COPENHAGEN BUSINESS SCHOOL – CAND.MERC.(JUR.)

MASTER THESIS

Privacy Considerations under EU Competition Law

Excessive Data Accumulation as an Abuse of Dominance

Danish Titel:

Persondata under EU-konkurrenceretten

Urimelig dataindsamling som misbrug af dominerende stilling

By:

Rachel Scheele (102416)

Supervisors:

Maria José Schmidt-Kessen

Thomas Rønde

Pages and Characters:

80 normal pages, 181.784 characters

14 May 2020

'The more dominant these companies become [...] the less incentive they have to respect your privacy. [...] Because accumulating data about you isn't just a strange hobby for these corporations. It's their whole business model.'

Al Franken, 30 March 2012

Abstract

Tech-giganter som Google og Facebook tilbyder deres tjenester uden at opkræve et gebyr. I stedet betaler vi med vores privatliv. Samtidig udfordrer den digitale platformøkonomi mange traditionelle antagelser under konkurrenceretten, hvorfor følgende spørgsmål er blevet særlig trængende: Hvilken rolle bør beskyttelsen af persondata have i en konkurrenceretlig kontekst, nærmere bestemt i forhold til TEUF artikel 102?

Afhandlingen anskueliggør, at persondata har fået stor konkurrencemæssig betydning og kombineret med karakteristika som stordriftsfordele, netværkseffekter, skifteomkostninger og adgangsbarrierer skabes stærkt koncentrerede markeder, der øger risikoen for udnyttende misbrug: Dominerende platforme kan gøre deres ydelse betinget af uigennemsigtige privatlivspolitikker, som muliggør indsamlingen af meget store datamængder. Ved formuleringen af tre skadesteorier er det blevet påvist, at denne praksis kan have negative velfærdsmæssige konsekvenser. Inspireret af den tyske konkurrencemyndigheds afgørelse mod Facebook klarlægger afhandlingen, at forbrugere kan beskyttes mod denne nye misbrugsform fra et konkurrenceretligt perspektiv. TEUF artikel 102(a) indeholder et forbud mod, at en dominerende virksomhed påtvinger urimelige priser eller forretningsbetingelser og det er blevet vist, at bestemmelsen kan rumme urimelige brugerbetingelser, der medfører en omfangsrig dataindsamling. I den forbindelse har også EU's Charter om grundlæggende rettigheder og persondataforordningen fået øget betydning for konkurrencemyndighederne.

Baseret på disse overvejelser fremsætter afhandlingen retspolitiske forslag og ideer til, hvordan EU-konkurrenceret kan tilpasses. Persondatas konkurrencemæssige betydning og platformmarkedernes særlige karakteristika bør inddrages ved vurderingen af markedsdominans, og der tales for en holistisk tilgang til konkurrenceretten, hvor retfærdighed og forbrugervelfærd er i fokus. Vigtigst af alt er dog, at TEUF artikel 102 anvendes aktivt som værktøj mod udnyttende privatlivspolitikker, eventuelt understøttet af en ny forordning for digitale platforme.

Table of Contents

1 Introduction

Technological development promises a wealth of possibilities for companies and consumers[1], and for a long time online platforms such as Google and Facebook were cheered for making our lives better and easier. These companies, operating with multisided business models, extract personal data from their users in exchange for providing their services. A consequence of this evolution has been the collection, storage and exchange of personal data at an increasing scale.[2]

The unrestrained use of personal data has become essential in predicting consumers' behaviour. Through algorithmic mediation, platforms have found a quest to map us as human beings, our social relations and desires, enabling them to manipulate and determine our demand through targeted advertisement.[3] Moreover, personal data has been misused to influence the political sphere as evidenced by the Cambridge Analytica-case in Brexit and the 2016 US presidential election. These examples only grasp a fraction of the substantial impact that personal data has on our markets and its potential to significantly disrupt the EU legal system, where critics argue that 'existing rules do not seem to cover the new realities' imposed on by digital platforms.[4] The awaking public conception and mistrust coincide with tightened enforcement against online platforms by competition authorities.[5]

For the German Bundeskartellamt (BKartA), another concern lies at the heart of platforms' dependency on personal data – namely that the collection entrenches their dominant position. In the *Facebook* case, the BKartA has found Facebook to abuse its dominant position on the market for social networks in Germany by imposing unfair terms and conditions on its users, by linking antitrust[6] violations under Section 19 of the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen (GWB)) (i.e., the German equivalent to Art. 102 TFEU) with data protection law.[7] Especially the theory of harm – that Facebook is conditioning the access to its

[1] The terms 'consumer' and 'user' will be used interchangeably throughout this thesis. The focus on multisided platforms entails that individuals can be both users (when they use the platform) and consumers (when they buy a good or a service) at the same time.
[2] Lundqvist, 2017, p. 712; Valletti, 2019, p. 2.
[3] Ezrachi & Stucke, 2016, p. 486 f.
[4] Hatzopoulus, 2018, preface.
[5] For example, the Commission has fined Google €4.34 in *Google Android,* case AT.40099 and €2.4 billion in *Google Shopping*, case AT.39740.
[6] The terms antitrust and competition law will be used interchangeably throughout this thesis. The Commission itself has treated Art. 102 of the Treaty on the Functioning of the European Union (TFEU) under the term 'European antitrust policy'. See European Commission Website, Antitrust Overview, 21 November 2014.
[7] *Facebook*, case B6-22/16.

service on users' consent to a limitless accumulation of their personal data – can be described as an antitrust novelty.

But is privacy really an antitrust concern? And – do we have the tools in EU competition law to tame dominant companies' 'appetite for [personal] data'?[8] This thesis is concerned with answering these questions, analysing whether antitrust should play a role in the protection of personal data and whether the approach from the BKartA could serve as a prototype case for competition authorities in their application of Art. 102 TFEU.

1.1 Research Question

The aim of this thesis is to explore what role the excessive accumulation of personal data by digital platforms should have in the context of abuse of market dominance. This aim builds on the ongoing discussion of whether EU competition law in its current form is capable of capturing the evolution of the platform economy and its impact on consumers' privacy. The analysis will depart from an economic and a legal perspective, followed by an integrated analysis. The goal is to answer the following sub-questions:[9]

Economic sub-question:
How can competition economics substantiate the need for the enforcement of data privacy under Art. 102 TFEU?

Legal sub-question:
How can data privacy be pursued under EU competition law, specifically under Art. 102 TFEU?

Integrated sub-question:
How can EU competition policy be adapted to comprise data-related concerns under Art. 102 TFEU?

[8] Mundt, 2017, p. 61.
[9] The term 'data privacy' is to be understood as the protection of users' privacy with regards to the collection and use of their personal data (information). See Kemp, 2019, p. 7.

1.2 Perspective

The research question will be considered from the theoretical perspective of the competition authorities in the EU in their (centralised/decentralised)[10] role as enforcers of EU competition law. The chosen perspective similarly entails that the discussions will focus on the supranational economic and legal consequences.

1.3 Limitations

This thesis departs from a supranational perspective but will use German legal sources as an input for discussion. The aim is, however, not to provide for a *comprehensive* comparative analysis, nor to consider other national legal systems in depth. Moreover, as the focus lies on data privacy in the context of the abuse of market dominance, Art. 101 TFEU and merger regulation will not be point of focus. Cases concerning both areas will only be included if found relevant for discussions concerning the research question.

The violation of Art. 102 TFEU requires several conditions to be fulfilled.[11] As this thesis is of a theoretical character, the analysis will mainly revolve around platforms' dominant position and abuse, as these two conditions have become particularly pressing with the rise of big data in the platform economy. This similarly entails that a discussion on appropriate remedies will not be covered, as they are found to be relevant for specific cases but have little impact on the theoretical question that this thesis revolves around.

The debate on what role data privacy should have in competition law often considers potential refusals of dominant undertakings to give access to their data. Such exclusionary strategies and the discussion on data as an essential facility will not be explored, as the attempt is to establish the economic harm from platforms' accumulation of data in which the restriction on privacy

[10] 'Decentralised' accounts for the national competition authorities (NCAs), while the Commission has the centralised role of enforcement with regards to Art. 102 TFEU. The division of work between the NCAs and the Commission is outlined in the Commission Notice on cooperation within the Network of Competition Authorities, which specifies that an authority is competent to investigate a case when the authority is 'well placed'. In case of the Commission this is true, if the effects of the undertaking's practice concern more than three Member States; or the case is closely linked to other Community provisions; or Community competition policy issues are at stake. Commission Notice, 2004/C 101/03, para 5-15.

[11] (1) Undertaking, (2) dominant position, (3) abuse and (4) effect on trade between Member States. Jones & Sufrin, 2016, p. 350 f.

may be analysed as a form of exploitation. Hence, the guidance by the Commission on its enforcement priorities in applying Art. 102 TFEU to abusive exclusionary conducts will not be considered.[12]

Lastly, the thesis will provide discussions on the interaction of EU competition policy with other policy branches, specifically data protection. Although the holistic approach to data privacy has considered consumer law as well, this area of law will not be analysed due to the constraints in the format of this thesis.

1.4 Theory and Method

This thesis is concerned with EU competition law, which consequently determines the theories and methods applied in the analysis. As the field of research has a strong interdisciplinary character, being influenced by economic and legal considerations alike, there may be passages in the analysis where the lines between the disciplines become blurred.

1.4.1 Economic Theory and Method

The economic level of analysis is a macro-perspective of the EU, and the subject of analysis is narrowed down to multisided platform markets where the focus will lie on the zero-price side.[13] The methodological approach to the analysis is deductive, implying that the arguments are based on general principles and existing theories that are tested on concrete observations. From these theories, concrete applications and reasonings are deduced, which are transposed into the conclusion.[14] The validity of the conclusion is thus dependent on the reliability of the arguments put forward in the analysis.

The aim of chapter two is to discuss whether competition economics can corroborate that data privacy should be enforced as an abuse of dominance under EU competition law. The analysis will draw on neoclassical economic theory, which traditionally has provided a basis for assessing antitrust cases.[15] One of the key elements is the idea of a relationship between price and quantity depicted on a downward-sloping demand curve and the assumption that consumers

[12] Commission Guidance, 2009/C 45/02.
[13] The zero-price side will be exemplified by search engines and social networks. See section 2.1.1 on multisided platforms.
[14] Knudsen, 1994, p. 58.
[15] Reeves & Stucke, 2010, p. 1544.

are rational, utility maximising economic agents that act on complete information.[16] Specifically, the analysis will rotate around the SSNIP-test[17] for the purpose of evaluating the market definition in the data economy and the traditional approaches in the measurement of market power.[18]

The increasing reliance on personal data in digital markets has initiated a debate questioning the legitimacy of neoclassical economic models, as prices are said to play too big a role in antitrust. According to scholars the fundamental problem lies within the failure to understand the competitive importance of personal data.[19] This thesis will, therefore, use neoclassical economics as a benchmark but depart from the strict application of traditional theories and methods by introducing alternative ways to assess the economics behind potential data privacy abuses. For this purpose, elements of conjoint- and survey-based analysis will be introduced, supported by theoretical possibilities of measuring the monetary value of personal data.

Furthermore, a body of behavioural economics will be presented to study the psychological, cognitive and social effects of the platform economy on consumer decisions. Behavioural economics characterises human behaviour by three traits: bounded rationality, -willpower and -self-interest.[20] Therefore, it contradicts with the neoclassical standard of a rational consumer that is expected to access, assess and act rationally on the information made available on the market. Scholars argue that decisions related to privacy are characterised by behavioural biases, which may increase the risk of exploitation.[21] Recalling *Newman*, 'economic models must fit real-world facts', and it can be argued that the introduction of behavioural economics will allow for a more realistic analysis of marketplace behaviour with regards to platforms that compete on personal data.[22]

Lastly, the economic analysis will focus on the formulation of a coherent theory of harm, attempting to conceptualise the possible detriment that can be suffered as a result of excessive accumulation of personal data. Theories of harms are supposed to be assessed in an economic

[16] J. Newman 2015, p. 183 and 196.
[17] SSNIP stands for *small but significant and non-transitory increase in price*. Motta, 2004, p. 102 f.
[18] These do for example include the Lerner Index, buyers' power and the estimation of the residual demand elasticity. Motta, 2004, p. 115 f.
[19] J. Newman, 2015, p. 190.
[20] Reeves & Stucke, 2010, p. 1532.
[21] Siciliani et al., 2019, p. 79.
[22] J. Newman, 2015, p. 183; Reeves & Stucke, 2010, p. 1585-1586.

balancing test ('rule of reasons'), establishing whether a practice has a (likely) effect on competition and, ultimately, on consumer welfare.[23] In order to measure the effect on consumer welfare, economists typically use the loss in 'consumer surplus' as a measure of harm.[24] This analytical framework is subject to the same limitations as discussed above because it only allows for an analysis of the variables price and quantity and relies on rational choice theory. Thus, in the attempt to formulate a coherent privacy-related theory of harm the results from behavioural economic research will be considered instead.

1.4.2 Legal Theory and Method

The following section aims to formulate the choice of theory and method for the legal analysis. The focus on EU competition law, specifically Art. 102 TFEU as the subject of analysis, entails that the level of analysis is supranational.

1.4.2.1 European Realistic Legal Positivism

The legal analysis will follow the principles in the European realistic legal positivism[25], which is a rather new synthesis of legal positivism (Kelsen and Tuori) and legal realism (Ross) developed by *Tvarnø & Nielsen* that may be applied when analysing the EU legal order.[26] The theory departs from the historical development in the mentioned traditional legal theories and combines them with the evolution of the EU legal system, which goes beyond regular legal federalism.[27] The theory takes into account the early jurisprudence by the Court of Justice of the European Union (CJEU)[28] on the status that shall be granted to EU law in national legal orders and is, therefore, build on the principles of direct effect and supremacy.[29] Moreover, it applies a monist understanding, where the national legal systems are defined as subsystems of the EU

[23] European Economic Advisory Group on Competition Policy, 2005, p. 6 f.
[24] Loss in consumer surplus can be depicted on a downward-sloping demand curve, showing the relationship between price and quantity: As price increases or quantity decreases, a loss in consumer surplus will occur. Siciliani et al., 2019, p. 80.
[25] From Danish: 'Europæisk realistisk retspositivisme'.
[26] Tvarnø & Nielsen, 2017, p. 467.
[27] The constitutional nature of the EU can be described as standing on 'federal middle ground' between an international organisation of sovereign states and a nation state – a *sui generis* of supranationalism. On the one hand, the EU has constitutional and federal characteristics such as Treaties. On the other hand, according to the German belief in the indivisibility of sovereignty and the conviction that the Member States are 'the masters of the Treaties', the Union would have to be categorised as an international organisation. For an in-depth discussion on this matter, see Schütze, 2018, chapter 2.
[28] Back then the European Court of Justice.
[29] *Van Gend en Loos*, case 26/62, p. 12; *Costa v ENEL*, case 6/64, p. 593-594. These principles are fundamental elements in the European realistic legal positivism. Tvarnø & Nielsen, 2017, p. 471.

legal order.[30] According to the chosen theory, *de lege lata* is defined as the body of rules which, based on a monistic grounded legal dogmatic analysis, is seen as valid because the judiciary, the legislative and legal scholars are in consensus.[31]

European realistic legal positivism can be criticised for its strong assumptions because the theory advances the position of EU law to an extent that the sovereignty of the Member States is undermined. For example, it does not consider that the absoluteness of EU law supremacy has been challenged several times by national constitutional courts, thereby realistically stretching the notion of European integration to its limits.[32] However, competition law is a special case, where the Member States have delegated sovereignty to the EU to such an extent that the theory is considered to suit the analysis properly.[33] Moreover, the close cooperation between the Commission and the NCAs in the European Competition Network points towards that the notion 'one-big-system'[34] fits an analysis of EU competition law.

1.4.2.2 Legal Dogmatic Method and Legal Sources

Following European realistic legal positivism, the legal analysis will be explored from a legal doctrinal approach, where the sources of law are systematised, described and interpreted to derive *de lege lata*.[35] The applied sources of information are mainly stemming from EU primary and secondary law, including relevant decisions by the courts[36] and the Commission and soft law.

The primary law consists of the Treaty of Lisbon and the Charter[37] and is supreme in the legal hierarchy. The main Treaty provisions concerning EU competition law are found in Art. 101 and 102 TFEU of which the latter will be subject to the analysis of the research question. As

[30] Tvarnø & Nielsen, 2016, p. 471.
[31] Ibid., p. 467.
[32] For example, in *Ajos*, case 15/2014, where the Supreme court of Denmark declined to follow the ruling of the CJEU in case C-441/14. This points in the direction that in practical terms we should acknowledge the relative rather than absolute supremacy of EU law.
[33] See Art. 105 TFEU which grants the Commission the right to initiative and limited judicial powers regarding infringements. See also Regulation (EC) No 1/2003, Art. 4, according to which the Commission 'shall have the powers provided for by this Regulation', such as Art. 7, Finding and termination of infringement; Art. 8, Interim measures; Art. 9, Commitments; and Art. 10, Finding of inapplicability.
[34] Tvarnø & Nielsen, 2017, p. 471.
[35] Ibid., p. 29 f.
[36] The notion 'the courts' accounts for the CJEU and national courts. Decisions from national courts will be subject to discussion in so far as they can be inspirational for regulation at EU level.
[37] The Charter of Fundamental Rights of the European Union.

the protection of personal data is one of the main concerns of this thesis, it is necessary to consider Art. 8 of the Charter as well. Moreover, the general principles that are codified in the Treaty on European Union (TEU) and are derived from decisions by the CJEU will be fundamental, such as the principle of proportionality.[38]

Secondary law includes regulations, directives and decisions, where EU competition law is mostly comprised of regulations and decisions.[39] According to Art. 288 TFEU both legal sources have binding nature. In the legal analysis, the focus will be on the application of decisions by the CJEU and the Commission that relate to data considerations. The relevance of data privacy for competition law raises questions about the importance of other branches of law, specifically data protection law. Therefore, specific provisions of Regulation (EU) No 2016/679 (the General Data Protection Regulation (GDPR)) will be included to give an adequate answer to the legal research question.

Lastly, the institutions and administrative authorities within the EU have generated a large volume of policy documents, such as notices, guidelines, etc., which form a considerable body of soft law (or non-binding secondary law). Soft law has not been attributed legally binding force but may have and is aimed at having (indirect) legal effects in practice.[40] The CJEU has also introduced the obligation for national authorities to consider soft law in the interpretation and application of EU law, which is why this legal source is considered to be relevant in the analysis as well.[41]

Beside the European legal sources, the analysis will involve a discussion of German competition law, including the *Facebook* case, contributing to the question of whether the reasoning put forward by the BKartA could also apply on a broader European basis. For this purpose, a portion of this thesis is concerned with comparative legal analysis. The decision by the BKartA in the *Facebook* case is revolving around Section 19 GWB, which is the German equivalent to Art. 102 TFEU and thus point of focus. The relationship between national and EU competition law, and similarly between the two main provisions (Art. 102 TFEU and Section 19 GWB), is

[38] Tvarnø & Nielsen, 2017, p. 102 f.
[39] For an overview, see Jones & Sufrin, 2014, p. 109 f.
[40] Ibid., p. 108-112.
[41] See *Grimaldi v Fonds des maladies professionnelles*, C-322/88, para 18, where the CJEU found that 'national courts are bound to take recommendations into consideration where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions'.

laid down in Regulation (EC) No 1/2003. In accordance with Art. 3(2) and Recital 8, Member States may apply stricter national laws with regards to the prohibition of abusive behaviour within their own territory.[42] Arguably, this has given the BKartA some margin by choosing to apply national rather than EU competition law in the decision against Facebook, which has been debated by scholars.[43]

Further, academic articles will be included in the analysis. These are not considered to be authoritative legal sources within EU law, but the theoretical arguments put forth therein can serve as a foundation in the examination of the legal discourses put forward in this thesis.

1.4.2.3 Interpretative Methods

The application of the described legal sources requires the correct use of the interpretative methods of EU law. This thesis will use the judicial reasoning of the CJEU as a benchmark, intending the use of four different methods of interpretation: *historical interpretation*, which implies the search for the original meaning of a rule; *literal interpretation*, ergo giving a contemporary meaning to the original text of the law; *systematic interpretation,* entailing to construct the meaning of a norm by reference to its place within the general scheme of the legislative system; and lastly, *teleological interpretation*, which implies the search for the purpose, spirit or useful effect of a legal norm.[44]

1.4.3 Integrated Method

The purpose of the integrated analysis is to examine how EU competition policy can be adapted to comprise data-related competition concerns under Art. 102 TFEU. Competition policy in this regard is to be understood as a collective term for 'policies and laws which ensure that competition in the marketplace is not restricted in a way that is detrimental to society'.[45] In the analysis, ideas and recommendations for legal policies, in light of broader objectives, will be put forward. The modus operandi will be to assess the results from the foregoing analysis and integrate them by combining economic and legal considerations.

[42] See also Communication from the Commission, COM(2009) 206, para 21.
[43] Botta & Wiedemann, 2019, p. 440. The analysis of the policy choice by the BKartA lies beyond the scope of this thesis and will, therefore, not be subject to discussion in the legal analysis.
[44] Schütze, 2018, p. 211-212.
[45] Motta, 2004, p. 30.

1.3.4 The European School

The theories and methods discussed above are seen through the lenses of the European School, according to which EU competition law has an interdisciplinary character and comprises a legal framework, economic analysis and social constituents.[46]

The focus on economic analysis in EU antitrust was introduced with the more economic approach in the late 1990s and is characterised by greater use of economic theories and methods and by the goal to make EU competition law enforcement more precise.[47] The economic analysis, therefore, seeks to supplement the law by 'enabling the proper application of legal rules' and improving the understanding of the working of the markets that this thesis revolves around.[48] Furthermore, social policy objectives will play a role, addressing the fairness aspects within the European social market economy in accordance with Art. 3 TEU.[49] The inclusion of this holistic view on consumer interests is supported by the recent communication by the Commission, pointing in the direction of a more proactive consumer-focused enforcement.[50] As this thesis revolves around potential data privacy abuses to the detriment of individual consumers, an emphasis on consumer welfare and fairness is found suitable.[51]

Building the analytical part of this thesis on the European School of thought fits the interdisciplinary approach to the research question and validates the combination of legal sources with economic methods and the objectives EU competition law is built upon.

[46] Hildebrand, 2016, p. 3.
[47] Patel & Schweitzer, 2013, p. 220.
[48] Hildebrand, 2016, p. 33.
[49] Jones & Sufrin, 2014, p. 37.
[50] The Commission itself noted that 'over the past two decades, antitrust and merger policy [...] more effectively placed the emphasis on consumer welfare'. Commission report, SEC(2011) 690 final, para 12. Furthermore, Vestager has recently emphasised the goal of fairness in her speeches, see section 4.3.
[51] Volmar & Helmdach, 2018, p. 214.

1.5 Disposition

The analytical part of this thesis is divided into four chapters which seek to explore what role EU competition law should have in the protection of data privacy in the context of abuse of market dominance.

Chapter 2 seeks to investigate how competition economics can substantiate the need for the enforcement of data privacy under Art. 102 TFEU. First, the economic characteristics of multisided platforms competing on personal data will be introduced, and it will be discussed why these markets are alleged of anti-competitive effects. Second, the concept of market definition and dominance will be elaborated, followed by an analysis of potential theories of privacy-related consumer harm.

Chapter 3 looks at how data privacy can be pursued as a goal under Art. 102 TFEU. The first part compromises an analysis of the *Facebook* case and a comparison between German and EU competition law. The chapter further presents ways in which EU competition law can be broadened to fit the goal of data privacy, specifically by discussing the external impact of the Charter and the GDPR and elaborating on to what extent direct antitrust provisions could be relied upon.

Chapter 4 discusses several legal policy considerations that have the aim to show how EU competition policy can be adapted to compromise data-related competition concerns under Art. 102 TFEU. First, the chapter tries to resolve the concerns of anti-competitive effects and market dominance. Second, two possible ways to include data privacy in the assessments of Art. 102 TFEU are proposed. Furthermore, the integrated analysis includes a discussion on the goals of competition policy and the evolving importance of fairness, as well as the balancing act of data privacy with other interests, such as economic efficiency.

Chapter 5 represents the final conclusions of this thesis.

2 Economic Analysis

The collection and use of personal data have gained increasing significance, and scholars have been trying to resolve the detriment for consumers caused by this development.[52] This chapter aims to contribute to this debate by analysing how competition economics can substantiate the need for the enforcement of data privacy under Art. 102 TFEU.

The economic analysis will revolve around four parts: First, the key economic characteristics of multisided platforms and the competitive importance of personal data will be introduced (section 2.1). Second, the concept of market definition and dominance will be elaborated on (section 2.2). Third, the thesis will discuss whether consumers can suffer detriment through the excessive harvesting of their personal data and how such detriment could be measured in economic terms (section 2.3). The arguments put forward will be concluded in section 2.4.

2.1 Moving Beyond Traditional Markets

2.1.1 Multisided Platforms and Personal Data

Multisided platforms are acting as an intermediary, facilitating the direct interaction between different customer groups.[53] A typical example is Facebook; a company bringing together advertisers and users of the social network. While advertisers pay a substantive fee for the service of posting adds on the platform, users can access the social network at a price of zero – instead, they pay with their personal data.[54]

The reliance of multisided platforms' business model on personal data influences how competition plays out. To assess the impact of personal data, it is reasonable to regard its basic economic characteristics. Personal data are non-rivalrous by nature, which means that the use of data does not reduce the amount that others can use it, and so data can be used repeatedly as an impact factor.[55]

Services by e.g. Google and Facebook have a default opt-in; users are only offered to use the service if they provide their data. This requirement increases the companies' market shares in

[52] See Acquisti, 2010; Acquisti et al., 2016; Deutscher, 2019; Kemp, 2019; N. Newman, 2014A, 2014B; J. Newman, 2015; Stucke & Ezrachi, 2017; Valletti, 2019.
[53] J. Newman, 2015, p. 156.
[54] Economides & Lianos, 2019, p. 14.
[55] Schepp & Wambach, 2016, p. 121.

the data market.[56] The availability of this data is at least as important as a well-functioning search algorithm. For instance, the more information Google can compile, the more relevant the search results will be in the future – not only for the specific user but for all users who are alike in terms of e.g. gender, age and occupation.[57] Particular information on users, for example about their purchasing behaviour, gives the platforms' algorithms the possibility to learn and improve predictions (so-called machine learning) and to make relevant suggestions for future purchases. As more personal data is gathered, better predictions are made and so the quality of the service can be increased. These predictions attract companies who buy targeted advertising space directed to consumers who are interested in precisely the product or service they supply.[58] Personal data is thus an impact factor that enables platforms to entrench their market position.

The multisided facet of platforms is supported by their often conglomerate structure. Not only does e.g. Google's substantial market power in online search translate into substantial market power in online search advertising – the company can also leverage the gathered data from its markets for capital businesses, auto-driving cars, life sciences and more.[59] Although these activities are not in a horizontal, nor vertical competitive relationship with the market for search engines, the data collected from each of these areas fortifies the effect explained above.[60] Taking into account this great potential value of data, the default opt-in excludes a potential market for personal information.[61] This can be categorised as a market failure, which is further supported by several features that entrench the market position of platforms competing on personal data. These are analysed in the following.

2.1.2 Economies of Scale and Scope

Although fixed costs in digital platform markets are assumed to be high, the marginal cost of displaying additional advertising, facilitating interaction between users or answering a search query is considered to be low.[62] Moreover, the mere magnitude of data gathering can lead to sufficient cost advantages, especially, in digital markets where 'the cost of production is much

[56] Economides & Lianos, 2019, p. 14.
[57] Graef, 2016, p. 46.
[58] Prat & Valletti, 2019, p. 2 f.
[59] Lim, 2017, p. 8.
[60] Report for the Federal Ministry for Economic Affairs and Energy (Germany), 2018, p. 117-118.
[61] Economides & Lianos, 2019, p. 15 f. The scholars make use of simple economic equations to model the market failure, which they label 'exploitative requirement contracts'.
[62] Shapiro & Varian, 1999, p. 3.

less than proportional to the number of users served'.[63] As it is pointed out in the Commission report on competition policy for the digital era, 'once a search engine [...] has been developed and is running, it can usually serve fairly cheaply hundreds of thousands of users'.[64] This effect goes under the concept of 'economies of scale'. Apart from economies of scale, a platform collecting data can be subject to economies of scope: The more personal data the platform is gathering, the more insights it will have on individual user preferences and habits, enabling it to improve its service compared to competitors.[65]

Some economists have argued that economies of scale and scope relating to data gathering are subject to diminishing returns, that is when the marginal value or information of more data declines at some point.[66] Depending on the volume at which the returns from the extra personal data start to diminish, the strength of the platform to outcompete other platforms can be determined. *Schepp & Wambach*, therefore, suggest that the effects should be assessed on a case-by-case basis.[67]

2.1.3 Network Effects and Tipping

Another essential feature that has been related to the success of online platforms is the existence of network effects. While network effects may be beneficial to consumers in the short term, they ease undertakings' process of becoming dominant and reinforce entry barriers, which may increase anti-competitive effects in the long run.[68] In the *Facebook* case, the BKartA has labelled the positive direct network effect 'self-reinforcing feedback loop'. It implies that the service provided by a platform is often more valuable to users if it captures a large number of other users, and this effect may increase the risk for markets to tip, i.e. the point where the market-specific size of a network is exceeded and almost no users will be left for competing networks.[69]

[63] Commission report, 2019, p. 20.
[64] Ibid.
[65] Townley et al., 2017, p. 2; Stucke & Ezrachi, 2017, p. 1242.
[66] Katz, 2019, p. 698, fn. 11.
[67] Schepp & Wambach, 2016, p. 121.
[68] Shelanski, 2013, 1682-1683.
[69] *Facebook*, case B6-22/16, para 425-426.

The tipping effect can easily be explained by the example of Facebook: Suppose a user is considering whether to join Facebook or another social media platform (e.g. Myspace). Both platforms set a monetary price of zero, which would make the user indifferent between choosing among the platforms, and in the best-case-scenario the user would join both (multi-homing). However, in the case of social media especially, multi-homing implies additional transaction costs because the user would have to be active on both platforms. This incentivises the user to only choose one of them (single homing). In that case, the user would most likely choose the platform where most of the user's friends are (e.g. Facebook), an effect that will be self-reinforcing over time as more and more friends of this user and others will choose Facebook over Myspace. The result can be the tipping of the market, entrenching Facebook's position and eventually leading to market dominance.[70]

The analysed direct network effects may be further accompanied by indirect network effects (also: 'positive spill-overs'), which are said to occur in situations where the value of the service for one user group increases when the number of users on the other side of the platform increases.[71] This would be true for advertisers who gain additional attention through new users on the social network or search engine where they provide their content. When such a positive spill-over occurs, the platform can use the data accumulated by one user group to improve its service for the other user group, generating additional returns and reinforcing its position.[72]

2.1.4 Switching Costs and Lock-In

Another characteristic of digital platform markets is the existence of switching costs that users incur when changing suppliers. When users incur an investment specific to the current service, it usually must be duplicated with regards to a new service provider.[73] If these costs are so high that the user will stay with the current platform even if another service is preferred, the user is said to be locked-in to the given platform and/or its technology. It has been argued that platforms such as Facebook impose switching costs by restricting data-portability, e.g. by limiting the possibility for users to transfer their profile and content such as photos, videos and the like.

[70] King, 2018, p. 111-112. It can be argued that direct network effects do not play a role on the user side of search engines because users dot not directly benefit from the use of others. Instead, the effects are indirect.
[71] Schepp & Wambach, 2016, p. 121-122.
[72] Ibid., p. 122.
[73] Graef, 2016, p. 51.

The Commission has acknowledged this risk by arguing that:

> 'the loss of contact information, calendar history, interpersonal communications exchanges and other kinds of personally or socially relevant data which is very difficult to create or restore [...] effectively creates a lock-in with the specific service for the user and makes it effectively very costly to change provider [...]'.[74]

Thus, although there may be more privacy-friendly services available, switching costs incentivise users to stay with the provider of their first choice.[75] Furthermore, the concealed nature of data policies by platforms makes it difficult for users to compare alternatives, and thus they may be cumbersome but also oblivious to the lock-in effect.[76]

2.1.5 Barriers to Entry

Platforms that are active in the digital economy have to make substantial investments to enter the market. These high fixed costs are for instance related to the development of advertising tools, search algorithms, social networking features and the like.[77] More important, however, is that the competitive importance of personal data reinforces these entry barriers, making it unprofitable for new competitors to enter the market: The entry barriers have an 'informational character' and are, therefore, different in nature than those playing a role in traditional competition cases.[78] As noted by former Commissioner Almunia, these features 'make it easier for companies to become gatekeepers in their respective markets than it is in the brick-and-mortar economy [...]'.[79]

---

[74] Commission Staff Working Paper, SEC(2012) 72 final, p. 28.
[75] In the case of Google this may be DuckDuck Go, a search engine that does not track users and their data. Stucke & Ezrachi, 2017, p. 1292.
[76] Kemp, 2019, p. 38-39.
[77] Shapiro & Varian, 1999, p. 3. In *Microsoft/Yahoo*, the Commission referred to the following investments that have to be made to enter the market for online search: '[h]ardware, cost of indexing the web, human capital, cost of developing and updating the algorithm and IP patents' and that 'Microsoft estimated that the capital expenditure required to enter the market is approximately USD 1 000 million in hardware and USD 1 000 million in human capital. On top of that, Microsoft estimates that a new entrant would have to spend several billions of dollars to develop and update the algorithm.' *Microsoft/Yahoo*, case COMP/M.5727, para 111.
[78] The 'informational character' of data gives the incumbent further advantages as it facilitates the analysis of users' behaviour and interests. Graef, 2016, p. 60.
[79] Almunia (speech), 11 November 2013.

2.2 Revising the Concepts of Market Definition and Dominance

The foregoing analysis has shown that the opt-in requirement of personal data accumulation by platforms, combined with features such as economies of scale and scope, network effects, switching costs and barriers to entry, allows them to gain competitive advantages. The question of whether these markets may be subject to anti-competitive effects, therefore, seems to be settled. In the following, the focus will be on the question of how the impact of personal data should be considered in the definition of the relevant market and the assessment of market dominance.

2.2.1 Personal Data and Market Definition

In antitrust cases, the definition of the relevant market is vital for the assessment of whether a conduct constitutes an abuse of dominance. Here, the SSNIP test[80] is usually applied but has by virtue of its focus on price been accused of being too simplistic.[81] The reason for the accusation is that the test is not designed to take into account the zero-price-side of the market, where users pay with their personal data. The following section is dedicated to analysing how the market can be defined in the absence of a monetary price.

There have been several proposals on what an alternative SSNIP test could look like. *Stucke & Grunes* discuss whether the traditional test could be used as an analogy – with a focus on privacy instead of price – by considering 'what then would a small but significant non-transitory decrease in privacy protection look like?'.[82] A second and similar approach is found in the assessment of the Chinese Supreme People's Court (SPC), which in a recent antitrust case applied the SSNDQ test. In its assessment, the SPC criticises the High Court's definition of the relevant market, arguing that when the price of a product is zero, a price increase would in percentage terms be 'equivalent to an infinite change in price, implying a major change in the product characteristics or the business model'. Thus, the SPC argues in favour of a test based on a *small but significant and non-transitory decrease in quality* (SSNDQ) instead.[83] *Eben* instead 'begs

[80] The SSNIP test is a hypothetical test, where a small but significant and non-transitory increase in price of 5-10% is used to evaluate the demand- and supply-side substitutability of a given product. In the test, it is evaluated (1) whether consumers will switch to other producers due to the increase in price and (2) whether producers can switch their production to other products that might satisfy the increase in price and thereby increase competitive constraints on the firm with market power. Motta, 2004, p. 102 f.
[81] Schmidt, 2019, p. 46.
[82] Stucke & Grunes, 2016, p. 119.
[83] *Qihoo v Tencent,* 16 October 2014. Review of the case in Stucke & Grunes, 2016, p. 119.

the reader to consider that consumers do pay a price for the service' and suggests the application of the SSNIP test but conceptualising personal data as a price in the analysis (as so-called 'Tradable Personal Data', or 'TPD').[84] TPD is to be seen as information exchanged between a service provider and a user and underlies the assumption that it can be monetised by the former.[85] The argument is that personal data may come to fulfil the function of price as a medium of exchange[86] in online business models that are centred on the offer of free services for profit.[87]

All three approaches can be characterised as novel and have one important thing in common: They show that the challenges occurring in the definition of the relevant markets for platforms competing on personal data may be solved by traditional tools if applied flexibly and creatively. However, a potential issue is that they assume that users could easily detect the degradation in data privacy, which would motivate them to switch to another platform. Despite the endorsement for the development of adapted tools, assessing and measuring the variables is trickier than using price as a proxy. For example, the EU delegate at the OECD roundtable expressed that it would be difficult to replace the SSNIP test with an SSNDQ test, 'insofar as the latter relies heavily on market data that is inherently difficult to measure'.[88] A possible solution to this challenge would be for enforcers to make use of conjoint analysis to determine the residual elasticity of a platform, i.e. whether a decrease in privacy for users of one multisided platform would motivate them to switch to another platform with higher privacy protection standards.[89]

2.2.2 Personal Data as a Source of Market Power

Corollary to defining the relevant market, antitrust enforcers must assess whether the alleged platform has market power. In the following section it will be discussed how the competitive importance of personal data can be taken into account in the measurement of market power.

[84] Eben, 2018, p. 231.
[85] Ibid., p. 233.
[86] According to Eben, two essential criteria must be fulfilled for personal data to be seen as a medium of exchange: *value* and *acceptability*. Eben argues in favour of these criteria to be fulfilled but stresses that further research and practical evidence is needed to make TPD feasible for the purpose of market definition. Ibid., p. 236 f.
[87] Ibid., p. 236.
[88] OECD, 2013B, p. 164.
[89] The use of conjoint analysis is further substantiated in section 2.3.3.

A typical procedure followed by competition authorities is to start measuring market shares held by firms on the relevant market making use of the Lerner Index and econometric techniques.[90] This traditional approach is subject to several hazards. First, the difficulty to use these evaluation tools arises with the competition on the free side of multisided platforms, where users pay with their data and the measurement of 'ability to raise prices above competitive levels'[91] loses its effect. Second, the establishment of market power on one side of the market does not necessarily entail market power on the other side of the market and what might appear to be dominance in the revenue-generating market because of a platforms' ability to raise price above marginal costs, cannot be translated into the free user market. Consequently, the accumulation of personal data must be taken into consideration when assessing market power.

Recalling *Schmidt*, we can get around this challenge by considering 'the legal concept of »dominance« being flexible [and] allowing for other indicators to establish market power'.[92] He lists indicators regularly applied in the assessment of market power, comprising superior technology and efficiency, economies of scale, overall size and strength, network effects and more.[93] The Commission confirmed the importance of other indicators when it noted that the conclusion of dominance in the *Google Shopping* case was based on the company's 'market shares, the existence of barriers to expansion and entry, the infrequency of user multi-homing and the existence of brand effects and the lack of countervailing buyer power'.[94] All these factors can help to entrench platforms' market power and can give the firm an incentive to reduce privacy protection while still retaining users.

The BKartA acknowledges this market failure, relying on the possibility for Facebook to process data even against the will of users, who have become subject to the 'privacy paradox'.[95] The competition authority relies on a novelty when evaluating the company's market shares, which might solve the issues revolving around the traditional price-centric approach. It bases the assessment on several metrics: numbers of daily active users (DAUs), monthly active users (MAUs) and the number of registered users of the service, the most important of them being

[90] The Lerner index is defined as the firm's ability to set price over marginal cost over price ratio: $L_i = (p_i - C'_i)/P_i$. Under econometric techniques falls the use of residual demand elasticities and logit models. For a review see Motta, 2004, p. 116 and p. 123 f.
[91] Motta, 2004, p. 115, fn. 22.
[92] Schmidt, 2019, p. 52.
[93] Ibid., p. 56.
[94] *Google Shopping*, case AT.39740, para. 272.
[95] *Facebook*, case B6-22/16, para 384-385. For a discussion on the 'privacy paradox' see section 2.3.1.

the share of DAUs.[96] To define the metrics, the competition authority proceeded survey-based, asking the social networks on the relevant market to state their quarterly user numbers achieved during the previous year and calculating the user shares based on the information gathered.[97] Relying on the resulting company's market share between 50 and 100% combined with an overall assessment of the same factors discussed in section 2.1, the competition authority concludes that Facebook is dominant in the national market for social networks for private users.[98]

Another approach of inspiration could be the one derived by *Graef*, who is focusing on the ability of a company to monetise the collected personal data and use the revenue as an indication of how successful the company is in the market.[99] She stresses that the amount or quality of data does not constitute an adequate indicator for market power because some personal data might have a lower value than other, depending on the information it gives to the platform. The measurement of success to monetise the data thus seems more reliable as it also takes into account the success of a provider to gain revenue from the employment of data.[100] However, the drawback to this approach is that not every platforms' business model relies on the monetisation of personal data.[101] When reaching such a point, it can be suggested to look past the market shares themselves and consider the 'likelihood that other undertakings hold similar information or that new entrants are able to collect the required data themselves thereby putting the incumbent under competitive pressure'.[102]

In conclusion, it can be stated that multisided platforms competing on personal data are challenging analytical subjects with regards to the measurement of market power, but the approaches analysed above could be of inspiration for competition authorities.

[96] *Facebook*, case B6-22/16, para 389 f.
[97] Ibid., para 391.
[98] Ibid., para 386 and 403 f.
[99] Graef, 2015, p. 502. This approach is similar to the conceptualisation of personal data as TPD by Eben, see section 2.2.1.
[100] Ibid.
[101] E.g. WhatsApp prior to its acquisition by Facebook.
[102] Graef, 2015, p. 503.

2.3 A Coherent Theory of Harm

It can be argued that the current absence of a privacy-related theory of harm lies with the orthodox assumption that privacy should be addressed by data protection law, which has been expressly endorsed by the Commission.[103] This view is, however, increasingly being challenged by scholars, paradoxically even by former DG Comp economists.[104] In the following, the rise of behavioural antitrust in relation to the data economy will be investigated, followed by an attempt to formulate possible theories of harm that link data harvesting with degradations of consumer welfare.

2.3.1 Behavioural Biases and Users' Inability to Make Well-Informed Decisions

Neoclassical economics generally proceed under the assumptions that consumers are 'perfectly rational, utility maximizing and narrowly self-interested'[105] – they are also coined the 'homo economicus'.[106] The dissatisfaction with some of these traditional assumptions has brought to light an emerging body of behavioural economics,[107] which might be a better fit for demonstrating the impact of multisided markets on users of free services.

Behavioural economics is focusing on three key elements: bounded rationality, bounded willpower and bounded self-interest of which the first two are highly relevant for the analysis of the research question.[108] Bounded rationality implies that consumers are not perfectly objective when they make choices and do not necessarily update their factual beliefs whenever assessing information.[109] Building the bridge to the digital economy, one might find this kind of behaviour in his or her everyday life: When accessing a new digital service for the first time and the login field pops up, many users opt for the easy alternative and choose to login with Facebook.[110] Does the majority of users going for this alternative read the terms and conditions before accepting? No – instead we 'maintain an illusion of objectivity' and only engage in a

[103] *Facebook/WhatsApp*, case COMP/M.7217, para 164.
[104] See the efforts of Tommaso Valletti, former chief economist at DG Comp, to include data and privacy in antitrust. Valletti, 2019.
[105] J. Newman, 2015, p. 183.
[106] Huffman, 2012, 115.
[107] Reeves & Stucke, 2010, p. 1528.
[108] Ibid., p. 1528.
[109] Ibid., p. 1532-1533.
[110] For an analysis of Facebook's social login, see Schroers, 2019.

couple of steps of iterated reasoning, or eventually none, which may lead to sub-optimal decision making.[111] In *Acquisti & Grossklags'* view:

> 'the complex life-cycle of personal data in modern information societies can result in a multitude of consequences that individuals are hardly able to consider in their entirety (as human beings, because of our innate bounded rationality, we often replace rational decision making methods with simplified mental models and heuristics).'[112]

Similar is true for our bounded willpower – often, we might make choices that are not in our long-run interest.[113] Carrying on the example from before: Would the majority of users repress from using the new service if aware of the impact the data accumulation could have in the future? At a practical level, we may not engage in this cost-benefit analysis that is expected from us under rational choice theory. Instead, we often give in to the temptation of smart and fast solutions that make our everyday life easier in the short-run.[114]

The observation that complete rationality and willpower are a myth is also confirmed by the privacy paradox, which fits into the discussion of our behavioural limitations to fulfil the orthodox assumptions under neoclassical theory. While consumers repeatedly claim that they are highly concerned about their data privacy, their behaviour in continuing to accept privacy-intrusive terms and conditions indicates the opposite.[115] This observation is sometimes used to contend that regulatory intervention is unnecessary as consumers through their behaviour *reveal* that they do not care about privacy.[116]

Scholars have identified several behavioural biases and cognitive limitations that might be the cause of why users' behaviour and preferences are not reliable indicators of how they value their privacy.[117] *Acquisti et al*. show that our leaning towards sharing personal information is influenced by other people's disclosure behaviour and their judgements.[118] *Acquisti & Grossklags* highlight that privacy choices are affected by incomplete information and in particular asymmetric information.[119] The fact that a user might not know when a platform has gained

[111] Reeves & Stucke, 2010, p. 1533.
[112] Acquisti & Grossklags, 2007, p. 2.
[113] Reeves & Stucke, 2010, p. 1535.
[114] Eben, 2018, p. 254 f.
[115] Kemp, 2019, p. 28.
[116] Valletti, 2019, p. 3.
[117] Ibid.
[118] Acquisti et al., 2012, p. 172.
[119] Acquisti & Grossklags, 2007, p. 1-2.

access to or used the personal data, and the negative effects such practices may have, can translate into a lack of transparency.[120] Examples are provided by Facebook and Google: 'We use your personal information to easier decide, which ad we should show you.'[121] or 'We collect information about your location when you use our services, which helps us offer features like driving directions for your weekend getaway or showtimes for movies playing near you.'[122] Users are made to see the instant benefit of saying yes to these privacy terms – if they at all choose to read them due to their lengthiness and opaqueness – and are prevented from seeing the possible future costs that are corollary to these benefits.[123] The ability by platforms to make users accept because of a lack of alternatives is an indication of how their market power may undermine the self-determination of individuals while increasing information asymmetries.[124]

If privacy preferences are malleable and unstable, it points towards that there is a severe dichotomy between users' privacy concerns and behaviours. The privacy paradox might not be that paradox – it is only under the assumption that users engage in rational disclosure of their personal data. The poor understanding of data practices makes it difficult for users to realise their true preferences and the possible degradation of their welfare. The possibility for dominant platforms to take advantage of these cognitive limitations, tricking users into disclosure, is an important factor to take into account in the formulation of privacy-related theories of harm.

2.3.2 Theories of Privacy-Related Consumer Harm

2.3.2.1 Data Harvesting as a Degradation in Quality

A long-standing concern of consumer harm in digital platform markets is the degradation of the services' quality due to decreased privacy protection.[125] Scholars and enforces have substantiated the risk that market power may lead to the reduction of privacy protection below competitive levels and the collection of personal data above competitive levels.[126] In the *Facebook* case, the BKartA argues that 'the extent of data processing can also be seen as an element of

[120] Valletti, 2019, p. 3.
[121] Facebook Terms of Service, 31 July 2019.
[122] Google Privacy Policy, 15 October 2019.
[123] Eben, 2018, p. 254 f.; Valletti, 2019, p. 3.
[124] Kemp, 2019, p. 38 f.; Valletti, 2019, p. 4.
[125] Stucke, 2018, p. 11.
[126] See for example Stucke & Ezrachi, 2017, p. 1285 on how digital assistants 'can depress privacy protections below competition levels.'

the quality of the service' and that 'the possibility of combining different data sources [...] means a different quality of invasion into the privacy of the individual'.[127]

There has been conducted a detailed case study about the phenomenon of qualitative differentiation in terms of privacy in the success story of Facebook. *Srinivasan* points out that in its upstart, Facebook tried to differentiate itself from the back then market leader Myspace by publicly pledging to take privacy seriously and persuading users that the social network will refrain from surveillance for commercial purposes.[128] She argues that privacy has been a major concern of Facebook's users and that the company's 'short privacy policy, default privacy settings and outward signalling as privacy-centric [...] played an important role in attracting users to the platform'.[129] However, as competition began to disappear, Facebook revoked its former privacy standards and started to degrade privacy levels to standards that we are familiar with today.[130] On the free side of multisided markets, where quality is severely more important for competition than price, this example shows how quality degradation can happen due to monopolisation.

There is a stance of academics that is in favour of the approach to include privacy as a parameter of competition. *Deutscher* argues that privacy 'constitutes an important non-price parameter of competition in online markets'.[131] Similarly, *Stucke & Grunes* point out that markets are in a 'dysfunctional equilibrium' because incumbents do not have incentives to protect users' privacy due to the hereto connected costs, and entrants will not achieve a sufficient user basis to make a profitable business.[132] Their argument builds on the competitive importance of personal data and the lock-in-effect that users are subject to when platforms use their market power to act independently of users' privacy preferences.[133]

This approach suffers from two flaws. First, analytical frames are needed to interpret the implications that the harvesting of personal data by platforms has on the potential degradation of quality. According to *Manne & Sperry*, consumers might not only suffer detrimental losses due

[127] *Facebook*, case B6-22/16, para 379 and 611.
[128] Srinivasan, 2019, p. 48 f.
[129] Myspace was open to anyone but in order to join Facebook, users had to validate their identity with a university-issued '.edu' email address. Moreover, Facebook hired a chief privacy officer, and the initial privacy policy was only around 950 words long. Srinivasan, 2019, p. 51.
[130] Srinivasan, 2019, p. 55 f.
[131] Deutscher, 2019, p. 189.
[132] Stucke & Grunes, 2016, p. 66.
[133] Ibid., p. 65-66. See also section 2.1.

to decreased privacy protections but also see benefits, such as better targeted advertising, which would imply a quality improvement.[134] Second, the 'magnitude of harms' between privacy-sensitive users versus less-privacy sensitive users would have to be compared by antitrust authorities to find whether an alleged practice would harm consumers, and this could be a very difficult exercise.[135]

Considering the arguments put forward, there seems to be a rational to focus on privacy as a dimension of quality when assessing the possible harm for users. However, the evaluation of such an impact might not be easy due to users' individual preferences for privacy, where some might be in favour of more protection, while others might be indifferent.

2.3.2.2 Facilitation of Price Discrimination

Another economic basis for a privacy-related theory of harm is the increased risk of price discrimination facilitated by excessive data collection and the use of algorithms. Personal information on users enables platforms to segment them, and it can be argued that this can result in price increases and/or demand-inflation.[136] *Ezrachi & Stucke* coin this phenomenon 'behavioural discrimination'.[137]

Behavioural discrimination is a complex form of new price-discrimination, and it can be discussed whether platforms' practices to facilitate it should be deemed anti-competitive.[138] The reason is that platforms operating on zero-price side markets only act as intermediators in the direct price discrimination on the end-consumer: The platform segments users with the help of algorithms, which analyse their personal data and refine their profiles, including reservation prices, habits, alternative options and behavioural weaknesses.[139] These better profiling standards enable dominant platforms on multisided markets to charge higher prices in the online advertising market (the paying-side), and these higher prices charged to advertisers can get passed onto end-consumers in the form of higher prices for the advertised goods and services

[134] Manne & Sperry, 2015, p. 4.
[135] Ibid., p. 6.
[136] Ezrachi & Stucke, 2016, p. 101; N. Newman, 2014A, p. 62; Townley et al., 2017, p. 28.
[137] Ezrachi & Stucke, 2016, p. 101.
[138] Scholars are suggesting that we are moving from a form of third-degree price discrimination to near-perfect price discrimination as algorithms make it possible to segregate users in ever-smaller groupings that have similar price sensitivity and purchasing behaviour. Ibid., p. 101 f.
[139] Ezrachi & Stucke, 2016, p. 102 f.; Townley et al., 2017, p. 2.
[139] Townley et al., 2017, p. 6.

they buy. This has two effects that tend to reduce consumer surplus: First, products or services might be offered at higher prices to those who value them highly and/or are easily persuadable. Hence, the platform can increase its profits (rents) at the expense of the end-consumer ('rent transfer effect').[140] Second, the output may not be allocated to those consumers that value it the most ('(mis)-allocation effect').[141] One may argue that the platforms' role is essential as they provide the requisite mechanism for price discrimination to occur, which can imply a loss in consumer welfare. Therefore, it can be argued that the facilitation hereof is an obvious theory of harm that should be subject to antitrust scrutiny.[142]

This approach, however, misses that behavioural discrimination may also have positive economic effects. For example, it can 'enable businesses to expand their output by serving previously underserved consumers'. [143] *Manne & Sperry* argue that by making use of segmentation, companies would be able to offer lower prices to lower-income classes, which can be identified through the data collection.[144] Moreover, it is important to consider the dynamic efficiencies that price discrimination can facilitate: Due to the prospects of higher prices, it may incentivise entrants to enter the market and increase competition for the advantage of consumers.[145] Therefore, there might not be a total welfare loss but gain instead. The first argument seems to be valid and points toward that the price discrimination approach could be subject to analytical problems. It might be difficult to differentiate between the prospects and negative effects of behavioural discrimination and to substantiate actual harm to consumers. This could also increase the risk of assessment errors in antitrust enforcement. The second argument, however, fails to consider that data markets are subject to high entry barriers and thereby ignores the features that make it difficult for new rivals to compete on these markets. The concealed nature of platforms' data practices makes successful entry even less likely because the resulting informational asymmetry makes comparisons of alternatives difficult to perform for users. Thus, this argument should be awarded a limited weight.

[140] Townley et al., 2017, p. 6.
[141] Ibid.
[142] N. Newman, 2014B, p. 4.
[143] Manne & Sperry, 2015, p. 7.
[144] Ibid.
[145] Ibid.

In can further be pointed out that the use of algorithms can allow for precise matching of consumer preferences and the products advertised, increasing market efficiency.[146] However, the matching is efficient only as long as consumers are offered products that they truly need or want (it is in accordance with their preferences) and not if the purchase was grounded in demand-inflating misperception-practices by the platform.[147] The methods of data processing present new possibilities of identifying cognitive biases and misuse them to trigger consumers into buying products or services they otherwise would not have purchased. The result is an unnatural increase in consumption, shifting the demand curve to the right.[148] The consumption increase might not necessarily make consumers better off – instead, it may imply a wealth-transfer to platforms and companies taking part in the behavioural discrimination.[149] Further, the manipulative practices may cause excessive consumption of demerit goods, such as cigarettes, 'a reasonably well-theorized harm'.[150]

Thus, although price discrimination can have benefits, the exploitation of our imperfect willpower and bounded rationality to increase consumption, without necessarily increasing consumer welfare, seems to reveal a concrete privacy-related harm. The effects, however, should be seen in the context of whether competition on the market is hampered and the consumer-segmentation can occur as a result of a dominant position.

2.3.2.3 The Deliberate Lack of Personal Data Protection

Apart from the obvious risk of price discrimination, according to *Newman* the more pervasive harm is the one stemming from the deliberate lack of personal data protection.[151] Inspired by *Acquisti*, the analysis of this possible theory of harm will depart from four types of costs that users incur when accepting opaque terms and conditions that imply the transfer of their data to digital platforms: (1) intangible costs, (2) tangible costs, (3) indirect costs and (4) probabilistic costs.[152]

[146] Bar-Gill, 2018, p. 3.
[147] Ibid., p. 2 f.
[148] Ezrachi & Stucke, 2016, p. 101.
[149] Ibid., p. 120-121.
[150] Calo, 2014, p. 1025; Ezrachi & Stucke, 2016, p. 120.
[151] N. Newman, 2014A, p. 62.
[152] Acquisti, 2010, p. 16.

Intangible costs imply the psychological discomfort with feeling observed or violated and the loss of autonomy connected to the fact that 'someone' knows so much about us.[153] Most users of search engines have experienced this: You are on the lookout for a new vacuum cleaner (or similar). You open your browser, search for one and find one, even at a reasonable price. You decide to think about it and close the browser. The day after your whole Facebook-feed is overflowing with vacuum cleaners. You suddenly get goosebumps and feel monitored – this is the disturbing and costly effect of your privacy being intruded.

Tangible costs occur when deleting junk mail, due to annoyances from ads or telemarketing calls.[154] The costs are mainly stemming from attention to unwanted advertisement, which can be frustrating for targets.[155] Moreover, price discrimination is a tangible cost and the probability hereof increases when users become subject to *indirect costs* (segmentation and profiling).[156] *Stucke & Ezrachi* argue that the greater volume of data available to firms about customers combined with the increasingly sophisticated means of using algorithms is likely to increase the risk of segmentation.[157] This segmentation may circle directly back to the harm incurred in the form of behavioural discrimination as discussed in section 2.3.2.2.

Lastly, users may be subject to *probabilistic costs*, i.e. 'expected, rather than occurred, damages'. [158] This may imply data breaches that can eventually result in identity theft or errors in users' databases due to poor data handling procedures by firms, which may cause consumers' requests to be wrongfully denied at a later point (for example in the case of insurance-applications).[159] An example of this risk is the extensive transfer of Facebook users' personal data to Cambridge Analytica, a consulting firm that misused the personal information of millions of people's Facebook profiles for political advertising purposes without gathering consent.[160] Similar data breaches have occurred as part of Facebook's partnerships with at least 60 device makers, which gave these companies access to data of Facebook users' friends, becoming subject to unwanted data flows.[161]

---

[153] Acquisti, 2010, p. 16; Acquisti et al., 2016, p. 447.
[154] Acquisti, 2010, p. 16.
[155] J. Newman, 2015, p. 170.
[156] Acquisti, 2010, p. 16.
[157] Stucke & Ezrachi, 2017, p. 1264.
[158] Acquisti, 2010, p. 16.
[159] Ibid.
[160] The New York Times, 3 June 2018.
[161] Ibid.

According to *Valletti*, these costs are objective and directly related to lower privacy protection and lack of competition in digital platform markets.[162] He argues that dominant platforms' ability to engage in concealed data practices, i.e. imposing terms of service with weak privacy protection that users do not understand but still accept due to the lock-in-effect, are detrimental for consumer welfare.[163] With more competition on these markets, it would probably become clear that users giving their data away are currently underpaid because the costs this trade-off implies are much higher than the actual value of their data for the companies building their business models around it.[164]

A privacy-related theory of harm revolving around these concerns would account for the discussed insights from behavioural economics regarding the effect of information asymmetries and cognitive biases on consumers' privacy choices and switching behaviours.[165] This approach is in accordance with the analysed literature above and is similarly supported by the BKartA in the *Facebook* case.[166]

2.3.3 How to Measure Privacy-Related Consumer Harm?

In the former sections three possible theories of privacy-related consumer harm have been put forward. The findings suggest that all three could imply a substantial loss in consumer welfare, which would give competition authorities the economic support to find alleged practices of data harvesting violating Article 102 TFEU. This section will revolve around how a degradation in privacy protection – and the hereto related harm – could be measured.

In the *Facebook* case, the BKartA acknowledges the high damage potential for users of the platform's data accumulation but also notes that 'it is difficult to quantify the effects of the damage, since it is not clear whether, when and how potential [...] consumer damage will occur and which users will be affected.'[167] Instead, the competition authority suggests using data pro-

[162] Valletti, 2019, p. 4.
[163] Kemp, 2019, p. 11.
[164] Valletti, 2019, p. 5.
[165] Deutscher, 2019, p. 197. See also section 2.3.1.
[166] The BKartA expressed that 'the collection of data itself can lead to behavioural changes among users, for instance, to avoid adverse reaction among friends or public bodies'. *Facebook*, case B6-22/16, para 909.
[167] Ibid., para 911-912.

tection regulation as a qualitative benchmark for determining the exploitative abuse. Accordingly, non-compliance with privacy regulations would indicate that a platform has violated Art. 102 TFEU.[168] This approach will be subject to more discussion in the integrated analysis.[169]

Further, the potential deterioration of privacy protection could be measured in qualitative terms by comparing privacy policies prior to a platforms' dominance and when dominance has been established as a concept of privacy-price.[170] In the case of Facebook for example, the platform evidently decreased privacy protection for users as its market dominance increased.[171] Such a change in privacy policies, which requires users to disclose more of their personal data, could then be interpreted equally to a price increase.[172] The disadvantage of this approach is that an increase in data harvesting is not necessarily understood as harmful by each user. As discussed in section 2.3.2.1 some, less-privacy-sensitive users, may favour the change in privacy policies if this would increase the quality of the service. Moreover, the exact amount of the price increase could be difficult to quantify, as the importance of changes in privacy policies can differ, depending on for example the type of information that users have to give away. This is where a conjoint analysis could be of help.

A conjoint analysis could economically corroborate the aforementioned proposition that personal data may constitute an actual price paid by users and be used as a quantitative tool for measuring the consumer harm related to privacy degradations.[173] It may enable the identification of the respective value of privacy protection for users by measuring how changes in the attributes hereof influence their preferences and decision making.[174] Similar models have been used by other economists to investigate users' privacy valuations, which validates the approach.[175] Competition authorities could carry out such an analysis in three steps: The conjoint analysis should start with the formulation of a consumer survey that helps to identify the relevant price and non-price attributes of the platforms' service by breaking it into its constituent

[168] *Facebook*, case B6-22/16, para 912.
[169] See section 4.4.1.
[170] This approach is inspired by *Deutscher*, who argues that in the *Facebook*/*WhatsApp* merger, the Commission could have measured the degradation in privacy protection by comparing the privacy policies prior to the merger and the potential privacy policies post the merger. Deutscher, 2019, p. 194 and 198. For methods of calculating a privacy-price see also Malgiere & Custers, 2018; OECD, 2013A.
[171] See section 2.3.2.1.
[172] Deutscher, 2019, p. 199.
[173] Ibid., p. 201.
[174] Ibid., p. 200.
[175] See Acquisti et al., 2013; Krasnova et al., 2009; Phelps et al., 2001; OECD, 2013A, p. 29 f. On the economics of conjoint analysis see Baker & Rubinfeld, 1999; Green & Srinivasan, 1978.

parts (called attributes and levels).[176] With regards to privacy as an attribute, an analysis of social networks could include the following attribute levels: (1) no disclosure of personal information; (2) disclosure of basic profile (name, email address or phone number); (3) full profile disclosure; and (4) full profile disclosure plus disclosure of contacts or friends.[177] Hereafter, all attributes and attribute levels should be bundled in different combinations (so-called stimuli).[178] This second step is followed by asking a specific number of representative users[179] to choose their preferred choice sets,[180] which they are then asked to rank according to their individual preferences.[181] Employing statistical methods, the relative importance of each attribute and attribute level for the users' platform services can be estimated.[182] To measure the value users ascribe to privacy and changes in privacy protection, the utility changes in response to variations in the attributive level are weighed with the utility changes in response to changes in monetary prices.[183] This approach would not only give competition authorities the possibility to measure the aforementioned consumer harm – it would also provide a tool to balance this possible harm with pro-competitive efficiencies.[184] Compared to traditional survey methods it might be a more reliable tool, as it allows to account for the privacy paradox because users can reveal their behaviour rather than only state their preferences.[185]

Regrettably, the quantitative approach is subject to disadvantages as well. The conjoint analysis is very complex in nature and requires heavy administrable resources.[186] Moreover, the results are often dependent on the way the choice sets are framed, which can lead to assessment errors and cause legal uncertainty.[187] It should, therefore, not be relied upon as the sole element on which an assessment is based. However, in combination with the privacy-price concept it could

[176] Deutscher, 2019, p. 202. It can be argued that this exercise is already applied when defining the relevant market. See Hildebrand, 2002, p. 13 f. on the application of conjoint analysis in the Hypothetical Monopolist Test.
[177] Inspired by Deutscher, 2019, p. 203. For a full example of possible attributes and attribute levels in conjoint analysis of social networks see appendix B.
[178] Green & Srinivasan, 1978, p. 105.
[179] The representative sample should include ideally around 1,000 users and represent different age and population groups. Moreover, it is of great importance, that it is composed of both actual and potential users. Deutscher, 2019, p. 202.
[180] The users should only be confronted with a limited number of choice sets, ideally 12-20. Ibid.
[181] Baker & Rubinfeld, 1999, p. 425.
[182] Green & Srinivasan, 1978, p. 107.
[183] Deutscher, 2019, p. 202.
[184] Ibid., p. 204.
[185] Ibid., p. 207.
[186] Ibid., p. 205.
[187] Ibid. The assumption of consumer rationality should thus be applied in a balanced manner, considering the findings in section 2.3.1

constitute an appropriate framework for competition authorities to measure consumer harm related to potential data privacy abuses.

2.4 Conclusion

The economic analysis has substantiated that personal data has an increasing value and competitive importance. The opt-in requirement by platforms to limitless accumulate users' personal data in exchange for the use of their services can be categorised as a market failure. The exclusive control over personal data may lead to impassable barriers to entry, due to the advantages enjoyed by incumbents and the concealed nature of data policies that make it difficult for users to compare alternatives. In addition, digital platforms can be subject to economies of scale and scope, as well as network effects. These features increase the risk of market concentration and should cause attention from competition authorities.

Moreover, it was analysed how current tools for market definition and assessment of dominance may be applied with regards to personal data. The conception that zero-price markets cannot constitute relevant markets and that market dominance cannot be assessed as a result hereof has been counter-argued. Although digital platforms constitute challenging analytical subjects, the traditional tools in antitrust applied creatively and combined with a stronger focus on conjoint- and survey-based analysis may be the way forward.

Lastly, the economic analysis has focused on the potentially detrimental effects of data accumulation on users by discussing three privacy-related theories of harm: (1) privacy protection may be reduced as a parameter of quality or limited consumer choice; (2) the collection and use of personal data can be used to segment consumers, thereby facilitating price discrimination; and (3) the deliberate lack of personal data may cause intangible, tangible, indirect and probabilistic costs for users. It has been outlined that these reductions in consumer welfare are related to the abuse of users' cognitive biases and their inability to make well-informed decisions. The operationalisation of the proposed theories of harm should be addressed by a combination of a privacy-price concept, considering a platform's privacy policies prior and post dominance and conjoint analysis, which may enable users to reveal their true preferences.

In conclusion, chapter two has outlined that the collection and use of personal data by undertakings has economic implications in an antitrust perspective.

3 Legal Analysis

In the former chapter the need for the enforcement of data privacy has been established from an economic perspective. The legal analysis will discuss how this approach can be pursued under Art. 102 TFEU with inspiration from the BKartA's decision against Facebook.

The following analysis will proceed in three steps: First, the *Facebook* case by the BKartA will be presented, followed by a comparison of German and EU competition law (section 3.1). Second, it will be examined whether the BKartA's alleged data privacy abuse is legally conceivable under EU competition law as well (section 3.2). Finally, section 3.3 concludes chapter three.

3.1 The German Way of Linking Antitrust and Privacy

In 2019, the BKartA issued an interim injunction against Facebook for the abuse of its dominant position in the German market for social networks, based on the company's imposition of abusive privacy policies, allowing the limitless accumulation of personal data generated by the use of third-party websites and merging it with the users' Facebook accounts.[188] In its judgment the BKartA links antitrust violations under Section 19 GWB with data protection law, thereby bending competition law to the 'heteronomous task of protecting users' personal data'. [189] The BKartA's judgment is seen by many as a landmark decision because it is the first attempt to expand the frontiers of competition law to pursue the goal of data privacy.[190] This is also the reason why an analysis of the case is found relevant for the answering of the legal sub-question.

Facebook appealed the decision to the competent Düsseldorf Higher Regional Court (Oberlandesgericht Düsseldorf (OLG)), which ruled in favour of Facebook and ordered the suspension of the interim injunction of the BKartA's decision.[191] It follows from the judgement that 'contrary to the Bundeskartellamt's view, the data processing by Facebook [...] does not give rise to any relevant competitive damage or any undesirable development in competition'[192] and

[188] *Facebook*, case B6-22/16.
[189] Schneider, 2018, p. 213.
[190] See Botta & Wiedemann, 2018 and 2019; Colangelo & Maggiolini, 2018 and 2019; Höppner, 2018/2019; Kemp, 2019; Robertson, 2020; Schneider, 2018; Volmar & Helmdach, 2018; Wils, 2019.
[191] *OLG on Facebook*, case VI-Kart 1/19 (V). This decision has similarly been appealed by the BKartA to the Federal High Court (Bundesgerichtshof (BGH)) of which the decision at the moment of writing (i.e., May 2020) is still outstanding.
[192] Ibid., p. 6.

the theory of abuse constructed by the BKartA was found to be non-existent.[193] In the following, the decision by the BKartA will be examined. The contesting statements put forward by the OLG will not be discussed here but instead substantiate the discussion in section 3.2 to increase the validation of the arguments for and against pursuing data privacy under competition law.

3.1.1 Revising the *Facebook* Case

The decision by the BKartA follows a logic that is two-folded. First, the competition authority refers to infringements of data protection as a key part of the assessment to find Facebook's conduct abusive – specifically, the GDPR and fundamental rights provided by the Charter. Second, the BKartA is relying on direct antitrust accusations as well.

3.1.1.1 A Privacy Violation Dressed as an Antitrust Violation

The following part will analyse the BKartA's focus on Facebooks' violation of data protection principles and fundamental rights, which according to the authority represent an abusive practice under Section 19 GWB.[194] The BKartA argues that state regulations, Section 19 GWB included, have to intervene to 'uphold the protection of constitutional rights' if 'constitutionally guaranteed legal positions are interfered with'.[195] According to the authority, the fundamental right to data protection under Art. 8 of the Charter must be weighed against the rights and interests of the data processor – and if a sufficient degree of market power is involved, the constitutional principle can be applied.[196] Thus, the BKartA argues that in the case at hand non-competition law principles must be taken into account, in particular the higher-ranking constitutional principles, which include data protection rules.[197]

To support this finding, the BKartA argues that it is in no violation of the rules on competence, as it 'does not operate to enforce data protection rules as a national data protection officer, but merely applies the European law principles as important indications for its assessment under

[193] *OLG on Facebook*, case VI-Kart 1/19 (V), p. 6 f.
[194] *Facebook*, case B6-22/16, para 523.
[195] Ibid., para 527.
[196] Ibid.
[197] Ibid., para 543.

competition law of whether the conduct of a dominant company is appropriate'.[198] In this regard, the competition authority also refers to the principle of consistent interpretation and points out that the substantive application of data protection law through competition law promotes consistency instead of threatening it, as the BKartA otherwise would have to develop other benchmarks or tools than following those from the GDPR.[199] Moreover, the BKartA refers to the fact that data protection authorities themselves have acknowledged the importance of antitrust enforcement as a reaction to violations of data protection rules and that it is the essential task of the BKartA to put an end to abusive practices that fall under the scope of the GWB.[200] The legislative intent on the 9th amendment to the GWB, where the access to data was included as a stand-alone criterion in the assessment of market power, according to the authority, implies that the German legislator is 'expressly emphasizing the relevance of data processing for competition law'.[201]

The BKartA acknowledges that data protection similarly takes into account the examination of a dominant position as it is clarified in the recitals to the Regulation that a clear imbalance between the controller and the data subject is required. That, however, does not imply, that the control of dominance by the competition authority is unnecessary. On these grounds, the BKartA concludes that the decision against Facebook does not imply a breach of the principle of sincere cooperation under Art. 4(3) TEU as parallel abuse control by the competition authority is necessary.[202] According to the BKartA, this finding is supported by the initiative by the German legislator to pave the way for cooperation with the German data protection authorities in Section 50c GWB, which the BKartA considered by consulting the relevant data protection authorities prior to the judgement.[203]

After having initiated its decision with focus on general principles, the BKartA dives deep into the interpretation of the GDPR and as one can argue acts 'as if it were a data protection authority'.[204] Most importantly, the BKartA notices that users' consent cannot be regarded as freely given within the meaning of Art. 6(1a) and 9(2a) GDPR as they were not fully aware of the

[198] *Facebook*, case B6-22/16, para 536.
[199] Ibid., para 541 and 551.
[200] Ibid., para 547
[201] Ibid., para 550.
[202] Ibid., para 554.
[203] Ibid., para 555.
[204] Colangelo & Maggiolini, 2019, p. 8.

collection and processing of their personal data and could not express a genuine form of consent.[205] As the authority puts forward:

> 'It cannot be assumed that individuals give their consent voluntarily since *users are forced* to consent to data processing terms when they sign up for a service provided by a company that has a dominant position in the market'.[206]

Moreover, the BKartA argues that the excessive collection of data from third-parties was not necessary for the offer of the service provided by the platform, i.e. for the performance of the contract itself, and cannot be justified pursuant to Art. 6(1b) GDPR.[207] Within the framework of the necessity-assessment, the competition authority finds it essential to take into account the dominant position of the company and argues that Facebook has a 'special responsibility' that it does not adhere to.[208] The competition authority neither deems the data accumulated from Facebook-owned services nor from Facebook Business Tools to be necessary to safeguard a personalised user experience: Although 'the ads shown might be less accurate and effective', Facebook would still be able to provide its outlined service.[209] Lastly, the BKartA shows that Facebook does not meet any of the legitimising conditions listed by Art. 6(1c-1f) GDPR.[210]

This departure from the mere application of general data protection principles, amounting up to 90 pages of data protection rule enforcement,[211] can be characterised as far-reaching as it can no longer be upheld by the argumentation put forward by the BKartA; 'merely applying European law principles', thereby not breaching the rules of competence.[212] The competition authority tries to resolve this conflict of competences by dressing the alleged privacy harms as cognisable antitrust violations. In its attempt to target Facebook's data accumulation strategy under Section 19(1) GWB, it relies on the case law of the BGH, which developed a special abuse of terms ('Konditionenmissbrauch') in its jurisprudence.[213] According to the BKartA, an

---

[205] *Facebook*, case B6-22/16, para 640.
[206] Ibid., para 643. Emphasis added. For the arguments on the *principle of voluntariness* see para 644-646.
[207] Ibid., para 666 f.
[208] Ibid., para 677.
[209] Ibid., para 695 f.
[210] Ibid., para 716-719 for Art. 6(1c) GDPR; para 720-722 for Art. 6(1d) GDPR; para 723-726 for Art. 6(1e) GDPR; and para 727-870 for Art. 6(1f) GDPR.
[211] Ibid., p. 166-257.
[212] Ibid., para 536.
[213] See hereto especially *VBL Gegenwert II*, case KZR 47/14, para 35, in which the BGH observed that 'contract terms which are incompatible with the laws regulating general conditions and terms of trade might be an abuse of a dominant position if the use of the terms is based on the company's market dominance'. Of similar importance is *Pechstein*, case KZR 6/15, para 55-57.

abuse of business terms can, therefore, be based on the general clause, in particular when terms and conditions are possible to be applied solely as a result of a dominant market position or superior bargaining power.[214]

Moreover, the BKartA relies heavily on the damage to users' privacy because the terms of business by Facebook lead to a 'loss of control' for users.[215] According to the competition authority, the abusive business terms combined with the merging of data by third-party-activities constitute a violation of the users' constitutionally protected 'right to informational self-determination and the fundamental right to data protection' – rights that provide individuals with the power to decide freely and non-compulsory on the processing of their personal data.[216] Thus, the BKartA did not rely on user-preferences as revealed in the marketplace but as constitutional principles and uses 'socially valuable aims' as a standard in the assessment, instead of conducting a contingent valuation of quality reductions in building the theory of harm.[217] The competition authority concludes that only 'voluntary consent' in accordance with data protection law can serve as a legitimate basis and Facebook's terms of service do not live up to this standard.[218]

On these grounds, the competition authority concludes that Facebook can dictate the business terms of the contract contrary to Section 19(1) GWB. In summary, the *Facebook* case is taken under German competition law, but the BKartA is using the violation of data protection law – principles as well as specific provisions – as a benchmark for establishing the abusive nature of Facebook's conduct.

3.1.1.2 A Direct Antitrust Assessment of Facebook's Conduct

Aside from using the violations of data protection law as a benchmark, the BKartA is concerned with direct antitrust problematics as well. The authority starts by arguing in favour of a causal link between Facebook's market power and the abuse from a normative perspective.[219] The focus lies on the relevance of data processing for the competitive performance of a company, arguing that the commercial use of personal data is a significant factor for competition.

[214] *Facebook*, case B6-22/16, para 527 f.
[215] See section 2.3 on possible theories of privacy-related consumer harm.
[216] *Facebook*, case B6-22/16, para 529.
[217] Economides & Lianos, 2019, p. 56 f.
[218] *Facebook*, case B6-22/16, para 876 f.
[219] The causality is found in relation to the outcome and not as causality in form of a strict counterfactual assessment. *Facebook*, case B6-22/16, para 873 and 875.

According to the BKartA, the user profiles build by platforms such as Facebook are highly relevant for their competitive performance as they are enabling the improvement of products, personalised services and targeted advertisement.[220]

Taking advantage of its dominant position, the authority argues, Facebook gets superior access to users' personal data by rendering the usage of its service conditional upon users granting limitless permission to the collection of their data. Thereby, the users are confronted with a take-it-or-leave-it offer. In particular, the BKartA focuses on the fact that a vast amount of personal data is accumulated when users operate on third-party websites and are then merged with the users' Facebook account:

> 'The lock-in effect [...] leads to cost disadvantages for competitors. Due to the high switching costs the competitors' prices not only have to be at least as favourable as Facebook's, but also have to compensate for the switching costs if users are to be motivated to switch.'[221]

This practice combined with the network effects and economies of scale as characteristics of the data economy leads to a situation where Facebook's market power is entrenched.[222] The BKartA seems to conclude that this practice can be considered both *exploitative* and *anti-competitive* because it is not only *unfair* for consumers but also works so as to optimise Facebooks' commercial activity and *tie* users to its social network, which has detrimental effects for the competitive process as such.

Referring to the case-law of the BGH, the competition authority argues that 'unfair contract terms' are considered 'abusive in the context of an assessment to be carried out in each case under Section 19 GWB'.[223] The BKartA does not mention exploitation directly in its assessment, but the arguments point in the direction that the competition authority is considering this form of abuse:

> '[W]hen consumers share their personal data, they are not really able to judge which and how many data are being collected by which company, to whom their data is being transmitted and what the implications of giving consent to data processing are [...] These characteristics justify

[220] *Facebook*, case B6-22/16, para 545.
[221] Ibid., para 479
[222] Ibid., para 480.
[223] Ibid., para 528.

> the examination of inappropriate agreements and provisions on data processing by the dominant undertaking under the aspect of abusive business terms.'[224]

According to the BKartA, the provisions of data do not constitute a price but still have a possible 'fee-like function' because the users are 'hardly aware, if not fully unaware' of the unlimited accumulation of their data by Facebook.[225] The competition authority argues that personal data represents a commodity that consumers are not able to determine the monetary value of and that the examination of 'inappropriate agreements and provisions on data processing' by Facebook, therefore, is justified directly on the grounds of competition law as well.

Moreover, the BKartA focuses on the integration of services, including shared user data assigned to Facebook user accounts. According to the competition authority, 'integration can transfer and safeguard market power', specifically through the reinforcement of barriers to entry.[226] The BKartA argues that in a case where significant barriers to entry and obstacles for switching providers already exist, the authority has a special obligation to balance the interests of Facebook and the rights of users. The necessity for Facebook to accumulate data from other companies than itself is not found reasonable for the service provided for the user, such as personalisation and individualisation.[227] Furthermore, the BKartA does not find clear evidence that the unlimited collection of data from other Facebook-owned services is necessary to safeguard user and network security, for example for the prevention of child abuse, terrorist activities, fraud, hacking-attacks, etc.[228] Thus, the BKartA finds that 'the legitimate interests claimed by Facebook in the processing of data [...] cannot outweigh the legitimate interests and rights of the users', considering the above of how it affects their interests and fundamental rights.[229] Interestingly, it seems as if the BKartA judges under the presumption that it is almost impossible to justify the restrictions of data protection in the case due to the constitutional importance of this right, bringing the decision close to establishing a per se prohibition under competition law.

In conclusion, the competition authority is asserting that Facebook's terms and conditions constitute a violation of Section 19 GWB, non-depending on the existence of privacy-violations,

[224] *Facebook*, case B6-22/16, para 571-572.
[225] Ibid., para 571.
[226] Ibid., para 747.
[227] Ibid., para 746.
[228] Ibid., para 750-754.
[229] Ibid., para 764-765.

which according to the BKartA, however, strongly support the finding of an antitrust infringement.

3.1.2 German and EU Competition Law: A Comparison

The question of whether the assessment by the BKartA can be transferred to EU level, depends on the characteristics of German and EU competition law respectively because the German competition authority has relied on national law. Thus, in the following the similarities and differences between Section 19 GWB and Art. 102 TFEU will be discussed.

In general, the wording and structure of Section 19 GWB and Art. 102 TFEU are very similar. Both provisions require the demonstration of a dominant position as well as abusive conduct. German courts are also found to strongly rely on European case law when interpreting German competition law.[230] However, several reasons point towards important dichotomies, which challenge a direct transfer from the national approach to EU level. First, the BKartA had the possibility to follow the above-mentioned jurisprudence by the BGH, holding that contract terms that are incompatible with the laws regulating general conditions and terms of trade (§§ 307 f. Bundesgesetzbuch) might amount to an abuse of a dominant market position. According to the BKartA, this could particularly be the case where the agreement on the business terms is established by a dominant undertaking and would not have been imposed or accepted under natural competitive market conditions.[231] The BKartA explicitly alludes that this approach in jurisprudence is different at EU-level:

> 'However, the examination has shown that the concept of protection developed by German case law on the general clause of Section 19(1) GWB [...] has so far found no equivalent in European case law or application practice.' [232]

This might be one of the challenges occurring when transferring the case to EU level. The decisions by both the CJEU and the Commission have so far not opened up for a similar argument.[233] Second, the German legislator introduced amendments to the GWB that substantially

[230] Volmar & Helmdach, 2018, p. 201.
[231] The BKartA argues specifically: '[W]here one contractual party is so powerful that it would be able to dictate contractual terms, thus eliminating the other party's contractual autonomy'. *Facebook*, case B6-22/16, para 527.
[232] Ibid., para 914.
[233] The OLG has not interpreted the jurisprudence by the BGH in the same manner as the BKartA. Instead, the OLG explicitly set out that 'an infringement of a law as such cannot be sufficient to constitute an offence' and that it cannot be inferred from the *Gegenwert* case that 'any contractual condition contrary to unfair contract terms law

separate German from EU competition law. Among other novelties, the amendments include a new version of Section 18(3a) no. 4, where the German legislator made access to data a stand-alone criterion in the assessment of a company's market position, which can be interpreted as an effort to emphasise the relevance of data processing for competition law. Because the reformed German competition law has been enacted after the BKartA's launch of the investigation, the decision could not be formally based on the amendments. However, as it can be seen from the arguments put forward by the competition authority, the legislative intent has been interpretatively referred to in the judgement.[234] While Section 18(3a) no. 4 revolves mainly around the market power of the undertaking concerned, the amendment shows that the German legislator is moving forward in considering the importance of personal data under competition law. [235] Similar efforts by the Commission to revise EU competition law have not yet been seen. Thus, it can be argued that, although the general provisions for the abuse of a dominant position are very aligned, the amendment introduced by the German legislator has drawn a line between German and EU competition law.

The national jurisprudence and the focus by the German legislator on data in relation to competition law point in the direction that the *Facebook* case might concern an abuse particular to German antitrust. An assessment by the Commission might, therefore, be sensitively different to the one from the BKartA. However, it can be argued that the BKartA's reliance on the constitutional principles and fundamental rights of users under the Charter is not dependent on the characteristics of German and EU competition law. This approach by the German competition authority could be transferred to EU level without taking into consideration the similarities and differences discussed above.

imposed by a dominant undertaking is inevitably also an abusive contractual condition within the meaning of Section 19(1) of the GWB'. *OLG on Facebook*, case VI-Kart 1/19 (V), p. 10-12.

[234] Such as in *Facebook*, case B6-22/16, para 550, where the BKartA argues that in line with the new version of Section 18(3a) GWB, the link between data processing activities, market power and similarly abuse control is justified.

[235] For further discussion on the efforts by the German legislator to emphasise the importance of data in competition law see section 4.1.

3.2 Broadening EU Competition Law

Generally, the EU institutions appear to exclude data protection considerations from the application of EU competition law. In *Asnef-Equifax*, the Court declared that 'any possible issues relating to the sensitivity of personal data are not, as such, a matter of competition law'.[236] The Commission appears to take a similar stance: In the assessment of the mergers *Google/Doubleclick* and *Facebook/WhatsApp*, the competition authority refused to take into consideration the potential implications for data protection that the merging of the parties' respective datasets would imply.[237] However, lately, the dictum by Competition Commissioner Vestager has been much less clear. With regards to the review of the *Google/Fitbit* merger, in an interview with Bloomberg she argued:

> 'We are just very careful not to see a competition issue where there is a privacy issue because, if that is the case, it's not for us', but also that 'privacy issues can be used in an anti-competitive manner. We will have to stay vigilant to see if that is actually the case.'[238]

With the approach by the BKartA in mind, the following analysis strives to ascertain to what extent data accumulation and privacy should play a role in EU competition law. The judgment by the BKartA relies on several assumptions that challenge the traditional approach by the Commission and the CJEU and are an opportunity of incorporating personal data into antitrust assessments: (1) data privacy as a fundamental right that competition law should consider in assessments of conducts that directly affect this right; (2) the relevance of the violation of another branch of law, specifically the GDPR, for competition law assessments; and (3) the collection of personal data as a direct antitrust issue, namely an exploitative abuse. This section is dedicated to the question of whether these approaches can lead to a rethinking of Art. 102 TFEU.

3.2.1 Data Privacy as a Fundamental Right under EU Competition Law

Drawing an analogy from the *Facebook* case to the EU level may be backed by the Charter, which provides for the right to the protection of personal data and that such data must be processed fairly and based on consent.[239] This fundamental right gains significant importance

[236] *Asnef-Equifax*, case C-238/05, para 63.
[237] *Google/DoubleClick*, case COMP/M.4731, para 368; *Facebook/WhatsApp*, case COMP/M-7217, para 164.
[238] Bloomberg, 25 February 2020.
[239] Art. 8 Charter.

when platforms impose terms and conditions that imply the limitless accumulation of personal data. By some scholars, it has been argued that the dimension of personal data necessarily needs to be considered by competition law; and by others, that the separation of data protection and competition law could even violate the fundamental rights guaranteed by the Charter.[240]

The EU institutions' obligation to respect and promote the Charter stems from Art. 51(1) and has further been acknowledged in the case law of the CJEU. For example, in *Schecke and Eifert* the Court declared that the secondary legislation at hand, requiring the publication of the names of certain Common Agricultural Policy beneficiaries, was found to interfere with the Charter's rights to data protection and privacy and constituted a violation of the fundamental rights.[241] By adopting a 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union' the Commission seems to have acknowledged its obligation. Beside conducting fundamental rights impact assessments of legislative proposals, the Commission sets out that:

> '[n]on-legislative measures adopted by the Commission, such as decisions, are also subject to checks on their compatibility with the Charter during drafting [...]'.[242]

It has, therefore, been argued that a failure of the Commission to respect the Charter 'when adopting a legally binding decision would lead to the invalidity of this decision'.[243] While the EU institutions' obligation not to *violate* the rights provided for by the Charter seems clear, the extent of their obligation to actively *promote* these rights is more uncertain. The Charter itself lays out that the institutions of the Union shall:

> 'respect the rights, observe the principles and *promote the application thereof* in accordance with their respective powers and the limits of the powers of the Union as conferred on it in the Treaties.'[244]

A literal interpretation of the rule itself points in the direction that the Charter claims for positive action by the Union's institutions. Further, the Commission has appointed a First Vice-president, who shall be responsible for the Charter. This appointment signals that 'it is a top

[240] Robertson, 2020, p. 174; Costa-Cabral & Lynskey, 2017, p. 24-25.
[241] *Schecke and Eifert*, joined cases C-92 & 93/09.
[242] Communication from the Commission, COM (2010) 573 final, p. 6.
[243] Costa-Cabral & Lynskey, 2017, p. 25.
[244] Art. 51(1) Charter. Emphasis added.

priority for the new College to safeguard the values of the Union, and particularly the rule of law and fundamental rights'.[245]

In the explanations accompanying the Charter it is clarified that 'an obligation, pursuant to the second sentence of paragraph 1, for the Union's institutions to promote principles laid down in the Charter may arise only within the limits of these same powers'.[246] The duty to take action and actively promote the Charter is, therefore, limited to the exercise of the powers that the institutions have been attributed. Following that, the question is whether it lies within the competences of competition authorities to apply a strict standard of review, which ensures the incorporation of the right in Art. 8 of the Charter when enforcing Art. 102 TFEU. The BKartA answers this question in the affirmative with regards to Section 19 GWB, arguing that the principles of general data protection law cannot be disregarded because it falls under its constitutional duty to apply the fundamental rights under the Charter.[247] This view also appears consistent with the calls from the European Data Protection Supervisor (EDPS), who has advocated that competition law enforcement should consider the data protection rights of consumers and suggested the adoption of a holistic approach, in favour of a coordination of the policy fields competition and data protection.[248] Further, *Costa-Cabral & Lynskey* take the stance that the fundamental right to data protection should matter for the application of competition law as it can strengthen the assessment of non-price competitive parameters.[249]

In light of these arguments, it seems as if the Commission's and CJEU's stance in cases such as *Google/Doubleclick*, *Facebook/WhatsApp* and *Asnef-Equifax* to not even consider the general fundamental rights of data protection is no longer tenable. According to the obligation to effectively implement the fundamental rights into legislation and decision-making – and having in mind the development in online platform markets, where personal data has become an indispensable input factor for competition – it might be relevant to include the Charter's right in antitrust assessments.

[245] Hillion, 2015, p. 623.
[246] Explanations relating to the Charter of Fundamental Rights, 2007/C 303/02, p. 16.
[247] *Facebook*, case B6-22/16, para 551.
[248] EDPS, 2016, p. 15. For further discussion on the holistic approach see section 4.2.1.
[249] Costa-Cabral & Lynskey, 2016, p. 30.

3.2.2 Can the Violation of the GDPR Be Relevant for Competition Law Assessments?

Going even further, the question could be asked whether the approach by the BKartA to rely on specific GDPR violations should be of inspiration for competition law assessments as well. Let us recall the main argument by the BKartA: Facebook's terms and conditions, 'legalising' the accumulation and processing of personal data by third-parties, constitute an abuse of a dominant position contrary to Section 19(1) GWB because these privacy policies violate the provisions of the GDPR.[250]

The GDPR is specifying the general principles of the Charter by setting out in detail the rights of data subjects and the obligations of those who accumulate and process these data.[251] Besides providing an exhaustive list of legal bases for data controllers to invoke their right to data processing,[252] Art. 6(1) GDPR includes the criterion of consent.[253] This general provision on 'lawfulness of processing' aims at giving individuals full control over their personal data, recognising the self-determination of data subjects on whether or not their personal data is processed. This basic aim builds on legal requirements that are defined more specifically in Art. 4 and 7, as well as Recitals 32, 42 and 43 GDPR.[254]

When discussing the question of whether a breach of these mandatory requirements can constitute a violation of antitrust law, one must bear in mind that an abuse of dominance requires the capability of a conduct to undermine competition. Thus, a threat to the competitiveness of the market must be validated.[255] The OLG points out that the BKartA has failed to demonstrate this causality as it did not carry out sufficient investigations into the counterfactual scenario whether Facebook's privacy policies deviate from those that a platform in a competitive market would impose.[256]

---

[250] *Facebook*, case B6-22/16, para 523.
[251] Botta & Wiedemann, 2019, p. 431.
[252] Art. 6(1b-f) GDPR.
[253] Art. 6(1a) GDPR.
[254] Art. 4(11) on the definition of consent, that is 'any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her' and Art. 7 on conditions for consent. Recital 32, 42 and 43 can be used as tools for interpretation.
[255] It can be argued that there are two lines of Art. 102 in case law: (1) by object approach (prima facie abuses) and (2) by effect approach. Colomo, 2016, p. 713 f.
[256] *OLG on Facebook*, case VI-Kart 1/19 (V), p. 13.

Another concern has been put forward by *Colangelo & Maggiolini*, who argue that by grounding an alleged abuse on the violation of the GDPR, the BKartA went 'far beyond the limits of its legal competence'.[257] This argument could essentially be relied upon with regards to other competition authorities as well if they were to be inspired by the *Facebook* case. It follows from Art. 55 GDPR that the application and enforcement of the Regulation lie within the competence of the Supervisory Authorities of each Member State. It can be argued that the sovereignty of the Member States would be undermined, if data protection law was to be relied upon in the enforcement of Art. 102 TFEU, as they have been granted the exclusive enforcement competences with regards to this branch of law. A strong reliance and interpretation of the GDPR by a competition authority thus seems far-fetched and could be found in violation of the 'Kompetenz-Kompetenz' principle, according to which a legal body may have competence to rule as to the extent of its own competence.[258] Moreover, the BKartA's approach could increase legal uncertainty in the assessment of competition law and data protection law alike.[259] As *Botta & Wiedemann* point out, the coexistence of both regimes would imply remedial challenges, as firms could be sanctioned several times for the same type of conduct.[260]

On the other side of these arguments, there is a stance of scholars indicating that the infringement of other branches of law as a significant factor in competition law assessments can be favourable and has similarly been acknowledged by the CJEU in its jurisprudence.[261] For instance, in *BRT*, the CJEU considered that an abuse of dominance may occur when 'an undertaking entrusted with the exploitation of copyrights and occupying a dominant position [...][encroaches] unfairly upon a member's freedom to exercise his copyright.'[262] Similarly, in *AstraZeneca* and *DSD* the violation of intellectual property law (IP law) was held as the basis of a violation of Art. 102 TFEU.[263] This view has similarly been endorsed by the BKartA and the Autorité de la concurrence, stating that:

> 'the fact that some specific legal instruments serve to resolve sensitive issues on personal data does not entail that competition law is irrelevant to personal data. Generally speaking, statutory

[257] Colangelo & Maggiolini, 2019, p. 10-11.
[258] Schütze, 2018, p. 68.
[259] Botta & Wiedemann, 2018, p. 87.
[260] Botta & Wiedemann, 2019, p. 444.
[261] Schneider, 2018, p. 221-222.
[262] *BRT*, case 127/73, para 15.
[263] *AstraZeneca*, case C-457/10; *DSD*, case C-385/07 P.

> requirements stemming from other bodies of law may be taken into account, if only as an element of context, when conducting a legal assessment under competition law.'[264]

These premises could point towards that other branches of law, such as the GDPR, can be relevant factors in the application of EU competition law and that this should especially be the case when competition law does not have sufficient tools for the assessment of the unfairness of an allegedly abusive conduct.

In summary, while data protection law might become increasingly relevant, it is debated whether a mere breach of the GDPR should fall within the scope of the assessment of a dominant firm's alleged conduct.[265] Such an approach could ultimately undermine the overarching goal of competition law – to protect competition on the merits to the benefit of consumer welfare – and instead foster enforcement practices where virtually *any* legal infringement by a dominant platform could amount to a violation of Art. 102 TFEU.[266] This discussion will be elaborated on further in the integrated analysis.[267]

3.2.3 Excessive Data Collection as an Exploitative Abuse

Aside from the discussion of the Charter's and GDPR's external influence on EU competition law, it is important to discuss to what extent direct antitrust provisions could be helpful as well. In the following, it will be discussed whether terms and conditions that imply the excessive accumulation of personal data by platforms may constitute a stand-alone exploitative abuse under the wording 'unfair trading condition' or 'excessive price' in Art. 102(a) TFEU.

3.2.3.1 The Current Discourse

In its assessment, the BKartA distances itself from traditional price parameters when the competition authority argues that 'the provision of data does not constitute a »price« within the meaning of the prohibition of anti-competitive behaviour'.[268] Still, it is argued that data processing has a 'monetization and indirect financing function' for the company and is a factor of quality for the consumer – the harm suffered by Facebook users according to the BKartA lies,

[264] Bundeskartellamt & Autorité de la concurrence, 2016, p. 23.
[265] Colangelo & Maggiolini, 2019, p. 12.
[266] Ibid.
[267] See section 4.4.1.
[268] *Facebook*, case B6-22/16, para 560.

therefore, in the *loss of control* over their personal data.[269] The OLG finds this argument unconvincing, stressing that the reliance of Facebook's service upon users' consent does merely require 'weighing up the benefits of using a social network [...] against the consequences associated with the use of the additional data by Facebook'.[270] Thereby, the OLG shifts the focus on factual circumstances that have to be put forward in the assessment of alleged practices, as it believes that the BKartA did not show that Facebook exploits its users' weakness of will by pressure.

The *Facebook* case is to be contextualised in the debate regarding the possibility to reconsider the narrow understanding of consumer welfare under EU competition law in zero-price markets and the growing recognition that non-price parameters may nowadays be as important for competition as price. Until recently, competition authorities have mostly understood Art. 102(a) TFEU as an instrument against excessive pricing,[271] and it is argued that the competition law discourse to price is connected to the influence by the Chicago-school and the 'phenomenon of mathematisation', despite the non-existence of a 'normatively established hierarchy of parameters'.[272] The Commission itself has highlighted that consumer welfare is defined by other parameters than price only, such as 'better quality and a wider choice of new or improved goods and services'.[273] Moreover, it laid out its credo that data protection can be relevant in antitrust insofar as it is a parameter of quality:

> 'Privacy related concerns as such do not fall within the scope of EU competition law but can be taken into account in the competition assessment to the extent that consumers see it as a significant factor of quality [...].'[274]

Stucke & Grunes argue that the reduction of privacy stemming from terms and conditions that are compulsory for consumers to accept to use the service may be equivalent to a reduction of product quality,[275] which is in accordance with the reasoning by the German competition authority. There has also been increasing attention on non-price parameters by the EU competition authority in its decisions. For instance, in *Microsoft*, the Commission found that 'Microsoft's

[269] *Facebook*, case B6-22/16, para 569 f.
[270] *OLG on Facebook*, case VI-Kart 1/19 (V), p. 9.
[271] Paulis, 2007, p. 516.
[272] Schneider, 2018, p. 218-219.
[273] Commission Guidance, 2008/C 45/02, 2009, para 5.
[274] Commission Press Release, IP/16/4284, 6 December 2016.
[275] Grunes & Stucke, 2015, p. 4-5.

refusal to supply has the consequence of stifling innovation in the impacted market and of diminishing consumers' choices by locking them into a homogeneous Microsoft solution'.[276] In so that Microsoft's practice was counteracting the proper functioning of the market, the company was found to abuse its dominant position. Similarly, in *Google Search*, the Commission affirmed that providing consumer choice and innovation is essential for competition on the merits when it fined Google with €2.42 billion for abusing its dominance as a search engine.[277]

Data privacy has also attracted considerable recognition in EU merger decisions, such as *Facebook/WhatsApp* and *Microsoft/LinkedIn*.[278] In the former, the Commission considered that in markets for consumer communication privacy and security are increasingly valued.[279] While acknowledging the importance of potential data concentration, the Commission refused to regard it as sanctionable under competition law:

> 'Any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of EU competition law rules but within the scope of the EU data protection rules'.[280]

A similar approach is true for the latter: In its press release on the approved *Microsoft/LinkedIn* merger, the Commission noted that data privacy was an important parameter of competition between professional social networks and could have been negatively affected by the merger.[281] However, the Commission argued that the GDPR will safeguard a 'harmonised high level of protection of personal data', which may limit the company's ability to accumulate and use the personal data of its users in the future. Therefore, the transaction was estimated not to raise serious concerns with respect to online advertising.[282]

Considering the above, it can be argued that data privacy seems to have gained ground as a quality parameter in EU competition law. Although the EU institutions have not yet acknowledged that Art. 102 TFEU may serve as an enforcement mechanism of this issue, it will be discussed whether such an approach could find a legal basis.

---

[276] *Microsoft*, case COMP/C-3/37.792, para 782.
[277] Google was found to deprive 'European consumers of the benefits of competition on the merits, namely genuine choice and innovation'. Commission Press Release, IP/17/1784.
[278] *Facebook/WhatsApp*, case COMP/M.7217; *Microsoft/LinkedIn*, case COMP/M.8124.
[279] *Facebook/WhatsApp*, case COMP/M.7217, para 87.
[280] Ibid., para 164.
[281] Commission Press Release, IP/16/4284.
[282] *Microsoft/LinkedIn*, case COMP/M.8124, para 178 f.

3.2.3.2 Excessive Data Collection as an Unfair Trading Condition

It has been stressed repeatedly that users are paying platforms for their services by accepting terms and conditions, which imply the contractual legality of an extensive accumulation of their data. As *Kalimo & Majcher* argue, the accumulated data 'are an intrinsic part of prices and trading conditions [...] in the two-sided digital marketplace'[283] and so it can be argued that an information trade occurs between platform and user, which qualifies as a 'trading condition' under Article 102(a) TFEU.

The central question relating to the qualification of excessive data collection within the meaning of this provision revolves around the issue when the privacy policies shall be deemed 'unfair'. Drawing an analogy to the *Facebook* case, competition authorities could rely on the necessity of the data accumulation. The BKartA acknowledges the processing of personal data as necessary to run the network itself and personalise it to users but not the merging of data from third-parties.[284] Hence, it seems as if the BKartA is conditioning the legality of terms and conditions on a proportionality assessment, weighing the interests and rights of users against those of the platform. The OLG has criticised this demonstration as insufficient because the BKartA did not determine 'the type, origin and quantity of the additional data in question'.[285] According to the court, the BKartA missed considering the counterfactual scenario,[286] which has been discussed in section 3.2.2. The *Facebook* case could, therefore, serve as inspiration in so far as the effect-based approach is properly included in the assessment.

Further, in the soft law relating to the adoption of recent EU legislation, common elements could help conceptualising an unfair trading condition in data markets.[287] The Commission broadly speaks of 'practices that grossly deviate from good commercial conduct, are contrary to good faith and fair dealing and are unilaterally imposed by one trading partner on another.'[288]

[283] Kalimo & Machjer, 2017, p. 213.
[284] *Facebook*, case B6-22/16, para 765.
[285] *OLG on Facebook*, case VI-Kart 1/19 (V), p. 8.
[286] Ibid.
[287] There must be distinguished between Art. 102 TFEU and the mentioned soft law but the approach to what constitutes 'unfair' can be used as inspiration.
[288] Communication from the Commission, COM(2014) 472, p. 2.

Also, 'transparency and predictability'[289], 'transfer of excessive risk and costs to weaker parties'[290] and 'imbalance of bargaining power' are mentioned.[291]

Lastly, the issue has been dealt with in several copyright cases, where the importance of necessity, indispensability and proportionality was stressed. In *BRT* for example, the CJEU decided that a dominant undertaking imposing obligations on copyright-management that are not necessary for the attainment of the object of the contract in question may violate competition law.[292] Similarly, in *GEMA II* the Commission referred to *BRT* and underpinned that it is crucial to determine whether the obligations stemming from the contract exceed the limits that are necessary for effective protection and whether the copyright holder's freedom to 'dispose of his work no more than need be' is limited.[293] The same approach was followed in *Tetra Pak II*, where the Commission found that the obligations have no connection with the purpose of the contract and deprive the purchaser of certain aspects of his property rights; and in *DSD*, where the conditions were deemed unfair because the principle of proportionality was violated.[294]

3.2.3.3 Excessive Data Collection as an Excessive Price

Art. 102(a) TFEU speaks not only of 'unfair trading conditions' but also of 'unfair purchase or selling prices', often referred to as excessive prices. Some scholars argue that excessive data collection could be treated like the abuse of excessive prices. Inspired by *Robertson*, the focus could lie on the monetary value of data, and it can be argued that economists already have the tools to 'express the value of personal data in monetary terms, thus enabling us to "calculate" whether data collection has been excessive'.[295] If one accepts that personal data constitute a monetary value that users pay for online services, a decrease in privacy could be considered as a tantamount to an increase in price. This would enable competition authorities to find dominant platforms charging 'excessive prices' (i.e., reducing the privacy for users of the service) in violation of Article 102(a) TFEU.

[289] Commission Staff Working Document, SWD(2018) 138 final, p. 34.
[290] Commission Staff Working Document, SWD(2018) 92 final, p. 11.
[291] Ibid.
[292] *BRT*, case 127/73, para 15.
[293] *GEMA II*, case IV/29.971, para 36.
[294] *Tetra Pak II*, case IV/31043, para 107; *DSD*, case COMP D3/34493, para 112.
[295] Robertson, 2020, p. 173.

If it can be agreed upon that personal data can be contextualised as a non-monetary price, it should be discussed when the harvesting of this data is regarded as excessive. Here, the case law by the CJEU on excessive prices could be used as guidance. The CJEU has consistently defined excessive pricing as an 'unreasonable' price in comparison to the economic value of the product or service.[296] The Court further developed this definition in the so-called *United Brands* test, which implies that in order to find a price excessive or not, one has to determine (1) 'whether the difference between the costs actually incurred and the price actually charged is excessive'; and if so (2) 'whether a price has been imposed which is either unfair in itself of when compared to competing products'.[297]

The first step of this test would imply that the competition authority would have to look at the amount of data harvested by a platform, followed by an analysis of what the user receives in return for giving away the data.[298] Hereafter, the second step of the *United Brands* test could be applied, assessing whether the amount of data accumulated is unfair in absolute or in relative terms ('compared to competing products'). This step was further substantiated in *Latvian Copyright Society*, where the CJEU declared that the benchmark to determine the unfairness in relative terms relies on whether the difference between rates is 'significant' and 'persistent'.[299] In the case of excessive data accumulation 'rates' could be defined as a combination of the quality and amount of data requested by other providers.[300] With regard to excessiveness of the data accumulation in absolute terms, EU case law does not provide sufficient guidance on how to determine when prices can be considered unfair in themselves or how the economic value of the product/service is to be determined.[301] *Robertson* points out that other legal instruments could be used as a benchmark, such as the GDPR,[302] which leads back to the discussion of whether other branches of law should filter into competition law assessments.[303]

According to *Botta & Wiedemann*, there has not yet been any case of excessive pricing regarding data markets.[304] The *Facebook* case is an example of unfair contractual clauses and does

[296] *United Brands*, case 27/76, para 250.
[297] Ibid., para 252.
[298] Robertson, 2020, p. 175.
[299] *Latvian Copyright Society*, case C-177/16, para 55.
[300] Botta & Wiedemann, 2018, p. 45.
[301] *Scandlines Sverige*, case COMP/36.568, para 217-218.
[302] Robertson, 2020, p. 177-178.
[303] See section 3.2.2 and 4.4.1.
[304] Botta & Wiedemann, 2018, p. 45.

not involve excessive pricing. The BKartA has directly opposed taking into consideration the monetary value of the personal data in its judgement: '[P]rovisions governing data sharing are not regulations governing payment within the meaning of Section 19(1), (2), no. 2 and 3 GWB, but rather contractual terms'.[305] Therefore, the proposal is only of theoretical nature.

3.3 Conclusion

The legal analysis addressed the question of how data privacy can be pursued under EU competition law, specifically under Art. 102 TFEU. The recent *Facebook* case has been discussed as a test case for the excessive collection of personal data by dominant platforms. The decision by the German competition authority is an example of how antitrust can be linked with data protection law as it provides legal arguments in favour of the application of the Charter and the GDPR. Moreover, the analysis exposed that the BKartA attempts to substantiate the violation of Section 19 GWB by considering excessive data collection as an exploitative abuse. The analysis of the *Facebook* case was followed by a short comparative analysis of German and EU competition law, which showed that the general provisions are very much alike. However, a much stronger focus to include considerations relating to personal data in antitrust can be found in German law, whereas the EU institutions have so far been reluctant to rethink data protection into antitrust.

Going forward, the analysis investigated whether the novel approach by the BKartA is conceivable under EU competition law. The analysis substantiated that competition authorities have an obligation to consider the fundamental rights stemming from the Charter. Whether this obligation implies a duty to *promote* the right to the protection of personal data in the enforcement of competition law can be debated but has been favoured by the German competition authority. It has also been argued that a violation of the GDPR or an application of its principles may find legal validation because the CJEU in former cases has opened up for the possibility to consider breaches of other branches of law when assessing an alleged abuse of market dominance. Though, especially the former approach is very contested. Lastly, the legal analysis examined the possibility to consider excessive data collection as an exploitative abuse. The analysed case law points in the direction that privacy policies may fall under the wording of 'unfair trading conditions' or 'excessive prices' and could be found in violation of Art. 102(a) TFEU if the

[305] *Facebook*, case B6-22/16, para 572.

amount of personal data collected is disproportionate to the value that users receive from the service.

In sum, it has been outlined that data privacy from a mere legal perspective could be implemented in EU competition law, either through the external influence of the Charter and principles of the GDPR or – most importantly – when excessive data collection is found to violate Art. 102(a) TFEU.

4 Integrated Analysis

The following chapter aims to answer the thesis' integrated research question of how EU competition policy can be adapted to comprise data-related competition concerns under Art. 102 TFEU. This question will be examined by drawing on the findings and considerations from the economic and legal analysis, showing that the approach by the BKartA to put the protection of users' privacy on top of the competition law agenda should be a point of focus at EU level.

4.1 Addressing Dominance in Digital Platform Markets

The conviction that markets are self-correcting is being challenged by a reality in which personal data leads to rapid expansions of market concentrations and where new entrants struggle to challenge incumbents. Departing from the economic analysis, this thesis suggests that competition authorities should not consider platforms in a vacuum of orthodox economic theories but take into consideration the market conditions in the digital economy. The risk for opaque and intrusive privacy policies is increasing with digital platforms becoming dominant. Therefore, assessments should consider the multisided and often conglomerate structure of platforms and revolve around whether (1) personal data is to be considered a significant input to end products or services; (2) network, feedback or lock-in effects occur; and (3) barriers to entry are high. As EU competition law in its current form is lacking the legal obligations to consider these economic considerations in relation to the data economy, it is inevitable to discuss how they could be taken into account.

The discussion will revolve around two parts: first, how the anti-competitive effects discussed in section 2.1 that lead to dominance in digital markets could be targeted; and second, whether it is appropriate from an antitrust perspective to impose obligations on significantly dominant and/or conglomerate incumbents that go beyond the special responsibility for dominant undertakings.

4.1.1 Targeting Anti-Competitive Effects

In the discussion of how the economic considerations on market dominance put forward could be introduced, inspiration can be found in the German competition law amendments. In the 9th amendment to the GWB, the German legislator paved the way for the inclusion of the special characteristics of multisided markets. Section 18(2a) acknowledges that services provided free of charge may constitute a market within the meaning of competition law. Moreover, Section 18(3a) considers the importance of (1) direct and indirect network effects, (2) switching costs for users, (3) economies of scale and (4) access to data relevant for competition, when assessing the market power of an undertaking active on a multisided market.[306] The German Parliament substantiates the reform by arguing:

> 'Digitalisation and the internet have given a new dimension to the possibilities of the acquisition and use of data. The market position of a company can be significantly influenced by its access to data [...] Limited opportunities for competitors to build up comparable data pools can give the owner of the data competitive advantages and market power.'[307]

Thus, the economic characteristics that have been discussed in section 2.1 of this thesis have found a direct way into German competition law, which should be of inspiration at EU level as well.

The German Parliament is going even further with the 'GWB-Digitalisierungsgesetz' that has the aim to provide an even more focused and proactive 'competition law 4.0'. The ministerial draft proposes that Section 20(3a) GWB shall extend abuse control to the tipping of markets – a *delictum sui generis* prohibiting the anti-competitive hindrance of competitors as soon as it is suitable to facilitate tipping.[308] As analysed in section 2.1, the risk for a high concentration, or market monopoly, is severe in markets that are characterised by strong positive network effects. The network effects in multisided markets increase the concerns that an undertaking's dataset might eventually lead to the tipping of the market and marginalise competitors facing a 'behavioural barrier to entry'.[309] The strong market position resulting hereof may lead to lower privacy

[306] Section 18(3a), no. 1-4 GWB.
[307] Draft bill no. 18/10207, 7 November 2016, p. 51. Translation by author, see appendix A.
[308] GWB-Digitalisierungsgesetz, 7 October 2019, p. 82 f.
[309] King, 2018, p. 112.

protection for consumers – as seen in the case of Facebook – and increase the risk of harm as substantiated in section 2.3.2.

In order to prevent this development in the future, it can be argued that targeting practices such as the obstruction of multi-homing or switching by digital platforms, and lowering the intervention threshold of Art. 102 TFEU in line with the proposal of Section 20(3a) GWB with regards to such behaviour that is likely to promote a dangerous probability of monopolisation (tipping), is favourable. However, it is of great importance to note that tipping can be based on the success of a platform, which should not be objectionable from a competition policy perspective. Tipping should only be put on the agenda if there is sufficient certainty that an unassailable monopoly might become the result of an alleged practice, not if it becomes apparent that a platform is successful in the market.[310] There is a narrow line between preventional mechanisms, which enable intervention before the market has tipped, and overregulation, which would counteract competitive innovation.[311] Thus, it can be argued that the proposal to include the risk of tipping in European abuse control can be legitimised but must be concretised as a sufficient threat in the concrete case.

Lastly, there have been calls to oblige dominant platforms to grant access to their data to increase competition and enable entrants to get past the informational disadvantage they face in these markets. However, in this regard personal data is a special issue as individuals' right to data protection may impose limits on how competition law can be applied.[312]

4.1.2 Special Responsibilities for some Platforms?

Art. 102 TFEU does not forbid dominance itself but implies that dominant undertakings bear a special responsibility to refrain from behaviour that has negative effects on the competitive process.[313] It has been stressed that this special responsibility should go even further in the case of platforms such as Google and Facebook.[314] Based on the precedent that the risk of opaque privacy policies and abuse of users increases with the dominance of digital platforms, this may

[310] Körber, 2020, p. 33.
[311] For more discussion on this balancing test see section 4.4.
[312] On this discussion see Graef, 2016.
[313] Irish Sugar, T-228/97, para 112; Microsoft, T-201/04, para 229; Post Danmark, C-209/10, para 23.
[314] Sims (speech), 11 February 2019.

be a favourable proposal. As it has recently been stressed by the European Court of Human Rights:

> 'The greater the amount and sensitivity of data held and available for disclosure, the more important the content of the safeguards to be applied [...].'[315]

In EU competition law, there is a concept that considers companies which strength approaches a position of quasi-monopoly: 'super-dominance'. The concept was first mentioned by Advocate General Fennelly in his opinion in *Compagnie Maritime Belge*, where he regarded the group of collectively dominant companies as super-dominant due to their market share of 90%.[316] 'Super-dominance' has similarly gained ground in the case law of the CJEU. In *Irish Sugar*, the General Court made reference to the company's 'extensive dominant position' and in *Tetra Pak II* the Court of Justice considered that a 'quasi-monopolistic position' was among the circumstances that must be considered in the assessment of an alleged infringement of Art. 102 TFEU.[317] Despite that the concept may be helpful to impose special responsibilities on platforms with significant dominance, it does not grasp the fact that companies such as Google and Facebook can reinforce their position on one market through the accumulation and use of data on other markets. As stressed in section 2.1, not only are these companies multisided but they may also be conglomerate, which has a severe impact on the possibility to deploy excessive amounts of data from their users.

This important facet has been considered in the 'GWB Digitalisierungsgesetz', where a real antitrust revolution seems to lie within the proposal of Section 19a GWB. Here, a whole new methodological category of market dominance is proposed: 'Undertakings with paramount significance for competition across markets' (Unternehmen mit überragender marktübergreifender Bedeutung für den Wettbewerb (UmümB)), which has been associated with both Google and Facebook.[318] According to the ministerial draft, the background of the proposed provision is

[315] *M.M. v The United Kingdom*, case 24029/07, para 200.
[316] Opinion of Advocate General Fennelly in *Compagnie Maritime Belge*, joined cases C-395/96 P and C-396/96 P, para 137.
[317] *Irish Sugar*, case T-228/97, para 185; *Tetra Pak II*, case C-333/94 P, para 28-31.
[318] Jungermann, 2019, p. 3.

that digital markets, especially due to network effects, data-advantages and inherent self-enhancing effects, can lead to strong concentrations, which require timely intervention.[319] Moreover, economies of scale and scope are taken into account.[320] The provision introduces a mechanism that would enable competition authorities to impose *stricter* antitrust assessments on digital platforms that have a paramount significance for competition across markets, among others, prohibiting practices that relate to the processing and combination of user data.[321] In the ministerial draft it is argued that especially UmümBs can deploy their powerful position and resources in other markets to limit the competitiveness on the current market and thereby advance their position even further.[322]

The question of whether Art. 102 TFEU should include a reference to varying degrees of dominance and/or UmümBs – and the hereof corresponding different levels of responsibility for such undertakings – should be regarded from an economic perspective as well. The results of the economic analysis are strongly aligned with the considerations behind both concepts. It must be taken into account, though, that positive network effects and feedback loops can be an expression of entrepreneurial success, and the non-excludable character of personal data might outweigh the negative effects of entry barriers. Further, *O'Donoghue & Padilla* point out that 'there is no basis in economics for specifying a point in a spectrum of market power in which a firm could be said to acquire »superdominance«' and that there is not an 'objective economic test' for determining the concept in the assessment of a specific case.[323] Lastly, especially the UmümB concept poses challenges with regards to the traditional assessment of the relevant market. As put forward in section 2.2.1, there may be ways to outline the relevant market regarding personal data as a competitive factor, but it is questionable how such an assessment could cater to the competitive advantages across several markets.

The opposing arguments put forward do not entail that the proposal is not favourable. First, there is no need to specify a specific amount of market power that would amount to 'superdominance' or measurement standards a company must fulfil to be considered significantly powerful. The reason is that EU antitrust enforcement is characterised by relying on individual

[319] GWB-Digitalisierungsgesetz, 7 October 2019, p. 73.
[320] Ibid.
[321] Section 19a (1), no. 4.
[322] GWB-Digitalisierungsgesetz, 7 October 2019, p. 78.
[323] O'Donoghue & Padilla, 2006, p. 168.

case-by-case assessments. Second, the argument that the conventional tools for market definition do not allow for the adaptions is counterproductive. If the development of competition law would rely on the necessity to apply traditional tools, the legal branch might soon become outdated with regards to digital platform markets. Thus, from an integrated perspective, it can be legitimised to make use of the concepts super-dominance and UmümB.

The outlined proposals in both sections above (4.1.1 and 4.1.2) could be addressed through a revision of the Commission Notice on the definition of relevant market[324] and by publishing a separate Notice on market definition and market power with respect to digital platforms.[325]

4.2 Two Ways of Incorporating Data Privacy into Competition Policy

In the legal analysis, the *Facebook* case has been used as an example to show how data privacy can be incorporated into assessments under competition law. The following section builds on this discussion from a competition policy perspective and will integrate the results from the economic analysis as well.

4.2.1 The External Influence of Data Protection

Inspired by the *Facebook* case, one policy recommendation is to put more emphasis on the interaction of antitrust with data protection to prevent user harm in the digital platform economy. Although the Commission has been pleading for separation of both policy fields, the legal analysis shows that the possible external influence of data protection via the Charter and the GDPR should be a point of focus.

The proposal of including data protection considerations in antitrust is in line with an academic movement in favour of a more holistic approach to competition policy.[326] *Stucke & Grunes* argue that privacy protection and competition officials can inform each other with regards to their knowledge on machine learning, user behaviour and lock-in-effects, the imbalance of powers and market transparency with regards to the value of data.[327] Moreover, the approach

[324] Commission Notice, 97/C 372 /03.
[325] Further, the recommendations could be addressed in a supplementary platform regulation for online platforms as set out in section 4.2.2.
[326] See Botta & Wiedemann, 2018; Costa-Cabral & Lynskey, 2017; EDPS, 2014 and 2016.
[327] Stucke & Grunes, 2016, p. 326 f.

would appear consistent with the EDPS's suggestion to adopt stronger cooperation mechanisms, acknowledging that the protection of personal data should be considered a central factor in the assessment of companies' economic conduct and their impact on competitiveness, market efficiency and consumer welfare.[328] The economic analysis shows that the EDPS's call for a new concept of consumer harm,[329] taking into account the increasing use of opaque and misleading privacy policies, can already be satisfied. Moreover, the GDPR includes important rules that could counter data lock-in, e.g. Art. 20 on data-portability. This provision is conceptualised as the individual's right to receive his/her personal data and to be able to transmit it to another controller without any hindrance. The application of this principle would facilitate switching and to some extent multi-homing as well and has been favoured in the recent Commission report on competition policy for the digital era.[330]

While of great value, it can be argued that the effectiveness of other principles of data protection law – such as user consent under the GDPR – may be undermined by economic considerations, such as the privacy paradox.[331] Because the majority of users of digital platforms offers consent without investing time and effort in reading privacy policies and without considering the implication of what they are accepting, it may be unfavourable from an economic perspective to apply these principles.[332] Moreover, as it has been outlined, data protection is valued differently by distinct user groups, and increasing the protection of these data through competition policy might increase legal uncertainty in enforcement, as the focus on economic efficiency would be set aside for the pursuit of other goals.[333] On the other hand, it has been pointed out that data protection law has remained rather underenforced and competition policy with its strong enforcement mechanisms could contribute to promoting the interests of both policy fields.[334]

This thesis advocates that as soon as data protection becomes an essential precondition in order to reach the goals of competition policy, the policy branch should have an impact on competition authorities' assessments, for example, in cases where the excessive accumulation of per-

[328] EDPS, 2014, p. 26.
[329] Ibid.
[330] Commission report, 2019, p. 8 and 81 f.
[331] Ezrachi & Robertson, 2019, p. 12.
[332] Ibid.
[333] Ohlhausen & Okuliar, 2015, p. 153.
[334] Graef, 2016, p. 327-328.

sonal data distorts the competitive process and causes harm to users. In such situations, competition authorities should acknowledge the constitutional nature of the right to data protection and similarly consider the overall guiding principles relating hereto. It is, therefore, also suggested that stronger cooperation mechanisms between competition and data protection authorities are implemented.

4.2.2 The Internal Discussion on Exploitative Abuses

Departing from the former section, it can be argued that even in the absence of the suggested external influence on competition law, an internal discussion should awaken, revolving around the question of whether it is feasible to treat excessive data accumulation as an exploitative abuse. In the legal analysis two possibilities have been laid out: excessive data collection as an unfair trading condition and/or an excessive price. To evaluate if this approach makes sense from a competition policy perspective, it is relevant to examine what exploitation means in the context of European antitrust and to discuss whether the economic theories of harm can be characterised under this category of abuses.

O'Donoghue & Padilla define exploitation as the practice by a dominant undertaking to extract rents from consumers that would otherwise not have been possible for a non-dominant undertaking.[335] Compared to exclusionary abuses, exploitation can thus be defined as a conduct that *directly* causes harm to the consumer of the dominant undertaking and not *indirectly* through the means of impeded competition.[336] *Akman* also stresses that exploitation cannot stand without any demonstration of harm to competition in general as it would otherwise not fall under the ambit of competition law but consumer law.[337] The economic analysis shows that the anti-competitive effects on multisided markets enable dominant platforms to exploit users by degrading the privacy quality of their services, increasing the risk of behavioural discrimination and misusing information asymmetries and cognitive biases to gain economic profits. First, this substantiates that platforms can extract rents from users; and second, that this is directly linked to their dominant position. From a mere conceptual perspective, it thus seems favourable for excessive data accumulation to be categorised as an exploitative abuse.

[335] O'Donogue & Padilla, 2006, p. 174.
[336] Akman, 2009, p. 167.
[337] Ibid., p. 8f.

However, specifically with regards to excessive pricing, commentators have expressed that antitrust intervention is not necessarily favourable. The traditional thought behind this scepticism is that high prices can attract competition and innovation.[338] In light of these considerations, a number of filters have been suggested that could limit intervention and make it more appropriate from an economic perspective to enforce.[339] These filters include high and long-lasting entry barriers as well as super-dominance (a market position of near monopoly).[340] According to *O'Donoghue & Padilla* the most important point is not the market share itself but how long it persists due to entry barriers.[341] The reliance upon these two limiting principles also seems to be in accordance with the case law analysed in section 3.2.3.3. For example, in *DSD* the Commission recognised that the company had a 'commanding market position'[342] and *United Brands* was found to be the main importer of bananas in Europe and entry in the market was argued to be highly unlikely.[343]

The conventional wisdom to excessive prices does, however, not necessarily apply in relation to data accumulation. First, the BKartA and some scholars have the presumption that data harvesting which contravenes data protection regulation can be considered excessive already.[344] Second, in these markets there is a risk that competition and innovation will get stuck in an equilibrium that is suboptimal from the perspective of data protection. As substantiated in the economic analysis, the vicious circle from data extraction to dominance to even more data extraction and the resulting harm to consumers is different from the mechanisms under excessive pricing regimes. Third, data markets may not be as self-regulatory as traditional markets due to the informational character of data. Once a market has tipped to a sub-optimal equilibrium in terms of reduced privacy, it will be very difficult for competitors or possible entrants to challenge the position of a dominant incumbent.[345] These arguments justify intervention from a competition policy perspective and combining the legal conceptualisation of excessiveness and

[338] Botta & Wiedemann, 2018, p. 33. The discussion on pro-competitive effects will be further elaborated on in section 4.4.
[339] For an in-depth discussion on the different filters see Konkurrensverket, 2007, p. 21 f.
[340] Konkurrensverket, 2007, p. 22 f.; Botta & Wiedemann, 2018, p. 34; Economides & Lianos, 2019, p. 41.
[341] O'Donoghue & Padilla, 2006, p. 168.
[342] *DSD*, case COMP D3/34493, para 122.
[343] *United Brands*, case 27/76, p. 235.
[344] *Facebook*, case B6-22/16; Economides & Lianos, 2019, p. 41.
[345] Economides & Lianos, 2019, p. 41.

unfairness (see section 3.2.3.2 and 3.2.3.3) with the two filters could guide competition authorities' and courts' assessments.

Though, as the economic analysis has outlined, there may be several challenges regarding enforcement when addressing alleged data privacy abuses. Although conjoint analysis may be a decent tool for the measurement of (potential) harms caused, privacy preferences are considered to be highly subjective and behavioural biases may have an increasing impact on the assessment. Moreover, it could be difficult to estimate the extent of the privacy paradox and it may not be easy to justify the conditions of super-dominance and high entry barriers to be fulfilled. Given these considerations, further research and empirical evidence are needed.

Despite these challenges, this thesis favours that this 'terra incognita'[346] of exploitative abuses is explored by the legislative and the judiciary. The recommendation is to establish new theories of exploitation in the context of abuse of dominance that consider the mere excessiveness of data accumulation in multisided markets. Intending to increase legal certainty, it might be beneficial that the findings of this thesis are addressed in a supplementary platform regulation for online platforms with a certain minimum turnover or number of users: a Platform-to-Consumer Regulation (P2C).[347] Such a Regulation could impose concrete rules of conduct on dominant online platforms that prevent market dominance from being abused. For example, the default regime for data accumulation could be changed from 'opt-in' to 'opt-out', or rules on a maximum amount of data-harvesting could be introduced. Further, the transparency of data markets should be addressed so that the information asymmetry regarding the value of users' data is decreased. Users need to know their bargain when interacting with companies such as Google and Facebook and the self-determined handling of personal data must be strengthened. Also, the above-mentioned considerations on data-portability could be facilitated through such a Regulation.

The recommendation to restore the conditions of multisided data markets through competition policy is further supported by the recent discussion on a rethinking of its goals, which the next section will revolve around.

[346] Botta & Wiedemann, 2018, p. 45-46.
[347] The report by the 'Kommission Wettbewerbsrecht 4.0' is aiming in the same direction. Report for the Federal Ministry for Economic Affairs and Energy (Germany), 2019, p. 51 f.

4.3 Data Privacy Entering the Antitrust Arena: A Fairness-Based Approach?

Traditionally, EU competition policy has been based on the overall conception that sound competition equals consumer welfare – not individually, but overall – and that the primary objective is to protect economic efficiency and competition as a process. This is in accordance with Protocol No. 27, according to which competition policy shall establish and protect a system 'ensuring that competition is not distorted'. The question to be asked is whether the development discussed in the former section may lead to a rethinking of the goals of antitrust. As *Stucke & Grunes* point out:

> 'If, as a result of our competition policy, our overall physical and mental health deteriorates, our isolation and distrust increase, and our freedom, self-determination and well-being decrease, then whatever the competition policy is promoting, it is not consumer welfare.'[348]

In the following, a new emerging era of antitrust will be discussed, one in which the focus is shifting towards the overall goal of treating consumers fairly.

One may argue that there is a tendency in the communication of the Commission to emphasise fairness in competition policy. This supports the idea of enforcing unfair/excessive harvesting of personal data as exploitative abuse.[349] *Volmar & Helmdach* label this development the 'Vestager School' as they argue that it is especially the involvement of the Commissioner for Competition driving forward fairness as a goal of antitrust.[350] This view can be supported by the talks held by the Commissioner in the recent years on digitisation and competition in which she emphasises fairness as a basic value of our society, along with privacy, freedom, democracy and the rule of law.[351] Vestager argues that an 'important piece of the puzzle' is to safeguard that consumers are treated fairly and have choices[352] and that fairness is one of the most fundamental questions in the work of competition enforcement, because: '[W]hat, exactly, is competition policy for?'.[353] Answering this rhetorical question with consumer welfare might underpin that the economic and legal considerations about data privacy should become embedded in EU antitrust enforcement. Fair competition working for consumers might, for example, entail that

[348] Stucke & Grunes, 2016, p. 271.
[349] Volmar & Helmdach, 2019, p. 204 f.
[350] Ibid.
[351] Vestager (speeches), 29 October 2019 and 12 November 2019.
[352] Vestager (speeches), 12 March 2018 and 29 November 2019
[353] Vestager cited in Gerard, 2018, p. 211.

profit maximisation should be limited as soon as social values and standards of justice are at stake.[354] Data privacy – due to its place in the Charter – should be assigned such a status.[355]

As mentioned above, it is often argued that competition policy protects the structure of competition, but that may, too, ultimately be based on the overall aim of consumer welfare protection. As pointed out by the CJEU in *TeliaSonera*, the aim of Art. 102 TFEU is:

> 'to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby *ensuring the well-being of the European Union*'.[356]

However, by some it is argued that consumer welfare is an economic concept and 'does not protect what some would see as the unfair [...] effects of market conditions'.[357] Rather, consumer welfare should be seen as a 'welfarist objective' in that it is a function of economic agents' utility levels.[358] From this perspective, competition policy should always be about competition and harm to consumers that competition law seeks to avoid should be understood as detriments that are the result of anti-competitive acts.[359] In light of these arguments, it can be questioned whether fairness and data privacy as normative values contrast the guiding principles of antitrust: economic efficiency and competition on the merits.

This thesis advocates for the opposite of this scholarly stance. First, it can be argued that '[f]airness is as old a competition law itself' and is anchored within the main rules of competition law.[360] As substantiated in the legal analysis, Art. 102(a) TFEU refers directly to unfair trading conditions. Second, the economic analysis has shown that this new type of exploitative abuses is fully compatible with the more economic approach because those harms that follow from the excessive accumulation of personal data by platforms can be concretised and measured. Third, in the European School of thought it is favoured to also look past the mere economic objectives in competition policy and engage with the full social costs of a specific conduct. For instance, *Lianos* argues that:

[354] Gerard, 2018, p. 212.
[355] See section 3.2.1 on data privacy as a fundamental right.
[356] *TeliaSonera*, C-52/09, para 21-22. Emphasis added.
[357] Dolmans & Lin, 2017, p. 7.
[358] Akman, 2009, p. 183.
[359] Ibid.
[360] Laitenberger (speech) 10 October 2017, p. 4-5.

> 'competition law will have to acquire a polycentric dimension in order to guarantee the effective protection of the societal values that may be affected by actors with economic power'.[361]

Others point out that if markets were prepared such that fairness was included by design, we might see a decrease in consumer detriment, where the duty is applied.[362] Applying this rationale could eventually prevent the harm to users analysed in chapter two to materialise in the first place.

On this backdrop, it can be argued that associating fairness – and accordingly data privacy – with competition policy is not a way to 'divorce'[363] it from economics but to restore its relation to society. The goals of economic efficiency and fairness could, therefore, be seen as complementary rather than competing. Especially, in the digital age, where concerns revolve around issues of trust and information asymmetry between dominant platforms and users, focus on fairness should be of special importance. This thesis suggests that we start engaging more fiercely with the dual role of competition law that – apart from being economic regulation – builds on the strong objectives and values the EU is built upon.

4.4 Balancing Data Privacy and Other Interests

Although Art. 102 TFEU does not contain an explicit exemption similar to Art. 101(3), the concept of 'objective justification' has been developed in case law and implies that conducts found to violate the provision may escape the main prohibition.[364] Thus, even if the fundamental question in the former sections could be answered in the affirmative, and the EU should strive for a fairness-based approach in which data privacy should be safeguarded by competition policy, an unresolved issue would still be how to balance the privacy interests against other interests, such as economic efficiency. The purpose of this section is to examine this issue.

It is important to stress that there is a distinction to be made between conducts that are prohibited by effect and by object. The former must underlie a comprehensive economic balancing

[361] Lianos, 2019, p. 162.
[362] Siciliani et al., 2019.
[363] De Pablo, 2017, p. 148.
[364] Dominant undertakings alleged of abusive conducts have the possibility to show whether their practice produces efficiencies or could be objectively justified. *Post Danmark*, C-209/10, para 41; *British Airways*, C-95/04 P, para 86; *Intel*, C-431/14 P, para 140.

act, whereas the latter is found abusive by their very nature.[365] Relevant for how comprehensive the balancing test must be conducted is which category a data privacy abuse should fall under.

4.4.1 A Violation of the GDPR as an Abuse by Object

According to the BKartA, Facebook abused its dominant position by violating Art. 6(1a) and 9(2a) GDPR. This reasoning can be interpreted as an attempt by the German competition authority to present a new category of prima facie abuses: Where the GDPR is violated by a dominant platform, this should automatically be understood as a violation of the prohibition of abuse of dominance. Is this reasoning appropriate from a competition policy perspective?

It has been pointed out that the error costs of false negatives (type II errors) in digital markets are high if markets are less likely to self-correct.[366] The combination of extreme economies of scale and positive network effects can quickly turn markets to become extremely concentrated and subject to robust and long-lasting entry barriers. Moreover, the possible irreversibility of market tipping increases the risk. The resulting data control by a few dominant players may lead to severe welfare losses from underenforcement in situations where these companies abuse their position to the prejudice of users.[367] As set out by *Schweitzer & Welker*, this may call for qualifying specific types of conducts as infringements by object instead of by effect.[368]

However, keeping the emphasis on the effect-based analysis in mind,[369] it can be argued that dressing a violation of the GDPR as an antitrust violation could represent the end of competition law as we know it. A prima facie abuse in cases where dominant companies breach data protection law would decrease the impact of economic analysis, and the questions of whether competition in the market is impeded or not and consumers are better or worse off would be of altered importance.

Moreover, the economic analysis shows that the effects on consumer welfare can be context-sensitive. For example, some users may be in favour of giving away their personal data to gain from better advertising etc., while others may feel intruded and expect long-lasting negative effects. Therefore, it would be counter-beneficial to depart from the effect-based approach

[365] Colomo, 2016, p. 714 f.
[366] J. Newman, 2015, p. 189.
[367] See section 2.3.2.
[368] Schweitzer & Welker, 2019, p. 19.
[369] For a discussion on the development from 'form' to 'effects' based analysis, see Jones & Sufrin, 2014, p. 382.

when it comes to analysing the individual harms or benefits of lower privacy protection. It can be argued that if a violation of the right to data privacy was to be included in competition law assessments, it would be essential that the likeliness of harm resulting from this violation is shown by the authority. Thus, the economic considerations this thesis has put forward call for an effects-based analysis.

4.4.2 An Exploitative Abuse as an Abuse by Effect

Akman argues that exploitative conducts, in general, should be treated under an effect-based approach.[370] It is held that some exploitative abuses, e.g. unfairly high prices, generate pro-competitive efficiencies because the opportunity to charge monopoly prices is what attracts entrants and induces risk-taking that can enhance innovation and economic growth.[371] This is especially in accordance with the Chicago School, assuming that monopoly power is not likely to be durable because profits resulting from dominance are likely to induce entry.[372]

It can be argued that the relationship between competition policy and innovation depends on many factors, but that a crucial issue in the digital economy is not to undermine firms' incentives to invest in R&D and develop new online services for consumers. While temporary market power of an average degree may have positive effects, an incontestable monopoly that may entail abusive behaviour by an undertaking to manifest this position should be avoided.[373] The economic analysis has shown that market power in the long run may be harmful to consumers – specifically, when the position on the market implies misusing the fundamental right of privacy protection for economic gains. The arguments in favour of monopolistic innovation go under the assumption that barriers to entry are not significant,[374] and this has been contested with regards to the technological and informational advantages giving rise to different entry barriers in these markets.

A factor making this balancing test challenging is that privacy interests may be difficult to reconcile with economic efficiencies. Following *Stucke & Grunes*, it can be argued that 'safeguarding privacy could increase the [platforms'] costs in identifying purchasers and perhaps

[370] Akman, 2009, p. 176.
[371] Jones & Sufrin, 2014, p. 575.
[372] Hildebrand, 2016, p. 25.
[373] For a discussion on the controversy between the two traditional competing schools, *Schumpeter* and *Arrow*, see Baker, 2007; Shapiro, 2012; Motta, 2004, p. 57.
[374] Hildebrand, 2016, p. 25.

keep socially valuable information out of the hands of people who could benefit from it'.[375] There is an internal balancing of privacy-considerations: On the one hand, personal data is increasing platforms' ability to identify consumer needs; and on the other hand, it is leading to a loss of privacy directly correlated with the theories of harm put forward in the economic analysis. This balancing-test may be the most difficult for competition authorities and courts because they may find it challenging to evaluate the net value of services where personal data is the cost, especially when the users get an immediate benefit and the harm is 'indirect, gradual, and also obscure'.[376]

4.5 Conclusion

The integrated analysis sought to propose recommendations and ideas for how data-related competition concerns can be addressed under Art. 102 TFEU. The German approach in the 9th and 10th amendment to the GWB was used as inspiration. It was proposed that services provided free of charge should constitute a market within the meaning of competition law and that the economic characteristics discussed in section 2.1 should find their way in the assessments of undertakings' market power. Further, it was argued in favour of an application of the concepts super-dominance and UmümB. These recommendations could be addressed by a revision of the Commission Notice on the definition of relevant market and by publishing a separate Notice on market definition and market power with respect to digital platforms.

The integrated analysis also built around the discussion of ways to incorporate data privacy in the context of abuse of market dominance. It was argued that stronger cooperation mechanisms between competition and data protection authorities are needed because the latter have the capability to inform competition authorities with regards to the excessive accumulation of personal data. Moreover, it was highlighted that Art. 102 TFEU should be applied to counter this new form of exploitative abuses. In order to increase legal certainty, the application of Art. 102 TFEU could be concretised in a Regulation for dominant online platforms and their relation to consumers (P2C). The recommendations were further endorsed by a discussion on understanding data privacy as part of the consumer welfare dogma and the recent focus on fairness in the communication of the Commission.

[375] Stucke & Grunes, 2016, p. 148.
[376] Ibid.

The last section revolved around the question of how data privacy should be balanced against other interests, such as economic efficiency, if it was to be included in the application of Art. 102 TFEU. The possibility to consider a violation of the GDPR by a dominant undertaking as abuse by object was opposed. Instead, it was argued that an alleged abuse should be subject to a sufficient economic balancing test. This test should revolve around the costs associated with the loss of data privacy but also the incentives to innovate and to increase the quality of the service for users.

5 Conclusion

This thesis explored what role the excessive accumulation of personal data by digital platforms should have in the context of abuse of market dominance. The economic analysis started by substantiating the value and competitive importance of personal data. It can be argued that the opt-in requirement by platforms to limitless accumulate users' personal data in exchange for the use of their services can be categorised as a market failure. Combined with features such as economies of scale and scope, network effects, switching costs and barriers to entry, it leads to highly concentrated markets, which should cause the attention from competition authorities.

It was further analysed that the neoclassical price-focused theory in antitrust has been leading to incorrect conclusions, such as the apprehension that it is not possible to define a relevant market and that market dominance cannot be assessed as a result hereof. The analysis has argued in favour of an adapted SSNIP-test that revolves around possible decreases in privacy instead of increases in price. Furthermore, it was substantiated that competition authorities should consider the legal conceptualisation of market dominance, increase the impact of survey-based analysis and focus on the prospect by platforms to monetise data because the success of a provider to gain revenue hereof may be an adequate indicator for market power as well.

Further, having asserted that users have malleable privacy preferences and are not able to engage in the rational disclosure of their personal data, sole reliance on the privacy paradox as an argument to oppose intervention in these markets is found inappropriate. The very poor understanding of data practices, combined with bounded rationality and willpower, makes it difficult for users to realise their true preferences. The lack of competition combined with the possibility for dominant platforms to take advantage of these cognitive limitations translates into three theories of privacy-related consumer harm: (1) reduction in the quality of the service; (2) the facilitation of price discrimination; and (3) the deliberate lack of personal data protection, causing intangible, tangible, indirect and probabilistic costs, such as the feeling of being monitored. It has been argued that the operationalisation of these exploitative practices should be addressed by a combination of a privacy-price concept and conjoint analysis.

When it comes to data privacy, not only the economic theories of harm applicable to digital platforms were considered but also whether competition authorities have the legal tools to address these issues. The German competition authority offered a novel possibility in the *Facebook* case, which has been discussed as a test case for the excessive collection of personal data by dominant platforms. The decision also addressed the legal link to the Charter and the GDPR, comprising the right to data protection of individuals. A comparative analysis of German and EU competition law has shown that – although the main provisions in Art. 102 TFEU and Section 19 GWB are very alike – so far only in Germany the way to consider data privacy in antitrust has been paved by both legislator and judiciary.

The analysis moved on by investigating whether the approach in the *Facebook* case could be transferred to the supranational level as well by broadening EU competition law. Competition authorities may have an obligation to consider the fundamental right to data privacy, following from the Charter, in their application of Art. 102 TFEU. Furthermore, the CJEU has considered breaches of other branches of law – such as IP law – when assessing an alleged abuse of market dominance, which could validate the external influence of the GDPR. The final stage of the legal analysis discussed whether the excessive data collection could be addressed as an exploitative abuse under Art. 102(a) TFEU. The case law points in the direction that opaque privacy policies may fall under the wording of 'unfair trading conditions' or 'excessive prices' and may constitute an abuse if the amount of personal data collected is disproportionate to the value that users receive when using the service.

Both in the economic and legal analysis this thesis advocated in favour of considering data privacy in the context of abuse of market dominance. The aim of the integrated analysis was to propose recommendations and ideas on how data privacy can be addressed under Art. 102 TFEU. Inspired by the German amendments to the GWB, it was proposed that EU competition law should include legal obligations to consider the economic characteristics of multisided platform markets with regards to the competitive importance of personal data. In that respect, assessments should also be supported by the concepts super-dominance and UmümB. These recommendations could be addressed by a revision of the Commission Notice on the definition of relevant market and by publishing a separate Notice on market definition and market power with respect to digital platforms.

Further, a holistic approach to Art. 102 TFEU was suggested in which data protection authorities could inform competition authorities with regards to data privacy concerns. The analysis then sought to integrate the economic and legal considerations with regards to excessive data accumulation as exploitative abuse. In light of the proposed theories of harm and the possibility to consider opaque privacy policies as 'unfair' and/or 'excessive', an application of Art. 102(a) TFEU was found favourable. This approach could be concretised in a Regulation for dominant online platforms and their relation to consumers (P2C). The outlined recommendations were supported by a discussion on the goals of EU competition policy in which the consumer welfare dogma and the fairness-based approach have been in focus. Lastly, the integrated analysis advocated in favour of an effect-based approach to data privacy abuses, considering pro-competitive efficiencies as well.

Bibliography

Legislation and Soft Law

EU Legislation and Soft Law:

Consolidated Version of the Treaty on European Union [2008] OJ C 115/13

Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/47

Charter of Fundamental Rights of the European Union [2000] OJ C 364/1

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1

Regulation (EU) No 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 L 119/1

Protocol (No 27) on the internal market and competition [2012] OJ C 326/309

Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17

Commission Notice 97/C 372/03 of 9 December 1997 on the definition of relevant market for the purposes of Community competition law [1997] OJ C 372

Commission Notice 2004/C 101/03 of 27 April 2004 on cooperation within the Network of Competition Authorities [2004] OJ C 101/43

Commission Guidance 2009/C 45/02 of 24 February 2009 on its enforcement priorities in applying article 102 TFEU to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7

Communication from the Commission to the European Parliament and Council of 29 April 2009 – Report on the functioning of Regulation 1/2003, COM(2009) 206 final

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 15 July 2014 – Tackling unfair trading practices in the business-to-business food supply chain, COM(2014) 472 final

Communication from the Commission of 19 October 2019 – Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union

Commission Staff Working Paper of 25 January 2012 – Impact Assessment, Accompanying the document, General Data Protection Regulation and the Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, SEC(2012) 72 final

Commission Staff Working Document of 12 April 2018 – Impact Assessment, Initiative to improve the food supply chain (unfair trading practices), Accompanying the document, Proposal for a Directive of the European Parliament and the Council on unfair trading practices in business-to-business relationships in the food supply chain, SWD(2018) 92 final

Commission Staff Working Document of 26 April 2018 – Impact Assessment, Accompanying the document, Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, SWD(2018) 138 final

German Legislation:

Gesetz gegen Wettbewerbsbeschränkungen (GWB), 26 August 1998, last amended by the 9th amendment of 1 July 2017

Gesetzesentwurf der Bundesregierung Drucksache 18/10207, 7 November 2016, Entwurf eines Neunten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen ('Draft bill no. 18/10207')

Referentenentwurf des Bundesministeriums für Wirtschaft und Energie, 7 November 2019, Entwurf eines Zehnten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 ('10th amendment' or 'GWB-Digitalisierungsgesetz')

Case Law

Court of Justice of the European Union:

Case 6/64 *Costa v ENEL* [1964] ECLI:EU:C:1964:66

Case 26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1

Case 127/73 *Belgische Radio en Televisie (BRT)* [1974] ECLI:EU:C:1974:25

Case 27/76 *United Brands* [1978] ECLI:EU:C:1978:22

Case C-322/88 *Grimaldi v Fonds des maladies professionnelles* [1989] ECLI:EU:C:1989:646

Case C-333/94 P *Tetra Pak II* [1996] ECLI:EU:C:1996:436

Case T-228/97 *Irish Sugar* [1999] ECLI:EU:T:1999:246

Case C-238/05 *Asnef-Equifax* [2006] ECLI:EU:C:2006:734

Case C-95/04 P *British Airways* [2007] ECLI:EU:C:2007:166

Case T-201/04 *Microsoft* [2007] ECLI:EU:T:2007:289

Case C-385/07 P *Duales System Deutschland (DSD)* [2009] ECLI:EU:C:2009:456

Joined cases C-92 & 93/09 *Schecke and Eifert* [2009] ECLI:EU:C:2010:662

Case C-52/09 *TeliaSonera* [2011] ECLI:EU:C:2011:83

Case C-457/10 P *AstraZeneca* [2012] ECLI:EU:C:2012:770

Case C-209/10 *Post Danmark* [2012] ECLI:EU:C:2012:172

Case C-441/14 *Ajos* [2016] ECLI:EU:C:2016:278

Case C-431/14 P *Intel* [2017] ECLI:EU:C:2016:145

Case C-177/16 *Latvian Copyright Society* [2017] ECLI:EU:C:2017:689

Advocates General:

Opinion of Advocate General Fennelly in *Compagnie Maritime Belge* Joined Cases C-395/96 P and C-396/96 P [1998] ECLI:EU:C:1998:518

European Commission:

GEMA II, (Case IV/29.971) Commission Decision 82/204EC [1981] OJ L 94/12

Tetra Pak II, (Case IV/31043) Commission Decision 92/163/EEC [1991] OJ L 72/1

Duales System Deutschland (DSD), (Case COMP D3/34493) Commission Decision 2001/837/EC [2001] OJ L 166

Microsoft (Case COMP/C-3/37.792) Commission Decision 2007/53/EC [2004] OJ L 32/23

Scandlines Sverige, (Case COMP/36.568) Commission Decision [2004] not yet published in OJ

Google/DoubleClick (Case COMP/M.4731) Commission Decision 2008/C 184/06 [2008] OJ C 185/10

Microsoft/Yahoo (Case COMP/M.5727) Commission Decision 2010/C 20/08 [2010] OJ C 20

Facebook/WhatsApp (Case COMP/M.7217) Commission Decision [2014] C(2014) 7239 final

Microsoft/LinkedIn (Case COMP/M.8124) Commission Decision [2016] C(2016) 8404 final

Google Shopping (Case AT.39740) Commission Decision 2018/C 9/08 [2017] OJ C 9

Google Android (Case AT.40099) Commission Decision 2011/965/EU [2018] OJ C 402

European Court of Human Rights:

M.M. v. The United Kingdom (No. 24029/07) Judgement of 13 November 2012 ECLI:CE:ECHR:2012:1113JUD002402907

German Case Law:

Bundesgerichtshof: *Pechstein*, case KZR 6/15, 7 June 2016

Bundesgerichtshof: *VBL-Gegenwert II*, case KZR 47/1424, 24 January 2017

Oberlandesgericht Düsseldorf: *OLG on Facebook,* case VI-Kart 1/19 (V), 26 August 2019

Bundeskartellamt: *Facebook*, case B6-22/16, 6 February 2019

Danish Case Law:

Danmarks Højesteret: *Ajos*, case 15/2014 (UfR 2014.3667), 6 December 2016

Books

Alison Jones & Brenda Sufrin, *EU Competition Law* (5th edn, Oxford University Press 2014)

Alison Jones & Brenda Sufrin, *EU Competition Law* (6th edn, Oxford University Press 2016)

Ariel Ezrachi & Maurice E. Stucke, *Virtual Competition – The Promise and Perils of the Algorithmic-Driven Economy* (1st edn, Harvard University Press 2016)

Carl Shapiro & Hal R. Varian, *Information Rules – A Strategic Guide to the Network Economy* (1st edn, Harvard Business School Press 1999)

Christian Knudsen, *Økonomisk metodologi – bind 1* (2nd edn, Jurist- og Økonomforbundets Forlag 1994)

Christina D. Tvarnø & Ruth Nielsen, *Retskilder og retsteorier* (5th edn, Jurist- og Økonomforbundets Forlag 2017)

Doris Hildebrand, *The Role of Economic Analysis in EU Competition Law* (4th edn, Kluwer Law International 2016)

Kiran K. Patel & Heike Schweitzer, *The Historical Foundations of EU Competition Law* (1st edn, Oxford University Press 2013)

Mario Motta, *Competition Policy: Theory and Practice* (1st edn, Cambridge University Press 2004)

Maurice E. Stucke & Allen P. Grunes, *Big Data and Competition Policy* (1st edn, Oxford University Press 2016)

Paolo Siciliani, Christine Riefa & Harriet Gamper, *Consumer Theories of Harm: An Economic Approach to Consumer Law Enforcement and Policy Making* (1st edn, Hart Publishing 2019)

Robert O'Donoghue & Jorge Padilla, *The Law and Economics of Article 82 EC* (1st edn, Hart Publishing 2006)

Robert Schütze, *European Union Law* (2nd edn, Cambridge University Press 2018)

Vassilis Hatzopolous, *The Collaborative Economy and EU Law* (1st edn, Hart Publishing 2018)

Anthology

Andreas Mundt, 'Wettbewerb und Verbraucherschutz im Internet stärken' (11 August 2017) 60-61 in *Wohlstand für Alle – Geht's noch?* Ludwig Erhard Stiftung Sonderheft <http://www.ludwig-erhard.de/wpcontent/uploads/LES_Sonderheft_2017.pdf> accessed 28 December 2019

Elias Deutscher, 'How to measure privacy-related consumer harm in merger analysis? A critical reassessment of the European Commission's merger control in data-driven markets' 173-211 in Bjørn Lundqvist & Michal S. Gal (eds), *Competition Law for the Digital Economy* (Edward Elgar Pub 2019)

Emil Paulis, 'Art. 82 EC and Exploitative Conduct' 515-524 in Claus-Dieter Ehlermann & Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing 2007)

Hedvig K. Schmidt, 'Taming the shrew: is there a need for a new market power definition for the digital economy?' 29-70 in Bjørn Lundqvist & Michal S. Gal (eds), *Competition Law for the Digital Economy* (Edward Elgar Pub 2019)

Journal Articles and Papers

Alfonso L. de Pablo, 'Competition Law as Fairness' (2017) Journal of European Law & Practice, 8:3, 147

Allen P. Grunes and Maurice E. Stucke, 'No Mistake about it: The Important Role of Antitrust in the Era of Big Data' (2015) University of Tennessee Legal Studies Research Paper, 269

Allessandro Acquisti, 'The Economics of Personal Data and the Economics of Privacy' (2010) Background Paper no. 3 to the OECD Roundtable of 1 December 2010

Allessandro Acquisti, 'Privacy and Market Failures: Three Reasons for Concern, and Three Reasons for Hope' (2012) Journal of Telecommunications and High Technology Law, 10, 227

Allessandro Acquisti, Curtis Taylor & Liad Wagman, 'The Economics of Privacy' (2016) Journal of Economic Literature, 52:2, 442

Allessandro Acquisti, Leslie K. John & George Loewenstein, 'The Impact of Relative Standards on the Propensity to Disclose' (2012) Journal of Marketing Research, 49, 160

Allessandro Acquisti, Leslie K. John & George Loewenstein, 'What Is Privacy Worth?' (2013) The Journal of Legal Studies, 42:2, 249

Amanda P. Reeves & Maurice E. Stucke, 'Behavioral Antitrust' (2010) Indiana Law Journal, 86, 1527

Andrea Prat & Tommaso Valletti, 'Attention Oligopoly' (2019) available at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3197930> accessed 10 May 2020

Ariel Ezrachi & Viktoria H.S.E. Robertson, 'Competition, Market Power and Third-Party Tracking' (2019) World Competition: Law and Economics Review, 42:1, 5

Christophe Hillion, 'Safeguarding EU values in the Member States – Is something finally happening?' (2015) Common Market Law Review, 52, 619

Damien Gerard, 'Fairness in EU Competition Policy: Significance and Implications' (2018) Journal of European Competition Law & Practice, 9:4, 211

Dina Srinivasan, 'The Antitrust Case Against Facebook' (2019) Berkeley Business Law Journal, 16:1, 39

Doris Hildebrand, 'The European School in EC Competition Law' (2002) World Competition, 25:1, 3

Francisco Costa-Cabral & Orla Lynskey, 'Family Ties: The Intersection Between Data Protection and Competition in EU Law' (2017) Common Market Law Review, 54, 11

Geoffrey A. Manne & Ben Sperry, 'The Problems and Perils of Bootstrapping Privacy and Data into an Antitrust Framework' (2015) CPI Antitrust Chronicle May 2015

Gianclaudio Malgieri and Bart Custers, 'Pricing Privacy – the Right to Know the Value of Your Personal Data' (2018) Computer Law & Security Review, 34:2, 289

Giulia Schneider, ‘Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt’s investigation against Facebook’ (2018) Journal of European Competition Law & Practice, 9:4, 213

Giuseppe Colangelo & Mariateresa Maggiolino, ‘Data Accumulation and the Privacy-Antitrust Interface: Insights from the Facebook Case for the EU and the U.S.’ (2018) International Data Privacy Law, 8:3, 224

Giuseppe Colangelo & Mariateresa Maggiolino, ‘Antitrust Über Alles. Whither Competition Law After Facebook?’ (2019) World Competition Law and Economics Review, 42:3, 355

Hanna Krasnova, Thomas Hildebrand & Oliver Günther, ‘Investigating the Value of Privacy on Online Social Networks: Conjoint Analysis’ (2009) ICIS 2009 Proceedings, Paper 17

Harri Kalimo & Klaudia Majcher, ‘The Concept of Fairness: Linking EU Competition and Data Protection Law in the Digital Marketplace’ (2017) European Law Review, 2, 210

Heike Schweitzer & Robert Welker, ‘Competition Policy for the Digital Era’ (2019) Competition Policy International Antitrust Chronicle, 3:2, 19

Howard A. Shelanski, ‘Information, Innovation, and Competition Policy for the Internet’(2013) University of Pennsylvania Law Review, 161, 1663

Inge Graef, ‘Market Definition and Market Power in Data: The Case of Online Platforms’ (2015) World Competition, 38:4, 473

Ioannis Lianos, ‘Competition Law for the Digital Era: A Complex Systems’ Perspective’ (2019) CLES Research Paper Series 6/2019

Jessica Schroers, ‘I have a Facebook account, therefore I am – authentication with social networks’ (2019) International Review of Law, Computers & Technology, 33:2, 211

John M. Newman, ‘Antitrust in Zero-Price Markets: Foundations’ (2015) University of Pennsylvania Law Review, 164, 151

Jonathan B. Baker & Daniel L. Rubinfeld, ‘Empirical Methods in Antitrust Litigation: Review and Critique’ (1999) American Law and Economics Review, 1:1, 386

Jonathan B. Baker, ‘Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation’ (2007) Antitrust Law Journal, 74:3, 575

Joseph E. Phelps, Giles D’Souza & Glen J. Nowak, ‘Antecedents and Consequences of Consumer Privacy Concerns: An Empirical Investigation’ (2001) Journal of Interactive Marketing, 15:4, 2

Katharine Kemp, ‘Concealed Data Practices and Competition Law: Why Privacy Matters’ (2019) University of New South Wales Law Research Series, 53, 1

Magali Eben, ‘Market Definition and Free Online Sevices: The Prospect of Personal Data as Price’ (2018) I/S: A Journal of Law and Policy, 14:2, 221

Marco Botta & Klaus Wiedemann, ‘EU Competition Law Enforcement vis-á-vis Exploitative Conducts in the Data Economy Exploring the Terra Incognita’ (2018) Max Planck Institute for Innovation and Competition Research Paper, 18:8, 1

Marco Botta & Klaus Wiedemann, ‘The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey’ (2019) The Antitrust Bulletin, 64:3, 428

Maureen K. Ohlhausen & Alexander Okuliar, ‘Competition, Consumer Protection, and the Right (Approach) to Privacy’ (2015) Antitrust Law Journal, 121, 146

Maurice E. Stucke, ‘Should We Be Concerned About Dataopolies?’ (2018) Georgetown Law Technology Review, University of Tennessee Legal Studies Research Paper No. 349, 275

Maurice E. Stucke & Ariel Ezrachi, ‘How Digital Assistants Can Harm Our Economy, Privacy, and Democracy’ (2017) Berkeley Technology Law Journal, 32, 1239

Max Huffman, ‘Marrying Neo-Chicago with Behavioral Antitrust’ (2012) Antitrust Law Journal, 78, 105

Maximilian N. Volmar & Katharina O. Helmdach, ‘Protecting consumers and their data through competition law? Rethinking abuse of dominance in light of the Federal Cartel Office’s Facebook investigation’ (2018) European Competition Journal, 14:2-3, 195

Michael L. Katz, 'Multisided Platforms, Big Data, and a Little Antitrust Policy' (2019) Review of Industrial Organization, 54, 695

Nathan Newman, 'Search, Antitrust and the Economics of the Control of User Data' (2014A) Yale Journal on Regulation, 30:2

Nathan Newman, 'The Costs of Lost Privacy: Consumer Harm and Rising Economic Inequality in the Age of Google' (2014B), William Mitchell Law Review, 40:2

Nick Economides & Ioannis Lianos, 'Restrictions on Privacy and Exploitation in the Digital Economy: A Competition Law Perspective' (2019) CLES Research Paper Series 5/2019

Nils-Peyer Schepp & Achim Wambach, 'On Big Data and Its Relevance for Market Power Assessment' (2016) Journal of European Competition Law & Practice, 7:2, 120

Oren Bar-Gill, 'Algorithmic Price Discrimination – When Demand is a Function of Both Preferences and (Mis)Perceptions' (2018) The Harvard John M. Olin Discussion Paper Series No. 05/2018

Pablo I. Colomo, 'Beyond the "More Economics-Based Approach": A Legal Perspective on Article 102 TFEU Case Law' (2016) Common Market Law Review, 53, 709

Paul E. Green & V. Srinivasan, 'Conjoint Analysis in Consumer Research: Issues and Outlook' (1978) Journal of Consumer Research, 5:2, 103

Pinar Akman, 'Exploitative Abuse in Article 82EC: Back to Basics?' (2009) Cambridge Yearbook of European Legal Studies, 11, 165

Ryan Calo, 'Digital Market Manipulation' (2014) The George Washington Law Review, 82:4, 995

Stephen King, 'Technology and Competition Economics' (2018) International Journal of the Economics of Business, 25:1, 109

Thomas Höppner, 'Data Exploiting as an Abuse of Dominance: the German Facebook Decision' (2018/2019) Hausfeld Bulleting Winter and available at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3345575> accessed 15 February 2020

Torsten Körber, ‘Die Digitalisierung der Missbrauchsaufsicht durch das „GWB-Digitalisierungsgesetz“ im Spannungsfeld von moderater Anpassung und Überregulierung’ (2020) available as SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3543719> accessed 3 March 2020

Viktoria H.S.E Robertson, ‘Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data (2020) Common Market Law Review, 57, 161

Wouter P. J. Wils, ‘The Obligation for the Competition Authorities of the EU Member States to Apply EU Antitrust Law and the Facebook Decision of the Bundeskartellamt’ (2019) Concurrences N° 3-2019

Working Papers

Allessandro Acquisti & Jens Grossklags, ‘What can Behavioral Economics Teach Us About Privacy?’ (2007) Draft version available at SSRN: <https://www.heinz.cmu.edu/~acquisti/papers/Acquisti-Grossklags-Chapter-Etrics.pdf> accessed 2 February 2020

Young Lim, ‘Tech Wars: Return of the Conglomerate - Throwback or Dawn of a New Series for Competition in the Digital Era?’ (2017) Draft version available at SSRN: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3051560> accessed 31 March 2020

PhD Thesis

Inge Graef, ‘Data as Essential Facility – Competition and Innovation on Online Platforms’ (2016) KU Leuven, Faculty of Law and available at: <https://limo.libis.be/primo-explore/fulldisplay?docid=LIRIAS1711644&context=L&vid=Lirias&search_scope=Lirias&tab=default_tab&lang=en_US&fromSitemap=1> accessed 18 March 2020

Reports and Opinions

Bundeskartellamt & Autorité de la concurrence, 'Competition Law and Data' (10 May 2016) <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.html;jsessionid=A811BBFF7ED4EB2333F71CF88E39478F.1_cid378?nn=3600108> accessed 7 February 2020

Digital Competition Expert Panel for the UCA, 'Unlocking digital competition' (2019) <https://www.gov.uk/government/collections/digital-competition-expert-panel> accessed 1 May 2020

European Commission, 'Competition policy for the digital era' (2019), by Jaxques Crémer, Yves-Alexandre de Montjoye & Heike Schweitzer <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 28 April 2020

European Commission, 'Report on Competition Policy 2010' (2011), SEC(2011) 690 final <https://ec.europa.eu/competition/publications/annual_report/2010/part1_en.pdf> accessed 28 April 2020

European Data Protection Supervisor (EDPS), 'Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy' (2014) <https://edps.europa.eu/sites/edp/files/publication/14-03-26_competitition_law_big_data_en.pdf> last accessed 9 May 2020

European Data Protection Supervisor (EDPS), 'Opinion 8/2016: EDPS Opinion on Coherent Enforcement of Fundamental Rights in the Age of Big Data' (2016) <https://edps.europa.eu/sites/edp/files/publication/16-09-23_bigdata_opinion_en.pdf> last accessed 9 May 2020

European Economic Advisory Group in Competition Policy (EAGCP), 'An economic approach to Article 82' (2005) Discussion Paper Series of SFB/TR 15 Governance and the Efficiency of Economic Systems 82 <https://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf> accessed 2 February 2020

Report for the Federal Ministry for Economic Affairs and Energy (Germany), 'Modernising the Law on Abuse of Market Power' (2018) by Heike Schweitzer, Justus Haucap, Wolfgang Kerber, Robert Welker <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3250742> accessed 3 March 2020

Report for the Federal Ministry for Economic Affairs and Energy (Germany), 'Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft' (2019) Bericht der Kommission Wettbewerbsrecht 4.0 <https://www.bmwi.de/Redaktion/DE/Publikationen/Wirtschaft/bericht-der-kommission-wettbewerbsrecht-4-0.pdf?__blob=publicationFile&v=12> accessed 1 May 2020

Konkurrensverket, 'The Pros and Cons of High Prices' (2007) <http://www.konkurrensverket.se/globalassets/english/research/the-pros-and-cons-of-high-prices-14mb.pdf> accessed 11 March 2020

OECD, 'Exploiting the Economics of Personal Data' (2013A) OECD Digital Economy Papers, No. 220 <http://dx.doi.org/10.1787/5k486qtxldmq-en> accessed 18 March 2020

OECD, 'The Role and Measurement of Quality in Competition Analysis' (2013B) OECD Policy Roundtables <http://www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf> accessed 13 May 2020

Thomasso Valletti, 'Online Platforms and Market Power Part 3: The Role of Data and Privacy in Competition' (18 October 2019) Before the Judiciary Committee <https://docs.house.gov/meetings/JU/JU05/20191018/110098/HHRG-116-JU05-Wstate-VallettiT-20191018.pdf> accessed 11 January 2020

Speeches

Al Franken, 'How Privacy Has Become an Anti-Trust Issue' (30 March 2012) Huffington Post <https://www.huffpost.com/entry/how-privacy-has-become-an_b_1392580> accessed 7 May 2020

Johannes Laitenberger, 'EU competition law in innovation and digital markets: fairness and the consumer welfare perspective' (10 October 2017) European Commission <https://ec.europa.eu/competition/speeches/text/sp2017_15_en.pdf> accessed 7 March 2020

Joaquín Almunia, 'Competition in the online world' (11 November 2013) European Commission <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_905> accessed 18 March 2020

Margrethe Vestager, 'A market that works for consumers' (12 March 2018) European Commission <https://wayback.archive-it.org/12090/20191129214816/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/market-works-consumers_en> accessed 1 May 2020

Margrethe Vestager, 'Building a positive digital world' (29 October 2019) European Commissionn <https://wayback.archive-it.org/12090/20191130020041/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/building-positive-digital-world_en> accessed 1 May 2020

Margrethe Vestager, 'Leadership in a changing world' (12 November 2019) European Commission <https://wayback.archive-it.org/12090/20191129195155/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/leadership-changing-world_en> accessed 1 May 2020

Margrethe Vestager, 'Digital power at the service of humanity' (29 November 2019) European Commission <https://wayback.archive-it.org/12090/20191130155750/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/digital-power-service-humanity_en> accessed 1 May 2020

Rod Sims, 'Insights and impacts of the ACCC Digital Platforms Inquiry' (11 February 2019) Australian Competition & Consumer Commission <https://www.accc.gov.au/speech/insights-and-impacts-of-the-accc-digital-platforms-inquiry> accessed 31 March 2020

Newspaper Articles

Aiofe White & Hamza Ali, 'Google-Fitbit Probe Isn't for Data Watchdogs, Vestager Says' (25 February 2020) Bloomberg <https://www.bloomberg.com/news/articles/2020-02-25/google-fitbit-probe-is-for-me-not-data-watchdogs-vestager-says> accessed 18 March 2020

Gabriel J.X. Dance, Nicholas Confessore & Michael LaForgia, 'Facebook Gave Device Makers Deep Access to data on Users and Friends' The New York Times (3 June 2018)

<https://www.nytimes.com/interactive/2018/06/03/technology/facebook-device-partners-users-friends-data.html> accessed 2 February 2020

Maurits Dolmans & Wanjie Lin, 'Fairness and competition law: A fairness paradox' (November 2017) <https://www.concurrences.com/en/review/issues/no-4-2017/articles/fairness-and-competition-law-a-fairness-paradox> accessed 9 March 2020

Ritzau, 'Fuel of the future – Information is giving rise to a new economy' The Economist (London 6 May 2017) <https://www.cloudera.com/content/dam/www/marketing/documents/campaign/the-economist-fuel-of-the-future.pdf> accessed 9 March 2020

Ritzau, 'The world's most valuable resource is no longer oil, but data' The Economist (London, 6 May 2017) <https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data> accessed 6 January 2019

Sebastian Jungermann, 'Das GWB-Digitalisierungsgesetz – ein großer Wurf' Arnold Porter (27 November 2019) <https://www.arnoldporter.com/-/media/files/perspectives/publications/2019/11/deutscher-anwaltspiegel-24-2019.pdf?> accessed 3 March 2020

Press Releases

Commission Press Release IP/16/4284 of 6 December 2019 <https://ec.europa.eu/commission/presscorner/detail/en/IP_16_4284> accessed 31 March 2020

Commission Press Release IP/17/1784 of 27 June 2017 <https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1784> accessed 21 April 2020

Websites and Blogs

European Commission Website, 'Antitrust Overview' (last updated: 21 November 2014) <https://ec.europa.eu/competition/antitrust/overview_en.html> accessed 31 March 2020

Facebook, 'Terms of Service' (last updated: 31 July 2019) <https://www.facebook.com/terms> accessed 2 February 2020

Google, ‘Privacy Policy’ (last updated: 15 October 2019) Concurrences Review No. 4-2017, Art. No. 85118 <https://policies.google.com/privacy?hl=en-US#intro> accessed 2 February 2020

Translations

An official translation has been used for the translation of the GWB: Official translation by the Language Service of the Bundeskartellamt in cooperation with Renate Tietjen <https://www.gesetze-im-internet.de/englisch_gwb/> last accessed 1 May 2020

An unofficial translation has been used for the translation of the GWB-Digitalisierungsgesetz: Unofficial translation by D’Kart Antitrust Blog <https://www.d-kart.de/wp-content/uploads/2019/11/RefE-GWB10-dt-engl-%C3%9Cbersicht-2019-11-15.pdf> last accessed 1 May 2020

All translations are reviewed by the author. For the analysis of the German case law, the original versions have been used.

List of Abbreviations

Article	Art.
Bundesgerichtshof	BGH
Bundeskartellamt	BKartA
Charter of Fundamental Rights of the European Union	Charter
Chinese Supreme People's Court	SPC
Court of Justice of the European Union	CJEU
Daily active users	DAUs
European Data Protection Supervisor	EDPS
General Data Protection Regulation	GDPR
Gesetz gegen Wettbewerbsbeschränkungen	GWB
Intellectual property law	IP law
Monthly active users	MAUs
National competition authorities	NCAs
Oberlandesgericht Düsseldorf	OLG
Platform-to-Consumer	P2C
Research and development	R&D
Small but significant and non-transitory decrease in quality test	SSNDQ test
Small but significant and non-transitory increase in price test	SSNIP test
Tradable Personal Data	TPD
Treaty on the Functioning of the European Union	TFEU
Treaty on European Union	TEU

Unternehmen mit überragender marktübergreifender
Bedeutung im Wettbewerb UmümB

Appendix A

Translation from German to English

Section 4.1.1, page 59

from

‘Durch die Digitalisierung und das Internet haben die Möglichkeiten der Datengewinnung und -nutzung eine neue Dimension erhalten. Die Marktstellung eines Unternehmens kann erheblich von seinem Zugang zu Daten beeinflusst werden, insbesondere wenn es sich um datenbasierte Angebote handelt. [...] Eingeschränkte Möglichkeiten von Wettbewerbern, vergleichbar große Datenpools aufzubauen, können dem Inhaber der Daten Wettbewerbsvorteile und Marktmacht verschaffen.’

to

‘Digitalisation and the internet have given a new dimension to the possibilities of the acquisition and use of data. The market position of a company can be significantly influenced by its access to data, especially when it comes to data-based offers. [...] Limited opportunities for competitors to build up comparable data pools can give the owner of the data competitive advantages and market power.’

Translation by author.

Appendix B

Possible Product Attributes and Attribute Levels for Conjoint Analysis on Social Network

Attribute	**Attribute Level**
Price	Free (0 €); Paying (1.99 €/month)
Network popularity	5% of friends/contacts 25% 50% more than 50%
Number of communication parties	One-to-one and/or Group chats
Functionalities	Text Photo Voice messaging Video messaging Video chat Group chat Voice call Sharing of location and other information
Availability	Only on one operating system (proprietary app) or Multiple operating systems (cross-platform apps)

Platform compatibility	Only smartphone All mobile devices All electronic communication devices
Privacy	No disclosure of personal information Disclosure of a basic profile (name plus addition identifier, e.g. email address) Full profile Profile of contacts and friends (interdependent privacy)

Source: Deutscher, 2019, p. 203.

Appendix C

Summary of Case Law by the CJEU

Case	Short summary
Case 6/64 *Costa v ENEL*	In the case, the ENEL Statute was challenged as a violation of the EEC Treaty, which lead to the establishment of the principle of EU law supremacy building on the decision in Van Gend en Loos.
Case 26/62 *Van Gend en Loos*	The case revolved around whether the increase of a tariff was in violation of Article 12 of the Treaty of Rome (now Article 30 TFEU). It is known as a landmark decision because the Court established the principle of direct effect of EU law.
Case 127/73 *Belgische Radio en Televisie (BRT)*	*BRT* concerned whether a dominant undertaking that is entrusted with the exploitation of copyrights and imposes on its members obligations, which constrain their freedom to exercise their copyrights, can constitute an abuse. The Court found that this is the case, when the obligations are not absolutely necessary for the attainment of the association's object.
Case 27/76 *United Brands*	The case concerned the abuse of United Brand Company's dominant position as the main supplier of bananas in Europe by virtue of fixed pricing, excessive pricing and unfair pricing.

Case C-322/88 *Grimaldi v Fonds de maladies professionelles*	In its decision, the Court answered the question whether recommendations by the Commission (in the case: a European list on occupational diseases) are binding measures confirmatory under the condition that they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions. The question was raised because the defendant had not accepted the Dupuytren's disease as an illness, which the plaintiff suffered of.
Case C-333/94 P *Tetra Pak II*	The case concerned tying of Tetra Pak's packaging machinery with its cardboards to obtain market power by excluding competitors. Tetra Pak was found to abuse its dominant market position. The decision built on a prior decision by the Commission (Case IV/31043), see appendix D.
Case T-228/97 *Irish Sugar*	The case concerned rebates issued by Irish Sugar, which hindered the competitiveness of the market and thus were found abusive.
Case C-238/05 *Asnef-Equifax*	*Asnef-Equifax* revolved around whether the exchange of information between financial institutions on the solvency of customers and borrower default through a register was a violation of Article 101 TFEU. The CJEU considered that this was not the case, unless the agreement had as its effect to restrict competition.

Case C-95/04 P *British Airways*	In British Airways, the Court found that bonuses granted to travel agents dependent on the amount of ticket sales were exclusionary and, therefore, constituted an abuse of dominance.
Case T-201/04 *Microsoft*	The case concerned Microsoft's abuse of dominance. Microsoft had refused to supply competitors with interoperability information. Further, the availability of its OC operating system was made conditional on the simultaneous acquisition of the Windows Media Player software. The decision built on a prior decision by the Commission (COMP/C-3/37.792), see appendix D.
Case C-385/07 P *Duales System Deutschland (DSD)*	DSD had charged a fee under a trade mark agreement for all the packaging bearing its 'Grüne Punkt' logo even where customers showed that they did not use the company's system for collection and recovery of used packaging. The CJEU found that this practice amounted to an abuse of Article 102(a) TFEU, because the price charged for a service was found to be disproportionate to the cost of supplying it. The decision built on a prior decision by the Commission (COMP/34493), see appendix D.

Joined cases C-92 & 93/09 *Schecke and Eifert*	In this case, the Court found that provisions of secondary legislation requiring the publication of names of certain Common Agricultural Policy beneficiaries were in violation of the EU Charter rights to data protection and privacy.
Case C-52/09 *TeliaSonera*	*TeliaSonera* revolved around the question whether it was necessary to constitute that the company had a dominant position on both the engross- and detail market in order for the Court to establish an abuse of dominance on the detail market only. The CJEU concluded that a precondition for the violation of Article 102 TFEU is that there is a connection between the dominant position and the abuse, which implied that the non-dominated market had to be interconnected with the market where the company held a dominant position.
Case 457/10 P *AstraZeneca*	In *AstraZeneca*, the Court found that the company's notification of misleading information to patent offices in order to exclude competitors constituted a violation of Article 102 TFEU.
Case C-209/10 *Post Danmark*	The case revolved around whether selective pricing reductions amounted to price discrimination on the liberalised market for unaddressed mail in Denmark. Moreover, the case concerned the AKZO-test – a measure of whether pricing is predatory and has as its intent to eliminate competitors.

Case C-441/14 *Ajos*	In *Ajos*, the claimant challenged the Danish Salaries Employees Act as a violation of EU directive 2000/78/EC on general treatment in employment law. In its decision, the CJEU expressed that the Danish court should interpret national law in the light of EU law.
Case C-431/14 P *Intel*	The decision sets out how Intel violated Article 102 TFEU by giving loyalty rebates to computer manufacturers. The conduct was found to diminish competitors' ability to compete on the merits, leading to a reduction in consumer choice and lower incentives to innovate.
Case C-177/16 *Latvian Copyright Society*	The case revolved around a collective management organisation in Latvia managing the copyright for musical works and collecting fees for this service. The Latvian competition council found the excessive high rates charged by the organisation to constitute an abuse of its dominant position. In its decision, the CJEU acknowledged that it was acceptable to compare the alleged prices to those charged for identical services in other Member States in order to determine whether a price is excessive. The price difference had to be significant and persistent in order to constitute an abuse.

Appendix D

Summary of Decisions by the Commission

Case	Short Summary
Case IV/29.971 *GEMA II*	GEMA is protecting authors, administering their rights and concluding exploitation contracts with their users in return for payment of royalty charges. The case revolved around the question whether the amendment of GEMA's statute (to include a prohibition for its members from promoting exploitation of their works) constituted unfair trading conditions contrary to Art. 86 EEC Treaty (now Article 102 TFEU). The Commission deemed the trading conditions not to be unfair because the burdensome effect for the parties bearing these conditions was outweighed by the efficiency-gains stemming from the prevention of authors and publishers that attempt to increase their share of royalties to the detriment of other members of GEMA.
Case IV/31043 *Tetra Pak II*	*Tetra Pak II* concerned several abuses violating Art. 86 EEC Treaty (now Article 102 TFEU), such as tying, exclusive sales and unfair contract terms. For example, Tetra Pak obliged buyers of the company's packaging machine to make use of Tetra Pak's cardboards. The Commission found that these contract terms aimed at tying buyers to Tetra Pak. On these grounds, the Commission found that Tetra Pak excluded competitors producing cardboards that were compatible with Tetra Pak's packaging machine and, therefore, abused its dominant position.

Case COMP D3/34493 *Duales System Deutschland (DSD)*	The decision concerned agreements set up by DSD for the collection and recycling of packaging waste. The Commission found that DSD abused its dominant position based on the payment provision in its trademark agreement, which obliged its customers to pay for all the sales packaging marked with the 'Grüne Punkt' trademark, irrespective of whether DSD provided its service or not.
Case COMP/C-3/37.792 *Microsoft*	Microsoft had denied competitors access to information necessary in order for the networking software to interact fully with Windows desktops and servers. Further, the availability of the company's operating system was tied to the acquisition of the Windows Media Player software. On these grounds, the Commission found that Microsoft abused its dominant position. The Commission requested Microsoft to provide the necessary specifications to enable third parties to implement the functionalities equivalent to those of Microsoft work group servers.
Case COMP/36.568 *Scandlines Sverige*	*Scandlines Sverige* is a rejection decision on excessive pricing in the port sector. Scandlines Sverige AB lodged a complaint against the Port of Helsingborg for violating Art. 82 EC Treaty (now Art. 102 TFEU). The alleged abuse concerned that the Port charged excessive port fees for services provided to ferry operators active on the route between Sweden and Denmark. In its assessment of the pricing strategy, the Commission not only considered the costs of providing the service but also the demand-side features. The complaint was dismissed as the Commission did not find sufficient

	evidence to conclude that the port charges would have 'no reasonable relation to the economic value' of the services. (paras 234-248)
Case COMP/M.4731 *Google/DoubleClick*	The Commission investigated the markets of Google (online search engines) and DoubleClick (ad serving, management and reporting technology to website publishers, advertisers and agencies). The Commission found that the companies were not exerting major competitive restraints on each other's services and could therefore not be considered as competitors. Moreover, the Commission analysed whether there were potential effects of non-horizontal relationships between the companies but found that the merged entity would not be able to marginalise Google's competitors due the sufficient numbers of alternative providers. The merger was approved.
Case COMP/M.5727 *Microsoft/Yahoo*	The merger between Microsoft and Yahoo concerned the search advertising market. The Commission examined whether the merger would enable Microsoft to become a more credible alternative to Google. Further, the potential impact on different other market players was assessed, such as internet search users, advertisers, online publishers and distributors of search technology. The Commission argued that the transaction would not have any negative effects on these market participants but would rather increase competition in internet search and search advertising by challenging Google as the biggest market player. The merger was approved.

Case COMP/M.7217 *Facebook/WhatsApp*	The investigation of the *Facebook/WhatsApp* merger covered three areas. In the market for consumer communication services, the Commission found that both companies were not close competitors and the transaction would not lead to lesser choices for consumers. The finding was the same for the potential market for social networking services, given the differences between the functionalities and focus of the services. Lastly, in the area of online advertising services, the Commission found that – although Facebook might start to collect data from WhatsApp users in order to improve the targeted advertising, or would introduce the same strategy on WhatsApp – this would not raise competition concerns due to the sufficient numbers of alternative providers to Facebook. Moreover, the large amount of user data was not found to be within the exclusive control of Facebook. The merger was approved.
Case COMP/M.8124 *Microsoft/LinkedIn*	The investigation of the *Microsoft/LinkedIn* merger covered three areas. The Commission looked at whether merger would have anti-competitive effects on the market for professional social network services, for example through the pre-instalment of LinkedIn on all Windows PCs or by integrating LinkedIn into Microsoft Office. Moreover, the Commission investigated whether the merger would eliminate competition in the market for customer relationship management software solutions, but the product of LinkedIn was found to be one of several on the market and the access to the LinkedIn database was argued not to be essential in order to compete on the market.

	Lastly, the Commission analysed a potential data concentration as a result of the merger on the market for online advertising services and concluded that a large amount of the relevant data will continue to be available on the market after the transaction. The merger was approved.
Case AT.39740 *Google Shopping*	The *Google Shopping* case concerned the more favourable positioning and display by Google of its own comparison shopping services (product results and ads) compared to competitors in its search results pages. The Commission found that this practice deprives consumers of choice to buy and compare prices online and thus violates Article 102 TFEU. Google was ordered to immediately bring the infringement to an end.
Case AT.40099 *Google Android*	Google made payments to manufacturers and operators on the condition that they exclusively pre-install the Google Search app, and prevented manufacturers from selling mobile devices running on alternative versions of Android that were not approved by Google. On these grounds, the Commission fined Google for imposing illegal restrictions on Android device manufacturers and mobile network operators in order to strengthen its dominance on the market for search engines.

Appendix E

Excerpt from the German Competition Act (GWB) – German and English Version

§ 18 - Marktbeherrschung

(2a) Der Annahme eines Marktes steht nicht entgegen, dass eine Leistung unentgeltlich erbracht wird.

(3a) Insbesondere bei mehrseitigen Märkten und Netzwerken sind bei der Bewertung der Marktstellung eines Unternehmens auch zu berücksichtigen:

1. direkte und indirekte Netzwerkeffekte,
2. die parallele Nutzung mehrerer Dienste und der Wechselaufwand für die Nutzer,
3. seine Größenvorteile im Zusammenhand mit Netzwerkeffekten,
4. sein Zugang zu wettbewerbsrelevanten Daten,
5. innovationsgetriebener Wettbewerbsdruck.

Section 18 – Market Dominance

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

(3a) In particular in the case of multi-sided markets and networks, in assessing the market position of an undertaking account shall also be taken of:

1. direct and indirect network effects,
2. the parallel use of services from different providers and the switching costs for users,
3. the undertaking's economies of scale arising in connection with network effects,
4. the undertaking's access to data relevant for competition,
5. innovation-driven competitive pressure.

§ 19 - Verbotenes Verhalten von marktbeherrschenden Unternehmen

(1) Die missbräuchliche Ausnutzung einer marktbeherrschenden Stellung durch ein oder mehrere Unternehmen ist verboten.

(2) Ein Missbrauch liegt insbesondere vor, wenn ein marktbeherrschendes Unternehmen als Anbieter oder Nachfrager einer bestimmten Art von Waren oder gewerblichen Leistungen

1. ein anderes Unternehmen unmittelbar oder mittelbar unbillig behindert oder ohne sachlich gerechtfertigten Grund unmittelbar oder mittelbar anders behandelt als gleichartige Unternehmen;
2. Entgelte oder sonstige Geschäftsbedingungen fordert, die von denjenigen abweichen, die sich bei wirksamem Wettbewerb mit hoher Wahrscheinlichkeit ergeben würden; hierbei sind insbesondere die Verhaltensweisen von Unternehmen auf vergleichbaren Märkten mit wirksamem Wettbewerb zu berücksichtigen;
3. ungünstigere Entgelte oder sonstige Geschäftsbedingungen fordert, als sie das marktbeherrschende Unternehmen selbst auf vergleichbaren Märkten von gleichartigen Abnehmern fordert, es sei denn, dass der Unterschied sachlich gerechtfertigt ist;
4. sich weigert, einem anderen Unternehmen gegen angemessenes Entgelt Zugang zu den eigenen Netzen oder anderen Infrastruktureinrichtungen zu gewähren, wenn es dem anderen Unternehmen aus rechtlichen oder tatsächlichen Gründen ohne die Mitbenutzung nicht möglich ist, auf dem vor- oder nachgelagerten Markt als Wettbewerber des marktbeherrschenden Unternehmens tätig zu werden; dies gilt nicht, wenn das marktbeherrschende Unternehmen nachweist, dass die Mitbenutzung aus betriebsbedingten oder sonstigen Gründen nicht möglich oder nicht zumutbar ist;
5. andere Unternehmen dazu auffordert, ihm ohne sachlich gerechtfertigten Grund Vorteile zu gewähren; hierbei ist insbesondere zu berücksichtigen, ob die Aufforderung für das andere Unternehmen nachvollziehbar begründet ist und ob der geforderte Vorteil in einem angemessenen Verhältnis zum Grund der Forderung steht.

Section 19 – Prohibited Conduct of Dominant Undertakings

(1) The abuse of a dominant position by one or several undertakings is prohibited.

(2) An abuse exists in particular if a dominant undertaking as a supplier or purchaser of a certain type of goods or commercial services

1. directly or indirectly impedes another undertaking in an unfair manner or directly or indirectly treats another undertaking differently from other undertakings without any objective justification;
2. demands payment or other business terms which differ from those which would very likely arise if effective competition existed; in this context, particularly the conduct of undertakings in comparable markets where effective competition exists shall be taken into account;
3. demands less favourable payment or other business terms than the dominant undertaking demands from similar purchasers in comparable markets, unless there is an objective justification for such differentiation;
4. refuses to allow another undertaking access to its own networks or other infrastructure facilities against adequate consideration, provided that without such joint use the other undertaking is unable for legal or factual reasons to operate as a competitor of the dominant undertaking on the upstream or downstream market; this shall not apply if the dominant undertaking demonstrates that for operational or other reasons such joint use is impossible or cannot reasonably be expected;
5. requests other undertakings to grant it advantages without any objective justification; in this regard particular account shall be taken of whether the other undertaking has been given plausible reasons for the request and whether the advantage requested is proportionate to the grounds for the request.

Official translation by the Language Service of the Bundeskartellamt in cooperation with Renate Tietjen: <https://www.gesetze-im-internet.de/englisch_gwb/>

Appendix F

Excerpt from the 'GWB-Digitalisierungsgesetz' – German and English Version

Entwurf § 19a – Missbräuchliches Verhalten von Unternehmen mit überragender marktübergreifender Bedeutung für den Wettbewerb

(1) Das Bundeskartellamt kann durch Verfügung feststellen, dass einem Unternehmen, das in erheblichem Umfang auf Märkten im Sinne des § 18 Absatz 3a tätig ist, eine überragende marktübergreifende Bedeutung für den Wettbewerb zukommt. Bei der Feststellung der überragenden marktübergreifenden Bedeutung eines Unternehmens für den Wettbewerb sind insbesondere zu berücksichtigen:

1. seine marktbeherrschende Stellung auf einem oder mehreren Märkten,
2. seine Finanzkraft oder sein Zugang zu sonstigen Ressourcen,
3. seine vertikale Integration und seine Tätigkeit auf in sonstiger Weise miteinander verbundenen Märkten,
4. sein Zugang zu wettbewerbsrelevanten Daten,
5. die Bedeutung seiner Tätigkeit für den Zugang Dritter zu Beschaffungs- und Absatzmärkten sowie sein damit verbundener Einfluss auf die Geschäftstätigkeit Dritter.

(2) Das Bundeskartellamt kann Unternehmen, deren überragende marktübergreifende Bedeutung für den Wettbewerb es feststellt, untersagen,

1. beim Vermitteln des Zugangs zu Beschaffungs- und Absatzmärkten die Angebote von Wettbewerbern anders zu behandeln als eigene Angebote;
2. Wettbewerber auf einem Markt, auf dem das betreffende Unternehmen seine Stellung auch ohne marktbeherrschend zu sein schnell ausbauen kann, unmittelbar oder mittelbar zu behindern, sofern die Behinderung geeignet ist, den Wettbewerbsprozess erheblich zu beeinträchtigen;
3. durch die Nutzung der auf einem beherrschten Markt von der Marktgegenseite gesammelten wettbewerbsrelevanten Daten, auch in Kombination mit weiteren wettbewerbsrelevanten Daten aus Quellen außerhalb des beherrschten Marktes, auf einem anderen Markt Marktzutrittsschranken zu errichten oder zu erhöhen oder andere

Unternehmen in sonstiger Weise zu behindern oder Geschäftsbedingungen zu fordern, die eine solche Nutzung zulassen;

4. die Interoperabilität von Produkten oder Leistungen oder die Portabilität von Daten zu erschweren und damit den Wettbewerb zu behindern;
5. andere Unternehmen unzureichend über den Umfang, die Qualität oder den Erfolg der erbrachten oder beauftragten Leistung zu informieren oder ihnen in anderer Weise eine Beurteilung des Wertes dieser Leistung zu erschweren.

Dies gilt nicht, soweit die jeweilige Verhaltensweise sachlich gerechtfertigt ist. Die Darlegungs- und Beweislast obliegt insoweit dem betreffenden Unternehmen. § 32 Absatz 2 und 3, § 32a und § 32b gelten entsprechend. Die Verfügung nach Absatz 2 kann mit der Feststellung nach Absatz 1 verbunden werden.

(3) §§ 19 und 20 bleiben unberührt.

Proposal Section 19a – Abusive Conduct of Undertakings with paramount significance for competition across markets

(1) The Federal Cartel Office may declare by order that an undertaking which is active to a significant extent on markets within the meaning of Section 18(3a) is of paramount significance for competition across markets. In determining the paramount significance of an undertaking for competition across markets, particular account shall be taken of:

1. its dominant position on one or more markets,
2. its financial strength or its access to other resources,
3. its vertical integration and its activities on otherwise related markets,
4. its access to data relevant for competition,
5. the importance of its activities for third parties' access to supply and sales markets and its related influence on third parties' business activities.

(2) The Federal Cartel Office may prohibit such undertakings whose paramount significance for competition across markets it establishes,

1. to treat the offers of competitors differently from its own offers when providing access to supply and sales markets;

2. directly or indirectly impede competitors on a market in which the respective undertaking can rapidly expand its position even without being dominant, provided that the impediment is capable having significant effects on the competitive process;
3. create or raise barriers to market entry or impede other undertakings with other means by using data relevant for competition, which has been obtained from the opposite market side on a dominated market, also in combination with other data relevant for competition from sources beyond the dominated market, or demand terms and conditions that permit such use;
4. to make the interoperability of products or services or the portability of data more difficult and thereby impede competition;
5. inform other companies insufficiently about the scope, the quality or the success of the performance they provide or commission, or make it difficult in other ways for them to assess the value of this performance.

This shall not apply where the conduct in question is objectively justified. In this respect, the burden of presenting facts and the burden of proof lie with the undertaking in question. Section 32(2) and (3), section 32a and section 32b shall apply mutatis mutandis. The order according to paragraph 2 may be combined with the declaration according to paragraph 1.

(3) Sections 19 and 20 shall remain unaffected.

Entwurf § 20 - Verbotenes Verhalten von Unternehmen mit relativer oder überlegener Marktmacht

(3a) Eine unbillige Behinderung im Sinne von Absatz 3 Satz 1 liegt auch vor, wenn ein Unternehmen mit überlegener Marktmacht auf einem Markt im Sinne von § 18 Absatz 3a die eigenständige Erzielung von positiven Netzwerkeffekten durch Wettbewerber behindert und hierdurch die ernstliche Gefahr begründet, dass der Leistungswettbewerb in nicht unerheblichem Maße eingeschränkt wird.

Proposal Section 20 – Prohibited Conduct of Undertakings with Relative or Superior Market Power

(3a) It shall also be an unfair impediment within the meaning of paragraph 3, sentence 1 if an undertaking with superior market power on a market in the sense of section 18(3a) impedes the independent attainment of positive network effects by competitors and thereby creates a serious risk that competition on the merits is restricted to a not inconsiderable extent.

Unofficial translation by D'Kart Antitrust Blog, reviewed and revised by the author: <https://www.d-kart.de/wp-content/uploads/2019/11/RefE-GWB10-dt-engl-%C3%9Cbersicht-2019-11-15.pdf>