision of EU law is required to make a reference.[189] The court holds that the question of whether Facebook is abusing its dominant position as a provider of social networks for the reason it collects and uses the data of its users in violation of the GDPR cannot be decided without referring to the ECJ. The result of such an order is that the decision rendered by FCO may not be enforced until the court has ruled on the appeal.

In its decision, Düsseldorf Higher Regional Court dismantled the entire reasoning of the FCO,[190] holding that the contested data policy did not give rise to relevant anti-competitive result.[191] The court rejected both the alleged exploitative abuse causing the detriment to Facebook's users and an exclusionary abuse with the detriment to actual or potential Facebook competitors.[192]

3.1 Excessive data processing leading to no exploitation to users

According to the court, the consideration of "excessive" data collection could not support FCO's decision.[193] FCO prohibits the processing of a wide range of data, while without justifying if all the additional data mentioned unexceptionally falls under the verdict of excessiveness. Taking the same account, the FCO has not established anything in this regard. It is verified hard to identify a competitive quantity of consumer data i.e., the quantity of personal data that firms would naturally collect in competitive markets.[194] In the analogue of price-based market, the competitive level of the market price can be approximated by looking at marginal costs. Whereas in the digital

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[182] Manzini, P. (2021). Unraveling the proposal of Digital Market Act-La proposta di legge sui mercati digitali: una prima mappatura. Orizzonti del Diritto Commerciale, Fascicolo speciale (June 2021), 435-462.

[183] See the Inception Impact Assessment of the New Competition Tool, published on 2 June 2020 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool.

[184] The proposal of DMA is accompanied by a second proposal for a regulation on the single market for digital services, called the Digital Services Act (DSA), see Commission, "Inception Impact Assessment of the Digital Services Act Package" Ares (2020)2877686, 2 July 2020.

[185] Graef, I., & Van Berlo, S. (2021), supra note 171.

[186] Witt, A. C. (2020), supra note 170.

[187] Article 267 TFEU

[188] Article 267(2) TFEU

[189] Article 267(3) TFEU

[190] Colangelo, G. (2019), supra note 171; see also Witt, A. C. (2021). Excessive Data Collection as a Form of Anticompetitive Conduct: The German Facebook Case. The Antitrust Bulletin, 66(2), 276-307.

[191] Düsseldorf Decision (2019), supra note 151, para 23.

[192] Ibid, para 18.

[193] Ibid, para 26.

[194] Colangelo, G., & Maggiolino, M. (2018), supra note 10.

economy does not exist a quantified benchmark for assessing the competitive quantity of personal data, even data protection law cannot help in this regard.[195]

In the issued case, the decision of Federal Court of Justice defined a standard of competitive quantity of data collection: "If the market-dominant operator of a social network stipulates in the terms of use to provide the user with a 'personalized experience', for the content of which personal data of the user can be used, which can be obtained by recording the access to websites outside the social network, this is the abuse of its dominant position."[196] If we keep this thought of train, the benchmark becomes whether the data collected is generated inside or outside of the social network.

In contrast, the Düsseldorf court upholds that the collection of additional data from third party does not lead to exploitation of private users.[197] In terms of free service without fee, it is far from apparent that Facebook's conduct caused exploitation effect to private users and their gain in product quality: less and more relevant ads could outbalance their loss of full control over their data.[198] In the same vein, data with the non-rivalry characteristics, can be duplicated effortless, and Facebook's collection behavior does not economically weaken consumers.[199] The users can also choose to share the data freely with other service providers in the relevant market.[200]

In any event, Facebook needs to "leverage" consumer data to benefit from advertising side, which in turn funds the zero-price service for consumers. Notwithstanding, the level of data collected and privacy terms do not seem to be set at a particularly necessary level.[201] Users should expect a certain level of processing of their data when using such a free service, they cannot anticipate that the data they generate on third party websites will be added to their Facebook account on such scale.[202] The argument of the Court was overruled by German Federal Court of Justice by admitting that data has significant economic value which is generally recognized,[203] users provide their personal data which represent an essential competitive parameter for advertise market side.[204]

3.2 Violation of privacy law is unrelated to harm of competition

In the court's perspective, FCO is discussing exclusively a data protection problem and not a competition problem.[205] The serious reservations are held in terms of the FCO's view that the collection and processing of user data even generated from Group-owned services, which is presumed to breach the data protection law, represents an exploitation of consumers and that is relevant to antitrust law.[206] With respect to the theory of harm, FCO focuses on the collection and processing of additional data violates privacy laws and the right to informational self-determination. This consideration, according to the court, is deemed as unconvincing.[207]

FCO sees the user damage as a "loss of control".[208] From the perspective of the court, this additional data is

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[195] Ibid.

[196] BGH Decision (2020), supra note 66, front page, (c).

[197] Düsseldorf Decision (2019), supra note 151, para 24.

[198] Hoppner, T. (2019), supra note 52.

[199] Düsseldorf Decision (2019), supra note 151, para 24.

[200] Ibid, para 24.

[201] Kemp, K. (2020). Concealed data practices and competition law: why privacy matters. European Competition Journal, 16(2-3), 628-672.

[202] Colangelo, G., & Maggiolino, M. (2018), supra note 10.

[203] BGH decision (2020), supra note 66, para 60.

[204] Ibid, para 59.

[205] Düsseldorf Decision (2019), supra note 151, para 29, point 3.2

[206] Ibid, para 33, point 4.1.

[207] Ibid, para 27.

[208] Bundeskartellamt(2017), supra note 17, Background information, page 4.

collected and processed based on Facebook's terms of use, which implements properly with the consent of the Facebook user.[209] The thesis of "losing control" over his or her data is out of question. The court assums that data processing is carried out with the user's knowledge and is thus appropriately under their "control".[210]
There is no evidence to support the assumption that Facebook obtains the users' consent through coercion, pressure, exploitation of a weakness of will or other unfair means,[211] or that the company uses the additional data beyond the agreed scope.[212] They can make their decision uninfluenced and completely autonomously according to their personal preferences and values.[213] On the contrary, the failure of uninformed users has nothing to do with Facebook's market power but derived from the indifference of the Facebook user or out of their consideration of convenience at realistic appraisal.[214] Taking account of number of Facebook users (around 32 million per month) and non-Facebook users (around 50 million) in Germany, it is a proof that users can choose to use it or quit voluntarily, and nothing indicates to an exploitation to users.[215]
On the other hand, if one takes into account of relevant data privacy assessment, the thesis of valid consent and "well informed customers" might lose its credit.[216] As is contested, consent is not freely given where there is a "clear imbalance" between the data subject and the data controller when the controller is a public authority[217] or on the situation of employment.[218] Imbalances of power are not limited to public authorities and employers, they may also occur in other situations.[219] A large multinational company as Facebook may have more resources and negotiating power than the individual data subject, and may be easy to impose on the data subject what it believes in its 'legitimate interest'.[220] According to the interpretation of the notion "freely given consent", the Article 29 Working Party states explicitly that Consent is valid only if the data subject can exercise a real choice and there is no risk of deception, intimidation, coercion or significant negative consequences if he or she does not consent.[221] The market power may serve as a good indicator to imply that such a "clear imbalance" between the data subject and the data controller exists.[222]

3.3 Absence of causality between market power and abusive conduct

The court held that FCO neither carried out sufficient investigations into "as-if-competition"[223] nor provided

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[209] Ibid, para 28 point 3.1.

[210] Ibid.

[211] Ibid.

[212] Ibid.

[213] Ibid.

[214] Ibid, para 30.

[215] Ibid, para 28.

[216] Bundeskartellamt Decision (2019), supra note 16, para 641-665.

[217] GDPR recital 43.

[218] Article 29 Working Party, "Guidelines on Consent under Regulation 2016/679" 17/EN WP259 rev.01, 10 April 2018.

[219] Ibid, page 7.

[220] Art. 29 Data Protection Working Party (2014). Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, 844/14/EN, WP 217, page 40.

[221] Article 29 Working Party, "Guidelines on Consent under Regulation 2016/679" 17/EN WP259 rev.01, 10 April 2018, page 7.

[222] Graef, I., & Van Berlo, S. (2021), supra note 171; see also Costa-Cabral, F., & Lynskey, O. (2017), supra note 14; see also Preliminary Opinion of the EDPS, supra note 2, "Where there is a limited number of operators or when one operator is dominant, the concept of consent becomes more and more illusory"; see also Bundeskartellamt Decision (2019), supra note 16, para 646, "Deciding not to use Facebook would have considerable disadvantages for users because they would no longer be able to fulfil their need toparticipate in the social network."; see also Botta, M., & Wiedemann, K. (2019), supra note 168.

[223] Düsseldorf Decision (2019), supra note 151, para 20.

evidence for the assumption that competition could have prevented undertakings from acting in a way that was incompatible with EU data protection rules.[224] Through its reasoning, the Court introduced a distinction between "behavioral causality" and "causality of results": (a) Behavioral causality lies in an abuse which can be assumed if the market leader instrumentalizes its market power to enforce certain behavior of other market participants, (b) Because of its already existing market power (without exercising market power), the exerted behavior leads to a strengthening of its market position or (further) weakening of the competitive structure is a causality of results or normative causality.[225]

From this perspective, the court stressed on the assumption that exploitative abuse is fundamentally different from the structural weakening of competition and whether the exploitative conditions in such a case are set by a dominant company or by a company not dominating the relevant market is irrelevant, thus the exploitation of consumers does not necessarily lead to an unfavorable market outcome.[226] The use of illegal or inappropriate terms may be considered abuse irrespective of whether it results in anti-competitive market effects, it can also be agreed on markets with "fierce price competition", whereby the exploitation does not have to be attributable to the exercise of market power, but can also be based on an "informational market failure" and a "systematic asymmetry of information" to the detriment of the customers, which in turn legitimizes the right to control general terms and conditions under the consumer protection law.[227]

The court then showed the standpoint that competition law should not interfere to regulate the infringement irrelevant to the competition only because they are committed by a dominant undertaking.[228] A stricter behavioral causality must be applied in such condition, without a causality of behavior there is no legitimate reason for antirust intervention.[229]

If we take reference to case law of Art. 102 TFEU, EU competition jurisprudence does not differentiate the causal link as a behavioral one or normative one. But repeatedly the EU denied the necessity of a causal link between market power and an abuse. Case Continental Can[230] and case Hoffman-La Roche[231] suggest that there is no requirement to show a causal link between the dominant position and its abuse. Abuse is an objective concept, and the conduct of an undertaking may be regarded as abusive in the absence of any fault and irrespective of the intention of the dominant undertaking.[232] It is possible to abuse a dominant position without actually exercising or relying on market power.[233]

The European practice, however, is in no way unambiguous.[234] In Tetra Pak II, CJEU said that Article 102

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[224] Ibid.

[225] Ibid, para 51

[226] Ibid, para 52

[227] Ibid, para 54

[228] Ibid, para 54

[229] Ibid, para 52,54

[230] ECJ, 21 February 1973, case 6/72, 1973, 215 – Continental Can, para 27: "Such being the meaning and the scope of Art. 86 of the EEC Treaty, the question of the link of causality raised by the applicants which in their opinion has to question casual links exist between the dominant position and its abuse, is of no consequence, for the strengthening of the position of an undertaking may be an abuse and prohibited under Art. 86 of the Treaty, regardless of the means and procedure by which it is achieved, if it has the effects mentioned above."

[231] ECJ 13 February 1979, case 85/76, ECR 1979, 461 – Hoffmann-La Roche, Can, para 91: "For the purpose of rejecting the finding that there has been an abuse of a dominant position the interpretation suggested by the applicant that an abuse implies that the use of the economic power bestowed by a dominant position is the means whereby the abuse has been brought about cannot be accepted. The concept of abuse is an objective concept […].

[232] Whish, R., & Bailey, D. (2012). Competition law. Oxford University Press, USA, page 204.

[233] ECJ, 21 February 1973, case 6/72, 1973, 215 – Continental Can, para 27.

[234] Körber (2016), supra note 27.

presupposes a causal connection between market dominance and abuse.[235] This may appear to contradict to the causation point in Continental Can. While the issue in Tetra Pak is whether it is possible for the abuse to take place in a market different from the one in which an undertaking is dominant; the CJEU was not concerned with the issue of whether the market power have been used to bring about the abuse.[236]

In the Facebook case as such, the 'close link' that may well exist between some markets on which a firm is dominant, and the gathering of huge amounts of data that is used to reinforce or strengthen the firm's position in the dominated market.[237] Maybe investigation into the collection and use of online data by a dominant firm would be ground-breaking in the sense that it has not been done before, it does not appear to stretch the substantive scope of Article 102.[238] Above all, we may get the conclusion that Düsseldorf Court's understanding related to the strict link between abusive conduct and market power from dominant company seems to deviate from the EU case, and the causal link suffice under CJEU's reading of Art.102 TFEU.

3.4 Reflection

The decision from Düsseldorf Higher Regional Court is applauded in the degree that the Court has set competition enforcement back on track[239] by stating under both EU and German law, damage to competition is required for an antitrust infringement, and dominant undertakings carry a special responsibility only as regards to competition. It is also criticized as a one of "forcefully worded" opinion and "bitter" to FCO's innovative endeavor after three years.[240] The court excluded entirely the data protection and privacy dimension out of the analysis of antitrust, which might, to certain extent, comply with the commission's approach: "Any privacy-related concerns flowing from the increased concentration of data […] as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules."[241] It's still out of expectation that the court denoted the reasonings of FCO are generally "without substance and meaningless".[242] After all the discussions of section 3, one should not deny that the points of the court have their own merits to push the further exploration in the case, "our beautiful antitrust decisions on the digital world must pass the test of the courts."[243] Nevertheless, the court took a clear-cut approach to decline the data privacy as a parameter of competitive object, without taking reference to the academic discussion with the huge concern to pursue an integrated approach from different regulatory perspectives,[244] which, however, should not be ignored. To encompass the privacy and data protection issue into the goal of competition law, a moderate methodology is proposed by German Federal Court of Justice.

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[235] ECJ, 14 November 1996, case C.333/94 P, ECR 1996, I-5987 – Tetra Pak II, para. 27: "It is true that application of Art. 86 presupposes a link between the dominant position and the alleged abusive conduct, which is normally not present where conduct on a market distinct from the dominated market produces effects on that distinct market. In the case of distinct, but associated, markets, as in the present case, application of Art. 86 to conduct found on the associated, non-dominated, market and having effects on that associated market can only be justified by special circumstances."

[236] Whish, R., & Bailey, D. (2012), supra note 231, page 204.

[237] Autorité de la Concurrence (2016), supra note 15, page 24.

[238] Bailey, D. (2018), supra note 3.

[239] Colangelo, G. (2019), supra note 172.

[240] Witt, A. C. (2020) supra note 170; see also Podszun, R. (2019). Facebook vs. Bundeskartellamt. D'Kart Antitrust Blog. August, 30, available at https://www.d-kart.de/en/blog/2019/08/30/en-facebook-vs-bundeskartellamt/.

[241] European Commission, Case COMP/M.7217 – Facebook/WhatsApp, 03 October 2014, recital 164.

[242] Düsseldorf Decision (2019), supra note 151, para 29.

[243] Podszun, R. (2019), supra note 239.

[244] Kimmel, L., & Kestenbaum, J. (2014). What's up with WhatsApp: a transatlantic view on privacy and merger enforcement in digital markets. Antitrust, 29, 48.; Manne, G. A., & Wright, J. D. (2011). Google and the limits of antitrust: The case against the case against Google. Harv. JL & Pub. Pol'y, 34, 171.; Sokol, D. D., & Comerford, R. E. (2016). Does antitrust have a role to play in regulating big data?. Cambridge handbook of antitrust, intellectual property and high tech; Kuschewsky, M., & Geradin, D. (2014). Data protection in the context of competition law investigations: an overview of the challenges. World Competition, 37(1); Evans, D. S., & Schmalensee, R. (2013). The antitrust analysis of multi-sided platform businesses (No. w18783). National Bureau of Economic Research; Costa-Cabral, F., & Lynskey, O. (2017), supra note 14.

4. Federal Court of Justice (German): A decision out of expectation

4.1 A changed decision and a temporary triumph to FCO

The FCO appealed against the Düsseldorf Higher Regional Court's interim order to the Federal Court of Justice, the highest court in the German ordinary jurisdiction. The antitrust division of the Federal court of justice annulled the decision of the Düsseldorf Higher Regional Court and rejected the request to order the suspensive effect of the appeal.

Federal Court of Justice agrees with the finding that Facebook holds a dominant position in the German market for social networks[245] and that Facebook abuses this dominant position by using the terms of service being prohibited by the FCO.[246] The Court stands with FCO on several aspects: Firstly, the Court in a general level agreed with FCO's market definition of the multi-sided market.[247] Secondly, the court recognized the market power analysis which contribute to the Facebook's dominant position, i.e., the correctly calculated market share,[248] the data's significant relevance to market power,[249] direct network effect,[250] lack of multi-homing[251] and the absence of innovation-driven competition pressure.[252] Thirdly, Facebook is abusing its dominant position by the means of providing service conditional on the term of service and gathering large amount of "off-Facebook" data without any further consent from users.[253]

It is not rejected to adopt GDPR as the instrument to assess the competitive amount of data which should be accessed by Facebook without beyond the appraisal of legitimate interest.[254] However, the decision of the court has dismantled the core part of the FCO's decision.[255] In terms of the GDPR's relevance in the antitrust investigation, a differentiation of reasoning is given explicitly by the Court that the abuse of dominant position is, unlike emphasized by the FCO, not decisive of processing and using Facebook user's data generated outside facebook.com, and it is also irrespective whether the term of use complies with the rules of the General Data Protection Regulation.[256] In the view of the Court, the imposition by a dominant firms of contract conditions that are inadmissible according to the legal system does not indicate it constitutes a threat to the protected interests of competition law.[257] From this angle, the theory of harm of FCO's decision has been replaced completely, the breach of GDPR constitutes abuse of dominant position is denied by the Court, and the exploitation to users is no longer emphasized.[258]

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[245] BGH Decision (2020), supra note 66, para 14.

[246] Bundesgerichtshof (Federal Court of Justice) (2020), no. 080/2020 KVR 69/19, Federal Court of Justice provisionally confirms allegation of Facebook abusing dominant position. Available at: https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020080.html.

[247] BGH Decision (2020), supra note 66, para 20-35.

[248] Ibid, para 38-40

[249] Ibid, para 43

[250] Ibid, para 44

[251] Ibid, para 45-48

[252] Ibid, para 50-52

[253] Ibid, para 53-63

[254] Ibid, para 106-111

[255] Olivieri, G. (2021). Sulle "relazioni pericolose" fra antitrust e privacy nei mercati digitali. Orizzonti del Diritto Commerciale, Fascicolo speciale (June 2021), 359-374; Graef, I., & Van Berlo, S. (2021), supra note 171.

[256] Bundesgerichtshof (2020), supra note 245, page 2-3.

[257] BGH Decision (2020), supra note 66, para 64.

[258] Podszun, R. (2020). Facebook Case: The Reasoning. D'Kart Antitrust Blog. August, 28. Available at https://www.dkart.de/blog/2020/08/28/facebook-case-the-reasoning/

4.2 Resort to fundamental right: Abuse rising from the limit of choice

Based on the Court's view, terms of service are abusive if they deprive private Facebook users of any choice.[259] In the decision, the users have lack of choice for: (1) whether they wish to use the network in a more personalized way and link the data from "off-Facebook" use of the internet; or (2) whether they want to agree to a level of personalization which is based on data they share on facebook.com.[260] The Court describes the abuse as an "extension of services" imposed on the users.[261] It is neither evident nor stated that the legitimate interests of Facebook cannot be adequately safeguarded by collecting data solely within the framework of the social network.[262] The theory of harm could resemble as in the case of a forced coupling of products or services,[263] both vertical and horizontal competition can have harmful effects if the imposed service expansion turns out to be the exploitation of customers or an obstacle to competition.[264] The lack of options available to Facebook users does not only affect their personal autonomy, but also affect the exercise of their right to informational self-determination which is also protected by the GDPR.[265]

The decision of the Court is deemed a huge step in the direction of taking into account privacy concerns in competition law.[266] This approach taken by the Federal Court of Justice seems to be more coherent under the view of the EU law. Both the CJEU and the Commission have clarified that a dominant undertaking is allowed to "compete on the merits". The Commission qualifies this as competition on "prices, better quality, and a wider choice of new and improved goods and services".[267] The choice of freedom is further underpinned in case law[268] and the speech of Commissioner that "market dominance entails special responsibilities, including the control of price rises, the guarantee of the provided services' quality and ultimately the preservation of users' freedom of choice".[269] The importance of choice of consumers is highlighted by EU competition law practice which corresponds the Court's deliberation.

A very interesting question is whether the employment of "fundamental right" in competition case related to data and privacy issues could also be used in EU competition law. One may argue that EU competition law could not ignore the fundamental right of EU charter pertinent to data protection[270]. According to Article 6(1) of the Treaty on European Union (TEU), the Charter of Fundamental Rights of the European Union has "the same legal value as the Treaties". There might be the legally binding obligation to facilitate the applicability of the fundamental rights[271] which reflect the meaning of the EU Charter to take a more coherent approach towards the protection of individuals by increasing the space for an integration fundamental rights protection

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[259] Bundesgerichtshof (2020), supra note 245, page 2.

[260] Ibid, page 3.

[261] German term "aufgedrängte Leistungserweiterung". See BGH Decision (2020), supra note 66, para 64, 65.

[262] Ibid, para 119

[263] Podszun, R. (2020), supra note 257.

[264] BGH Decision (2020), supra note 66, para 64.

[265] Bundesgerichtshof (2020), supra note 245, page 3.

[266] Kerber, W., & Zolna, K. K. (2020), supra note 12.

[267] 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 C 45/02, para 5.

[268] European Commission Case COMP/C-3/37.792 Microsoft, para 782. Available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf

[269] Vestager, M. (2017). Statement on Commission decision to fine Google euro 2.42 billions for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, 27 June. Available at: http://europa.eu/rapid/press-release_STATEMENT-17-1806_en.htm

[270] Charter of Fundamental Rights of the European Union [2016] OJ C 202/389, art 8.

[271] The CJEU has nevertheless confirmed that the EU Charter constrains the actions of EU Institutions when they adopt legally binding measures. See Joined Cases C-92 & 93/09, Schecke and Eifert, EU:C:2010:662.

in EU policies including competition law.[272]

4.3 Causality and as-if-competition assumption

The Court is not a fan of strict requirements. It holds that in cases such as the present one, the requirement under Section 19 (1) GWB for causality cannot regularly be denied.[273] The last-mentioned view is to be agreed to insofar as one strict behavioral causality, as requested by the appellate court, is a sufficient but not necessary condition.[274] Contrary to the view of the appellate court, abuse does not always presuppose that only its dominant position allows the dominant market to enforce those conditions which result in the exploitation of the customer.[275] Causality of the result is approved by the Court that the behavior is basically possible for every company, but only harmful effects on competition arise in dominant companies.[276]

As to the as-if competition conception, it should be predominantly used by the Court.[277] The as-if competition conception can be tested by the counter fact that if there exist robust and healthy competition in the relevant market, the dominant companies could or not still make the same extent of exploitation to its consumers. However, the answer will be disappointed for almost all the competitors in the relevant market do the same way as Facebook does.[278]

In case at issue, according to the Court, if the conditions that can be affected even without market dominance or with effective price competition but due to the information asymmetries and rational apathy on the part of consumers, they cannot represent any abusive exploitation, because they are not enforced by market dominance.[279] While the court deems it should be sufficient if the market position is one of the reasons for the unseen acceptance of unfair contractual conditions.[280] In any case, private users could expect a company that specializes in handling user data in an outstanding position to provide its services in compliance with data protection law.[281]

In the case where the imposed service expansion leads to a detrimental result to the customer, however, would not be expected with well-functioning competition.[282] This comes into consideration in particular if, in a bilateral market, the exploitation of one side of the market by the intermediary is at the same time likely to impair competition on the other side of the market.[283]

4.4 Reflection

We can see that the Court tries to settle the intense debate between FCO and OLG. It has given a clearer

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[272] Graef, I. (2016). EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility (PhD summary). EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility, Kluwer Law International; see also Costa-Cabral, F., & Lynskey, O. (2017), supra note 14.

[273] BGH Decision (2020), supra note 66, para 72

[274] Ibid, para 71

[275] Ibid, para 65

[276] Ibid, para 71

[277] Ibid, para 69

[278] Podszun, R. (2019). Facebook vs. Bundeskartellamt. D'Kart Antitrust Blog. August, 30, available at https://www.d-kart.de/en/blog/2019/08/30/en-facebook-vs-bundeskartellamt/.

[279] Ibid, para 69

[280] Ibid, para 70

[281] Ibid, para 70

[282] Ibid, para 65

[283] Ibid, para 65

theory of harm[284] to balance rationally the weight of data and privacy concerns in competition law theory. The analysis above may nonetheless ascertain some unexpected reflections as a clarity of the default point of view that data protection law had been the direct thrusters to the breach of the competition law in the case since the FCO's decision has been *de facto* altered after the Court's rules. Rather than "data protection law", the latest decision of German Federal court of Justice shows the very interaction between "data protection" and competition law. By which means that data and privacy protection does not only serve as the subjects of data protection law, but also becomes a competition purport convinced by the wilder interpretation of the consumer welfare falling into the competition law from the German highest court. As the main proceeding still under the charge of OLG, the future of the case is however a myth due to the deeply diverse attitude held by the institutional players of competition law in Germany. Without excluding the possible ruling from CJEU, it might take years to face the aftermath.

5. Art.102(a) TFEU and excessive data collection

5.1 Art.102 TFEU and exploitative abuse

Article 102 TFEU[285] deals with the restrictions to competition resulting from unilateral behavior of undertakings having a dominant position. The Court of Justice in United Brands v Commission laid down what is meant by a dominant position:

> The dominant position thus referred to by Article 102 relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by an appreciable extent independently of its competitors, customers and ultimately of its consumers. [286]

However the definition has a limited reference to practice. An economical approach is thus proposed that an undertaking has substantial market power if it is "capable of profitably increasing prices above the competitive level for a significant period of time".[287] The EU Courts have refrained from broad theoretical statements to apply the Art.102 TFEU, instead to decide each case on its merits.[288]
The prohibited practices under Article 102 TFEU is abusive conduct which differentiate into exclusionary and exploitative abuse.[289] Exploitative conducts in this regards are unilateral behaviors that distort competition in the market by earning monopoly profits at the expense of the customer, rather than excluding competitors.[290] The exploitative abuses consist by: a) directly or indirectly imposing unfair purchase or selling prices, b) or other unfair trading conditions.[291] Compared with exclusionary abuse, exploitative abuse

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[284] Podszun, R. (2020), supra note 257.

[285] Consolidated Version of the Treaty on the Functioning of the European Union [2016] OJ C202/47 (TFEU).

[286] Case 27/76 United Brands [1978] ECR 207, [1978] 1 CMLR 429 para 65; ECJ has used the same formulation on several other occasions, eg in Case 85/76 Hoff mann- La Roche v Commission.

[287] 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 C 45/02, para 11

[288] Whish, R., & Bailey, D. (2012), supra note 231, page 197-198.

[289] Ibid, page 201.

[290] Ibid, page 201-210; see also Lyons, B. (2007). The paradox of the exclusion of exploitative abuse; see also Swedish Competition Authority (2007). The Pros and Cons of High Prices (Stockholm: November), page 66. Available at http://www.crid.be/pdf/public/7425.pdf.

[291] Art.102 TFEU (a); see also Case 27/76 United Brands Company and United Brands Continentaal BV v. Commission, [1978], ECR 207, para 248.

is deemed as controversary[292] and, in certain degree, less concerned than the former one.[293] In the US, it is clear that the Sherman Act sanctions only exclusionary conducts that harm competitors, rather than exploitative abuses, as is stated in case Trinko by the US Supreme Court: "The mere possession of monopoly power, and the concomitant opportunity to charge monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts business acumen in the first place."[294] In EU level, although the case law did not reject totally to rule on the excessive prices, it is deemed that due to the high burden of proof and concerns of excessive intervening into market activities , the EU Commission has seldom investigated this type of abuses under Art. 102 TFEU.[295] In spite of the cases on IPR where the constellation of cases concentrating on the activities of collecting societies in which their rules have been scrutinized in order to ensure that they do not act in a way that unfairly exploits the owner of the copyright,[296] a few cases based on sanction on the exploitative abuse existed. (Both unfair conditions and excessive prices).[297]

However, given the fact that personal data is increasingly central to competition interactions in digital markets, the statement that exploitative abuses have been less prominent in the jurisprudence compared to exclusionary abuses is presumed to be outdated.[298] The speech on exploitative abuses given by Commissioner Vestager[299] in 2016 constitutes an important evolution in this respect:[300] While competition authorities protect consumers indirectly by keeping market structures competitive, they are also "bound to come across cases … where dominant businesses are exploiting their customers, by charging excessive prices or imposing unfair terms".[301] Simultaneously, it has been recently observed that the situation has changed over years when NCAs from a number of EU Member States have sanctioned cases of excessive pricing and unfair contractual clauses in energy sector,[302] where the industries is characterized by high entry

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[292] Evans, D. S., & Padilla, A. J. (2005). Excessive prices: Using economics to define administrable legal rules. Journal of competition law and economics, 1(1), 97-122; see also Ezrachi, A., & Gilo, D. (2009). Are excessive prices really self-correcting?. Journal of Competition Law and Economics, 5(2), 249-268, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1237802; see also Fletcher, A., & Jardine, A. (2007). Towards an appropriate policy for excessive pricing. European competition law annual, 533-546; see also Jenny, F. (2018). Abuse of dominance by firms charging excessive or unfair prices: An assessment. Excessive pricing and competition law enforcement, 5-70.

[293]. 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 C 45/02, para 7.

[294] US Supreme Court, Verizon Communications Inc v. Trinko. Ruled on 13 January 2004. For a comparison of the EU and US approach to sanction exploitative conducts under competition rules, see Gal, M. S. (2004). Monopoly Pricing as an Antitrust Offense in the US and the EC: Two Systems of Belief about Monopoly?. The Antitrust Bulletin, 49(1-2), 343-384.?" 49 Antitrust Bulletin: 343-384.

[295] Ibid, Gal, M. S. (2004).

[296] Whish, R., & Bailey, D. (2012), supra note 231, page 202.

[297] To date, the Commission has adopted only four decisions sanctioning excessive prices: Case General Motors, decision of 19/12/1974, OJ L 29/14; Case United Brands, decision of 17/12/1975, OJ L 95/1; Case British Leyland, decision 84/379/ECC of 2/7/1984, OJ L 207/11; Case Deutsche Post II, decision of 25/7/2001, OJ L 331/40..

[298] Schneider, G. (2018), supra note 22.

[299] Vestager, M. (2016, November). Protecting consumers from exploitation. In speech at the Chillin'Competition Conference, Brussels (Vol. 21).

[300] Kalimo, H., & Majcher, K. (2017). The concept of fairness: linking EU competition and data protection law in the digital marketplace. European law review, 42(2), 210-233.

[301] Vestager, M. (2016), supra note 297.

[302] Karova, R., & Botta, M. (2017). Sanctioning excessive energy prices as abuse of dominance–are the EU Commission and the National Competition Authorities on the same frequency? In Abuse of Dominance in EU Competition Law. Edward Elgar Publishing.

barriers, where the regulatory framework cannot effectively tackle such structural competitive issues.[303] There are also significant calls for intervention against high prices for pharmaceutical products of off-patent medicines. Several competition enforcement actions in EU wide directed against excessive pricing in this sector have also taken place.[304]

5.2 Unfair conditions in data economy

In the case at issue, the competition authority could have contested the abusive behavior in the issued case for the reason of Facebook's abuse of service terms.[305] It seems to be a means to streamline the investigations in the EU level, also to reduce the divergence of the controversial presuppose vis-a-vis the high degree involvement of GDPR. By sanctioning abuse of a dominant position, Art. 19(1) GWB which was applied in the issued case by FCO reflects the language and the scope of application of Art. 102 TFEU.[306] Nonetheless, it would be easier to satisfy the European courts' legal standards when it comes to sanctioning unfair contractual clauses by dominant online platforms under Art. 102 TFEU.[307]

Article 102 TFEU expressly provides that exploitative abuse consists in (a) directly or indirectly imposing unfair purchase or (b) selling prices or other unfair conditions.[308] Terms and conditions are unfair if they are (a) not necessary to achieve the object of the contract or (b) not proportionate in view of the object or (c) not transparent.[309] It denotes that Article 102 TFEU could also cover the imposition of unfair conditions in relation to access to personal data.[310] The act of data collection may amount to an exploitative abuse where the arrangements applicable to it are unfair.

As to the notion "necessity", CJEU upheld that an exploitative abuse may occur when "imposes on its members obligations which are not absolutely necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright."[311] When revert to digital economy, this principle first of all leads to the question of which type of data processing and data harvesting is 'necessary' in order to run a multi-sided platform such as a social media network.[312] The answer may not be the same under data protection rules and under competition rules. That is, even the data collection behavior complies with the GDPR, it is not clearly be safe under competition law for the possible anti-competitive effect of such behavior. Although the Faccebook.com provides the monetized free service, the benchmark of "necessity" should by any event not be undermined, and the consideration is already given in this respect in

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[303] Botta, M., & Wiedemann, K. (2018). EU Competition Law Enforcement vis-à-vis Exploitative Conducts in the Data Economy Exploring the Terra Incognita. Max Planck Institute for Innovation & Competition Research Paper, (18-08).

[304] The cases related this topic occurred in UK, Italy and Denmark, as well as USA, see OECD, 'Excessive Prices in Pharmaceutical Markets' DAF/COMP (2018), para 39-70; see also Colangelo, M., & Desogus, C. (2018). Antitrust scrutiny of excessive prices in the pharmaceutical sector: a comparative study of the Italian and UK experiences. World Competition, 41(2).

[305] See section 2.5

[306] Botta, M., & Wiedemann, K. (2019). The interaction of EU competition, consumer, and data protection law in the digital economy: the regulatory dilemma in the Facebook odyssey. The Antitrust Bulletin, 64(3), 428-446; see also Volmar, M. N., & Helmdach, K. O. (2018), supra note 28.

[307] Botta, M., & Wiedemann, K. (2019), supra note 168; see also Colangelo, G. (2019), supra note 163.

[308] Art.102 TFEU (a)

[309] Volmar, M. N., & Helmdach, K. O. (2018), supra note 28; see also Faull, J., & Nikpay, A. (2014). The EU Law of Competition. Oxford University Press, page 677; see also ECJ Judgments of 16 July 2009, Der Grüne Punkt – Duales System Deutschland v Commission, C-385/07 P, EU:C:2009:456, paragraph 142; see also ECJ Judgments of 6 December 2012, AstraZeneca v Commission, C-457/10 P, EU:C:2012:770, paragraph 93.

[310] Wils, W. P. (2019), supra note 161; see also Schneider, G. (2018), supra note 22.

[311] ECJ, Case 127/73, Belgische Radio en Televisie e société belge des auteurs, compositeurs et éditeurs v. SV SABAM e NV Fonior, EU:C:1974:25, para. 15.

[312] Robertson, V. H. (2020). Excessive data collection: Privacy considerations and abuse of dominance in the era of big data. Common Market Law Review, 57(1).

the decision of German Federal Court of Justice.[313] What matters from a competition perspective is whether Facebook imposed privacy terms of service on users that allowed it to harvest excessive amounts of user data.

Secondly, regards "proportionality", it requires that (a) the object of the contract is legitimate, (b) the obligation in the contract can contribute to achieving this object, (c) there are no less abusive means to achieve the object and (d) the legitimate object should outweigh the exploitative effect.[314] The problem rephrases as whether there are no less abusive means (for example less collection of data) to achieve the object of Facebook to provide the free service and at the same time to keep to profit from the advertisement side of market; and to what extent would the amount of the profit generating from the data collection to facilitate the distribution of advisement should be deemed as proportionate. To answer this question, there are two choices ahead: 1) One may assess the proportional amount of data collection based only on the zero price market as the FCO did to resort to the legality of GDPR. However, this approach lacks the endorsement from competitional jurisprudence as analyzed in section 2.5&2.6. The zero price markets are still a mystery to be fully unveiled and we need a metrics and a reliable methodology to assess what the real value of non-monetary pricing is.[315] 2) One may take account into the advertisement side of market to decide if the service provider get the proportionate revenue deriving from the harvest in the user side of market. Among this, other parameters need to be considered such as the input for technology research and the cost of the operation. Notably, if following this way, it will come back to a more traditional competitive analysis. Refer to the limitations of FCO's reasoning,[316] we advise a holistic approach to considering both sides of the markets.

Thirdly, as to "transparency", it may be argued that a company processing data can be condemned on the basis of fairness of trading conditions under art.102(a) TFEU where it provides unclear, or even misleading or deceptive information about data-related conditions for using a service.[317] The situation resembles the famous case AstraZeneca[318] where the abusive conduct is attribute to its consistent and linear, highly misleading, featuring a manifest lack of transparency, and deliberate.[319] Service providers frequently use privacy policies to give themselves the right to amend privacy terms in future without the consumer's consent, individual private users have no power to bargain for better privacy terms but to use the relevant service in the first place, or choose to leave it at all.[320] Similarly, FCO recognized that the processing of data is necessary in the data-driven business model that Facebook represents, but it by no means the scope of the data processing should be unilaterally determined by the dominant entity.[321]

From the analysis above, the excessive data collection behavior of Facebook may need further investigation in terms of the proper delineation of the necessary and proportional amount of data collection once the case goes under the charge of CJEU or need to be settled on the EU level based on the fairness principle.

5.3 Excessive price in data economy

Another group of proposals tries to deal with excessive data collection by using the notion of exploitative

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[313] See section, 3.1.

[314] Robert O'Donoghue and A Jorge Padilla (2013). The Law and Economics of Article 102 TFEU (2nd edn). Hart Publishing. Page 856.

[315] Buttarelli, G. (2019). This is not an article on Data Protection and Competition Law. CPI Antitrust Chronicle.

[316] See section 2.3

[317] Kalimo, H., & Majcher, K. (2017), supra note 298.

[318] ECJ Judgments of 6 December 2012, AstraZeneca v Commission, C-457/10 P, EU:C:2012:770

[319] Ibid, case AstraZeneca, para 93.

[320] Kemp, K. (2020), supra note 200.

[321] Bundeskartellamt Decision (2019), supra note 16, para 897.

"price" abuse.[322] This would appear in a market such as that for private social networks, where services like Facebook.com are offered ostensibly for "free" to users, while it is increasingly accepted that data and attention are seen as a consumer's counter-performance for the receipt of digital services.[323] In the sectoral EU law,[324] the concept of remuneration of the digital services encompasses situations where: a) the provider of a service requests and the end-user knowingly provides personal data or other automatically generated information, such as information collected and transmitted by a cookie.[325] b) remuneration also exists if the service provider is paid by a third party and not by the service recipient.[326]

It is by and large recognized that data has significant value, even serves as the monetary parameter in the backdrop of digital economy, while the analogue direct to the "price" is held suspected by scholars. First of all, there is an important caveat to this analogy as regards the lack of scarcity and imitability in data – means that competitive analytic tools that are based upon the criterion of monetary remuneration cannot simply be applied to data without a significant tweak.[327] In this respect, as Kemp upheld, it is reasonable to define "data price" as a "negative price": the supplier would *pay* the consumer in money or other benefits of the free service and permit collection of their personal information.[328] If we follow this route, the data will now be defined as the "new currency" in the digital economy which has the same functionality the money serves, such as "means of payment" and "value means".

Excessive pricing is, however, an abuse that is difficult to prosecute. The methods to establish the "price" of personal data are proposed by OECD to refer to i)"the financial results of a company such as market capitalization, revenues and net income on a per-user or per-record basis", ii) "price per data entry offered on the market by data brokers".[329]

In case United Brands,[330] the Court of Justice developed the principle to test excessive prices: "whether the difference between the costs actually incurred and the price actually charged is excessive", if the answer is affirmative "whether a price has been imposed which is either unfair in itself or when compared to competing products." It is complex to distinguish between high, yet still tolerable, and unreasonably high prices.[331] Whereas the peculiarity of two-sided market, the advertisement side of market gains the monetary earnings and user side gains free service, one could argue that it is more feasible to apply the excessive price analysis directly on the monetary side of the market than to resort to the excessive data price from the zero price side to analogue to the data as a price. Traditional price parameter which is put aside in the abusive assessment on the users' side is likely to gain relevance at a later stage, where the abusive effects reflect themselves on the prices charged on the paying side.

6. Conflict of competency: should data related conduct be examined under competition law?

The OLG proposed that the abuse of market power in the application of national law presupposes that an

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[322] Kerber, W. (2016). Digital markets, data, and privacy: competition law, consumer law and data protection. Journal of Intellectual Property Law & Practice, 11(11), 856-866.

[323] Article 3(1) and recital 24 of Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, [2019] OJ L136/1

[324] Directive (EU) 2018/1972 establishing the European Electronic Communications Code [2018] OJ L321/36

[325] Ibid, Recital 16

[326] Ibid.

[327] Robertson, V. H. (2020), supra note 310, direct quote 78.

[328] Kemp, K. (2020), supra note 200, direct quote 139.

[329] OECD. (2013). Exploring the economics of personal data. OECD Digital Economy Papers 220.

[330] Case 27/76 United Brands EU:C:1978:22, para 252.

[331] Faull, J. & Nikpay, A. (2014), supra note 307, page 192.

infringement of a law as such cannot be sufficient to constitute an offence.[332] The prohibition of abuse is intended to prevent a dominant undertaking from using means outside competition to impair existing competition or hinder the development of competition on a market whose competitive structure has already been weakened. In the case of VBL Gegenwert II, not every use of an ineffective provision in general terms and conditions by a norm addressee constitutes an a of market power.[333] Even regarding the open wording in this respect, it cannot be inferred from this passage of judgment that any contractual condition contrary to unfair contract terms law imposed by a dominant undertaking is inevitably also an abusive contractual condition within the meaning of Section 19 (1) of the GWB.
In contrast, it is not the aim of abuse control to pursue any violations of the law without a competitive connection under antitrust law.[334] The perspective of OLG is based on the backdrop of German national law and may have limited reflection to the enforcement of Art.102 TFEU, one may wonder if the conducts fall inside the domain of data protection rules, in particular, the GDPR could consist in abuse of market power under the applicability of Art.102 TFEU.

6.1 Regulatory framework implies immunity from competition law?

Firstly, does a regulatory framework serve as a basis for implied immunity from competition law? It is not uncommon for competition law to intersect with other sectoral law –eg. intellectual property law– to provide the resolution into the normative backdrop for anti-competitiveness.[335] It is also not uncommon for competition law to take into account the impairment of objectives pursued by another set of national rules to assess whether there was a restriction of competition.[336] In the case Deutsche Telekom (DT),[337] the Commission decided that DT had abused its dominant position for charging its competitors a price higher for professional services than what is paid by DT's own retail customers. DT's behaviors of margin squeeze made its competitors less efficient to compete for subscribers in the downstream broadband market in Germany. An important feature of this case was the fact that the German telecoms regulator RegTP, at the time, had specifically reviewed and approved DT's wholesale prices.[338] The compliance with the specific sectoral law does not necessarily guarantee that there is no possible harm on competition emanating from the conduct in the scope of sectoral law. Regulatory obligations thus as general do not necessarily or impliedly prevent the application of EU competition law. Anti-competitive conduct is excluded from the scope of 102 TFEU only if it is specified by the Treaty of express derogations where certain activities are removed from the ambit of the competition rules,[339] or if the regulatory obligations preclude the possibility of competitive conduct.[340] It thus can be attractive to use competition law to resolving issues which do not belong to its core realm since competition law enforcement has proven to be a tool of considerable efficiency.[341]

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[332] Düsseldorf Decision (2019), supra note 151, para 35, point 4.1 aa.

[333] BGH, judgment of 24 January 2017 - KZR 47/14, NZKart 2017, 242 = WuW 2017, 283 para 35 – VBL Gegenwert II

[334] Ibid, para 48.

[335] Costa-Cabral, F., & Lynskey, O. (2017), supra note 14; see also Schneider, G. (2018), supra note 22; see also Robertson, V. H. (2020), supra note 310.

[336] ECJ Judgment of 14 March 2013, Allianz Hungária Biztosító and Others, C-32/11, EU:C:2013:160, para 46,47.

[337] OJ [2003] L 263/9, upheld on appeal Case T-271/03 Deutsche Telekom v Commission [2008] ECR II 477, upheld on further appeal Case.

[338] Bailey, D. (2018), supra note 3.

[339] Joined Cases 209/84 to 213/84 Ministe`re Public v Asjes [1986] ECR 1425, para 40. For further analysis regards express derogations, see ibid Bailey, D. (2018).

[340] Ibid, Bailey, D. (2018).

[341] Picht, P. G., & Loderer, G. T. (2019). Framing Algorithms: Competition Law and (Other) Regulatory Tools. World Competition, 42(3).

On this point, provided that GDPR tackles on the principles of consent, data minimization, purpose limitation, as well as restrictions for profiling etc., through this framework, it seems not to be able to have the appropriate instruments to deal with the data concentration which have the impact on competition. According to the investigation on Facebook, the market power is considerably conferred from the network effects, data accumulation and the absent of multi-homing.[342] Although the decision of FCO did not choose Art.102 TFEU but rather build on the national regulatory background, it could however be concluded that the behavior as such, not only breach the relevant transparency rules stipulated in the GDPR, but also more a sign of new type of abuse of dominant position in the competition domain, which should at least not to be precluded from the competition scrutiny.

6.2 Whether competition law refers to objectives of GDPR?

Secondly, should broader regulatory policy objectives considerations enter competition analysis? Whether the data protection objectives pursued by the GDPR should possess a place in the anti-competitive considerations?

On one hand, the answer is positive with affirmations of the general policy-linking clause of article 7 TFEU 28, as well as more specific clauses of articles 8 to 16 TFEU, which prevent the Union from disregarding objectives which may have little or even nothing to do with competition analysis.[343] As the European data protection supervisor Buttarelli maintains ”I am hopeful that the FCO’s decision, in its inherent ambition of aligning different policy goals, could set an important precedent to be considered by the European Union at a large”[344] On the other hand, however, the Commission and the CJEU have explicitly excluded the parameter of *privacy* out of the anti-trust consideration in its precedents (mostly in merger cases). In Asnef-Equifax in 2006 the Court ruled that “since ... any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection.”[345] Similarly, in the Facebook/WhatsApp acquisition in 2014, the Commission stated that “any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the transaction would not fall within the scope of EU competition law but that of the EU data protection rule.”[346]

Taking a close look at aforementioned statements in cases Asnef-Equifax and Facebook/WhatsApp acquisition, the core words might concentrate on “sensitivity” of personal data and “privacy-related” concerns which apply for the hand-off policy to delineated from competition investigation. Nonetheless, data accumulation does not only touch the vulnerable space of sensitive personal privacy, but also relates to the essential input of digital economy, which could affect advertisement market competition significantly. In the same case of Facebook/WhatsApp acquisition the Commission decides that “the Commission has analyzed potential data concentration only to the extent that it is likely to strengthen Facebook's position in the online advertising market or in any sub-segments thereof.”[347] Commission has examined whether the Transaction could have the effect on strengthening Facebook's position in the online advertising market and the existence of two main possible theories of harm related, according to which Facebook could strengthen its position in online advertising by: (i) introducing advertising on WhatsApp, and/or (ii) using WhatsApp as a potential source of user data for the purpose of improving the targeting of Facebook's advertising activities outside WhatsApp.[348]

Most recently, the merger case of Fitbit/Google is cleared by the Commission subject to conditions of full

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[342] See Section 2.4

[343] Zingales, N. (2018). Data protection considerations in EU competition law: funnel or straightjacket for innovation? In The Roles of Innovation in Competition Law Analysis. Edward Elgar Publishing.

[344] Buttarelli, G. (2019), supra note 313.

[345] ECJ, Case C-238/05, Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v. Asociación de Usuarios de Servicios Bancarios (Ausbanc), ECLI:EU:C:2006:734, para. 63

[346] Case M.7217 – Facebook/WhatsApp Commission decision of 3 October 2014, paragraph 164

[347] Case M.7217 – Facebook/WhatsApp Commission decision of 3 October 2014, paragraph 164

[348] Case M.7217 – Facebook/WhatsApp Commission decision of 3 October 2014, paragraph 167

compliance with a commitments package,[349] raising questions concerning the use of behavioural rather than structural remedies in digital markets.[350] By increasing the already vast amount of data used for the personalization of ads, it would be more difficult for rivals to match Google's services in the markets for online advertising and the entire "ad tech" ecosystem. "The transaction would therefore raise barriers to entry and expansion for Google's competitors for these services to the detriment of advertisers, who would ultimately face higher prices and have less choice."[351] The proposed remedies to address the Commission's competition concerns are data processing commitments. The data related commitments will determine how Google can use the data collected for ad purposes and how users can continue to share health and fitness data if they choose to:[352] 1) it will maintain a technical separation of the relevant Fitbit's user data and store the data separately from any other Google data that is used for advertising. 2) to ensure users will have an effective choice to grant or deny the use of health and wellness data stored in their Google Account or Fitbit Account by other Google services.[353]

However, regarding such behavioral remedy which denies the major access to the data of Fitbit, doubts exist that it will limit the use of the newly acquired data, which might be deemed useless to bring benefits to consumer welfare deriving from the improvement of instrumental nature of the advertising market for the efficiency of many other activities of the economic system, meanwhile remaining harmful to the innovation in the market, thus should have been adjusted in favor of other solutions.[354] In any case, the objective of GDPR might not fully within the radar of EU competition investigation, such as "sensitivity" of "privacy", while it is far from certain that the Court of Justice would exclude any competition concerns stemming from the limitless acquisition of personal data to the detriment of digital platform users and detriment to the structure of competition in relevant markets.[355]

6.3 Where is the boundary of EU competitional enforcement?

Thirdly, how to define the boundary of competitional enforcement? Recent enforcement continues to explore (or stretch) the outer boundaries of the law and policy under Article 102. Some scholars are reluctant to make the antitrust tool to be a universal instrument to apply to any illegal conduct from dominant companies which has nothing to do with competitiveness.[356] It is promoted by Bailey that the limits of Article 102 should depend on whether there is an act (or omission) of a dominant undertaking that distorts the competitive process or is directly exploitative of consumers.[357] Similarly, in case Astra Zeneca, the General Court upheld, relating to the second abuse, that AZ had infringed Article 82 EC and Article 54 of the EEA Agreement by requesting the deregistration of the Losec capsule MAs in Denmark and Norway in combination with the withdrawal from the market of Losec capsules and the launch of Losec MUPS tablets in those two countries, inasmuch as it was found that those actions were capable of restricting parallel imports of Losec capsules in

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[349] European Commission (2020), Mergers: Commission clears acquisition of Fitbit by Google subject to conditions, Press release of 17 December.

[350] G. Basini(2022), Dati, Algoritmi E Impegni Comportamentali: Note A Margine Della Decisione Google/Fitbi, Concorrenza e Mercato: Antitrust, Regulation, Consumer Welfare, Intellectual Property, vol. 28/2021

[351] Ibid, page 1

[352] Ibid.

[353] Ibid, page 2.

[354] G. Basini(2022), Supra note 350.

[355] See also de Moncuit, A. (2018). In which ways should privacy concerns serve as an element of the competition assessment. Available at: https://ec.europa.eu/competition/information/digitisation_2018/contributions/aymeric_de_moncuit.pdf

[356] Körber (2016), supra note 27; uber ally; Colangelo, G. (2019), supra note 172.

[357] Bailey, D. (2018), supra note 3.

those countries.[358] AZ emphasizes that the existence of a MA imposes stringent pharmacovigilance obligations on its holder, involving permanent costs, which it is lawful to dispose of if the authorised product is no longer marketed.[359] In this case, the Court of Justice endorsed that the preparation by an undertaking, even in a dominant position, of a strategy whose object it is to minimize the erosion of its sales and to enable it to deal with competition from generic products is legitimate and is part of the normal competitive process, provided that the conduct envisaged does not depart from practices coming within the scope of competition on the merits, which is such as to benefit consumers.[360] However, contrary to what the appellants(AZ) submits, conduct like that impugned in the context of the second abuse – consisting in the deregistration, without objective justification and after the expiry of the exclusive right to make use of the results of the pharmacological and toxicological tests and clinical trials granted by Directive 65/65, of the MAs for Losec capsules in Denmark, Sweden and Norway with the intention to hinder the introduction of generic products and parallel imports – does not come within the scope of competition on the merits.[361] Court of Justice ruled that the "illegality of abusive conduct under [now: Art. 102 TFEU] is unrelated to its compliance or non-compliance with other legal rules and, in the majority of cases, abuses of dominant positions consist of behavior which is otherwise lawful under branches of law other than competition law."[362] In the European Union, the competition authorities have, in fact, assumed the role of watchdog towards all those behaviors of companies that make instrumental use of industrial rights causing damage to the competitive physiognomy of the markets.[363] As we have seen, many fear that the intervention of competition law could jeopardize the delicate system of incentives promoted by industrial property rights, to the detriment of the progress of science and technology.[364]

Revert to the issued case, the focal point becomes to identify the anti-competitive effect either on the structure of competition or the direct harm on consumers. As is thoroughly evaluated by FCO, the huge market power is conferred to Facebook through network effects and data processing.[365] FCO did not go further to establish on the possible exclusionary abuse according to Art.102 TFEU, but rather built the case on the national regulatory background and emphasized on the GDPR violation. However, one may not deny the potential injuries to competitive process attained both from distinct lock-in effect and barriers to entry.

On the other hand, if the privacy concern of private users will be the consumer welfare within the interpretation of EU competition law? Combined with the attitude flow out from the case law of Commission and CJEU, the answer may be negative.[366] Commissioner Vestager replied that the FCO's decisions could "probably not" serve as a template for future Commission cases, as it was based on German competition law and sat "in the zone between competition law and privacy law",[367] and "the European legislator has made

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[358] ECJ Judgement of 2012, AstraZeneca AB and AstraZeneca plc v. European Commission, C-457/10 P, ECLI:EU:C:2012:770, para. 22.

[359] Ibid, para. 126.

[360] Ibid, para. 129

[361] Ibid, para. 130

[362] Ibid, para. 132.

[363] Emanuela Arezzo (2019), Brevettazione Strategica E "Non Uso" Del Brevetto. Giurisprudenza Commerciale, Anno XLVI Fasc. 2 – 2019.

[364] Ibid.

[365] See section 2.4.

[366] See section 6.2.

[367] White, A. & Ponikelska, L. (2019). Germany's Facebook Order Will Be Studied by EU, Vestager Says. Bloomberg (8 February). Available at: https://www.bloomberg.com/news/articles/2019-02-08/germany-s-facebook-order-will-be-studied-by-eu-vestager-says

sure that the type of conduct in question is addressed by the General Data Protection Regulation."[368]
It thus can be assumed that the excessive data collection behavior may fall into the field of EU competition law with regards to its anti-competitive effects, while the sensitivity of privacy may well fall within the realm of GDPR. The simple violation to GDPR may well not equate to the existence of harm to the competitiveness, therefore, to automatically connect the violation of GDPR to the breach of competitional law will by and large be invalid under the investigation of Art.102 TFEU.

7. Conclusion

In view of the analysis that the privacy policy cannot be fully valid out of imbalanced bargaining power of both parties and the third party tracked data is excessive collected without the specific consent of users, the issued case should be better to established on the zero price of user market instead of advertisement market In this scenario, is the zero price market to be excluded by the anti-trust investigation? In terms of the more economic approach adopted by the competition theories, consumer harm would therefore need to be assessed economically in order to pursue a case under article 102 TFEU.[369] The current consideration given to the data related competition concerns of Commission is limited to the possible effect on the advertisement market side.[370] It can be assumed that the zero price market is by now outside of the anti-trust background in the EU law precedence. Although the relevance should also be given to a reduced consumer welfare in terms of lower quality being framed in terms of giving up too much personal data, hence losing privacy.
This may lead to problems since the competition law does not reach to the consumer welfare in a more personal sphere, i.e. data privacy. Including privacy among competition concerns falling within the meaning of Article 102 TFUE would imply protecting consumer welfare more directly, which may not be in EU competition law "DNA" due to the original influence of ordoliberal theories.[371] The approach to comprise the privacy right into the competition law based on the constitutional right is also strongly contended. The decision of German Federal Court of Justice confirmed Facebook's abusive behavior for the reason that the conduct deprives the users freedom of choice about whether to use the personalized ad service and about their free right of disposal of their personal data provide another feasible theory to facilitate the combination of data and antitrust.
We believe that the zero price market should not be abandoned by EU competition assessment. While private users' benefit may not be reflected in a monetized dimension, the data, as the counter-performance of the provision of free service, plays the same role as the benchmark of consumer welfare just as money/price can do. As analyzed in the section 5.3. the ubiquitous and non-rival nature of personal data makes it inappropriate to go in line with the "excessive price" analogue. In contrast, it can be rather efficient to investigate and go to the conclusion of whether abusive or not in the light of "unfair trading conditions".[372]
If based on the thesis of unfair trading conditions, the data collection on the zero price market is not as assumed to relate only to privacy right of consumers, the amount of data processing also serves as the very check and balance to the behavior of the service providers which must be considered by competition agencies. In this respect, it is not against with the standpoint of Commission that "sensitivity of privacy" should be dealt with by GDPR.
The existence of network effects has closely connected the two-sides of markets. Without taking into account of ad side of market , the abusive analysis has less support. Taking an example, it can be deemed abuse on user side for the third-party tracking and data collection, the same conduct may also lead to the augment of market power gained from the larger data base which can cause another abuse on the ad side of market. That is, the same conduct may lead to the double abuse in both sides of markets. And this mutually affected abuse should serve as the reinforcement to the theory of harm when one side of market abuse is not well proved.
The analysis on the connection of personal data and ad revenue is indispensable. When defining the

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[368] Wils, W. P. (2019), supra note 161, direct quote 48: Answer given by Vestager on behalf of the European Commission to Question P-001183/2019 (8 May 2019)

[369] Gallo Curcio, M. (2020). Big data, abuse of dominance and the enforcement of article 102 TFEU in digital markets: the Google cases; see also section 2.1

[370] See section 6.2

[371] de Moncuit, A. (2018), supra note 355.

[372] See section 5.2

advertisement market, one may take look at the whole online ad market which embraces the competitors such as Google, YouTube, LinkedIn etc.; one may also do the same delineation as FCO did, that is, the doctrine of social media demand substitutability based on the user side. The latter will be easier to identify the dominance of Facebook on the ad side of market for the existence of less base of the members in the defined market. While we need to consider the character of ad market itself regards the business mode of the data-orientated ad distribution. The competitors with the similar business mode will compete for the users' data with Facebook in spite of the user side demand substitutability.

With the possible ruling from CJEU on the issued case,[373] whether the CJEU will deal with the German Facebook case on the merit of zero price market to emphasize the benefit of private users may set an example which is eagerly awaited.

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[373] See Section 3, page 23-24

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