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Excessive Data Collection as an Abuse of Dominant Position

The Implications of the Digital Data Era on EU Competition Law and Policy

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Abstract

This dissertation looks into excessive data collection as an abuse of dominant position under EU competition law. The term excessive data collection refers to data collection practices that enable platforms to collect and combine excessive amounts of data to create comprehensive user profiles (e.g., data collection through third-party tracking). In the digital economy, excessive data collection has raised concerns as to the misuse of personal data. This dissertation demonstrates that EU competition law holds the tools to tackle excessive data collection and that EU competition law plays an important role in tackling excessive data collection.

This dissertation affirms that EU competition law could tackle excessive data collection as an abuse of dominant position by various means under Article 102 Treaty on the Functioning of the European Union ("TFEU"). After having analyzed different theories of harm, this dissertation proposes that excessive data collection *could* be tackled through a concept of restriction of consumer choice. This concept requires that the user is given a choice between two services: a service that involves more intense data collection and a service that involves less data collection.

This dissertation confirms that EU competition law plays an important role in tackling excessive data collection to secure the values of consumer welfare, fairness, economic freedom, democracy, data protection and privacy, that is to say, potential goals of EU competition law. After having analyzed provisions of the Digital Markets Act ("DMA"), which is a proposal to new legislation in the EU that among other things tackles extensive data collection practices operated by so-called gatekeepers, this dissertation confirms that this role of EU competition law applies regardless of the DMA.

This dissertation embraces a wider perception of the goals of EU competition law that reflects the current values of society and market realities. After having considered the values and market context of today, this dissertation concludes that EU competition law could and should tackle excessive data collection to secure the foundations of the Union, to ensure the well-being of the Union's people and to avoid competition from being distorted to the detriment of the public interest.

Abbreviations

BGH	Bundesgerichtshof (Federal Court of Justice of Germany
BKartA	Bundeskartellamt (German Competition Authority)
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CMA	Competition and Markets Authority of the United Kingdom
Commission	European Commission
DMA	Digital Markets Act
EU	European Union
GDPR	General Data Protection Regulation
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
OLG Düsseldorf	Oberlandesgericht Düsseldorf (Higher Regional Court in Düsseldorf)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union

Table of Contents

"Competition policy does not exist in a vacuum: it is an expression of the current values and aims of society and is suspectable to change as political thinking generally."

– Richard Whish & David Bailey.

1 Introduction

1.1 Background

Data is recognized as the key-driver in the digital economy and is sometimes referred to as the new currency of the twenty-first century.[1] Instead of monetary payment, consumers pay for services online by giving firms permission to collect their data. User data is highly valued by firms in the digital economy since it constitutes an input for digital business models. Firms that pursue digital business models are, therefore, driven by collecting vast quantities and varieties of data.[2] These data-driven business models are not in themselves problematic. However, they may become so from a competition law perspective when dominant firms, through their data collection practices, abuse their market power by causing harm to the privacy and commercial autonomy of users. As a result, the Bundeskartellamt ("BKartA") acted against Facebook's data collection practices on its platform for social networks in the so-called German Facebook decision.[3]

The BKartA was particularly concerned about the fact that Facebook's data collection terms allow it to collect extensive amounts of data outside the platform on third-party websites, which can be combined and assigned to the Facebook user's account. In a case summary the BKartA held that:

> Using and actually implementing Facebook's data policy, which allows Facebook to collect user and device-related data from sources outside of Facebook and to merge it with data collected on Facebook, constitutes an abuse of a dominant position on the social network market in the form of exploitative business terms pursuant to the general clause of Section 19(1) GWB. Taking into account the assessments under data protection law pursuant to the General Data Protection Regulation (GDPR), these are inappropriate terms to the detriment of both private users and competitors.[4]

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[1] Graef, Inge, *Market Definition and Market Power in Data: The Case of Online Platforms*, World Competition, Vol. 38, Issue 4, December 2015, p. 474.

[2] See e.g., Graef, *Market Definition and Market Power in Data*, pp. 473–474. See also Ezrachi, Ariel & Stucke, Maurice E., *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy*, Harvard University Press, Cambridge, Massachusetts, 2016, pp. 20–21.

[3] BKartA, decision of February 6, 2019, B6-22/16, *Facebook*, available in English at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5.

[4] BKartA, "Case Summary: Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing", February 15, 2019, available in English at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4.

In summary, the BKartA found that Facebook had abused its dominant position by engaging in data collection practices that breached principles of the General Data Protection Regulation ("GDPR").

Facebook appealed the BKartA's decision to Oberlandesgericht Düsseldorf ("OLG Düsseldorf"), which ruled in favor of Facebook by suspending the BKartA's decision.[5] The BKartA appealed OLG Düsseldorf's decision to the Bundesgerichtshof ("BGH"), which in a decision on interim proceedings on June 23, 2020, overturned OLG Düsseldorf's decision and rejected the suspension. The BGH found that Facebook's data collection terms amounted to an abuse of dominant position as users are forced to pay for a service they do not desire.[6] Unlike the BKartA, the BGH did not rely on data protection values but on the restriction of consumer choice to establish an abuse of dominant position under German competition law. The case was referred to OLG Düsseldorf, which on March 24, 2021, announced that it will refer questions to the Court of Justice of the European Union ("CJEU"). OLG Düsseldorf held that the question of whether Facebook is abusing its dominant position by engaging in data collection practices that breaches principles of the GDPR cannot be decided without referring questions to the CJEU as the Court is responsible for the interpretation of European Union ("EU") law.[7]

The German Facebook proceedings are interesting as both the BKartA and BGH target Facebook's data collection practices as an abuse of dominant position under competition law. Data collection is typically seen as a matter for data protection law.[8] However, data protection law has been regarded as insufficient to tackle the challenges posed by platforms data collection practices in the digital economy.[9] This has sparked a debate of whether EU competition law could and should be used to tackle these data collection practices.[10] The BKartA and BGH's respective decisions shed light on this multifaceted debate by tackling data collection practices that enable platforms to collect and combine excessive amounts of data (e.g., data collection through third-party tracking). Such data collection practices can be recognized as "excessive data collection".

Excessive data collection enables user profiling and for commercial and political messages to be delivered to specific individuals, which raises concerns

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[5] OLG Düsseldorf, Case VI-Kart 1/19 (V), *Facebook*, available in English at: https://www.d-kart.de/wp-content/uploads/2019/08/OLG-D%C3%BCsseldorf-Facebook-2019-English.pdf.

[6] BGH, Case KVR 69/19, *Facebook*, ECLI:DE:BGH:2020:230620BKVR69.19.0, available in English at: https://link.springer.com/article/10.1007%2Fs40319-020-00991-2, see in particular para 58.

[7] OLG Düsseldorf, Press Release – "Facebook Against the Federal Cartel Office: Results of the Negotiation Date", March 24, 2021, available at: https://www.olg-duesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20210324_PM_Facebook2/index.php.

[8] See particularly Article 5–6 GDPR.

[9] See e.g., Costa-Cabral, Francisco & Lynskey, Orla, *Family Ties: Intersection Between Data Protection and Competition in EU law*, Common Market Law Review, Vol. 54, Issue 1, February 2017, p. 12. See also Koops, Bert-Jaap, *The Trouble with European Data Protection Law*, International Data Privacy Law, Vol. 4, Issue 4, November 2014, p. 250 ff.

[10] See e.g., Robertson, Viktoria, *Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data*, Common Market Law Review, Vol. 57, Issue 1, March 2020.

as to the misuse of personal data.[11] The Cambridge Analytica scandal manifests these concerns. The scandal revealed that the data of millions of Facebook users were utilized for commercial and political profiling.[12] With Cambridge Analytica it has become apparent that today's platforms not only have the power to affect the economic decisions of individuals but also the political decisions. Against this background, the subject of this dissertation is excessive data collection as an abuse of dominant position under EU competition law.

1.2 Purpose and Research Questions

The fact that online platforms engage in data collection practices that enable them to collect and combine excessive amounts of data to create comprehensive user profiles (e.g., data collection through third-party tracking) have raised concerns as to the misuse of personal data. Therefore, it has been suggested that EU competition law could and should be used to tackle excessive data collection in the digital economy.[13] In this light, the purpose of this dissertation is to demonstrate that EU competition law holds the tools to tackle excessive data collection and that EU competition law plays an important role in tackling excessive data collection.

To achieve this purpose, the following questions will be answered:

i. Which theories of harm could be utilized to tackle excessive data collection by means of Article 102 Treaty on the Functioning of the European Union ("TFEU")?
ii. Do the goals of EU competition law allow and promote tackling excessive data collection under EU competition legislation?

1.3 Delimitations

Article 102 TFEU consists of five criteria: the concept of undertaking; the holding of a dominant position; within the internal market or a substantial part of it; the existence of an abuse; and an appreciable effect on trade between Member States. All five criteria must be fulfilled for EU competition law to tackle excessive data collection under Article 102 TFEU. For the purpose of this dissertation, the analysis is limited to the abuse criterion. The other four criteria are indeed interesting, not least the dominance criterion and how to establish a dominant position in the context of today's data-driven markets. However, the abuse criterion is the most interesting criterion for this dissertation since it gives rise to a discussion of the potential harm of excessive data collection.

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[11] Robertson, *Excessive Data Collection*, pp. 162–164.
[12] Goata, Cătălina & Mulders, Stephan, *Move Fast and Break Things': Unfair Commercial Consent on Social Media*, Journal of European Consumer and Market Law, Vol. 8, Issue 4, January 2019, p. 137.
[13] See e.g., Robertson, *Excessive Data Collection*.

Article 102 TFEU distinguishes between exploitative and exclusionary abuses. An exploitative abuse involves conduct where a dominant firm takes advantage of its market power to exploit its trading parties or consumers whereas an exclusionary abuse involves conduct, which impedes effective competition on the market by excluding competitors.[14] Excessive data collection occurs in relation to consumers and can be assigned to the category of exploitative abuses. However, a firm's intention with its data collection practices might ultimately be to exclude competitors. For instance, a platform might utilize user data to monopolize a target market and to entrench its dominant position in the origin market.[15] For that reason, excessive collection could potentially be tackled through the category of exclusionary abuses as well. However, only exploitative abuses and the possibility to tackle excessive data collection as such are discussed in this dissertation. In its enforcement, the European Commission ("Commission") has mainly focused on exclusionary abuses. It has not given the exploitative abuses as much attention. This dissertation, therefore, raises the need to shed light on the exploitative abuses of EU competition law in the context of the digital economy and excessive data collection.

Considering the German Facebook decision by the BKartA, this dissertation discusses, inter alia, the breach of data protection values as a potential exploitative abuse under EU competition law. Consequently, this dissertation will to some extent touch upon data protection law. However, data protection values are only described on an overall level when establishing the BKartA's findings in the German Facebook decision and to a limited extent in relation to other exploitative abuses. Analyzing data protection values and the case law thereunder would require another dissertation.

1.4 Thesis

This dissertation is driven by the thesis that EU competition law could and should tackle excessive data collection. The thesis goes hand in hand with the purpose of this dissertation, which is to illustrate that such is the case. The dissertation is driven by this thesis in the light of an urgent need to tackle excessive data collection under EU law to secure the foundations of the Union and to ensure the well-being of the Union's people. As mentioned previously, there is a growing acceptance that EU competition law could and should be used to tackle excessive data collection practices in the digital economy. This dissertation seeks support for this thesis by exploring the possibilities to establish excessive data collection as an abuse of dominant position under EU competition law.

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[14] Jones, Alison & Surfin, Brenda, *EU Competition Law: Text, Cases, and Materials*, 7th edition, Oxford University Press, Oxford, 2019, p. 289.

[15] See Condorelli, Daniele & Padilla, Jorge, *Harnessing Platform Envelopment in the Digital World*, Journal of Competition Law & Economics, Vol. 16, Issue 2, June 2020, p. 176.

1.5 Method and Material

1.5.1 Legal Dogmatic Method as a Part of Legal Analytical Method

A central part of the method is to establish existing law under Article 102 TFEU by applying "legal dogmatic method", which aims to reconstruct the solution on a legal problem by applying existing law.[16] However, solely applying legal dogmatic method is not sufficient to achieve the purpose of this dissertation. Accordingly, legal dogmatic method is applied in a wider context and as part of "legal analytical method", which aims to analyze existing law with the help of any material. Legal analytical method broadens the task to also analyze the law. The advantage of legal analytical method is that the subject choice and argumentation are free and that it does not presume correct answers on legal problems. Legal analytical method is more open comparing to traditional investigations. It allows for values to take place, for instance, by analyzing the law from a particular angle.[17] Legal analytical method, therefore, corresponds well to this dissertation, which is driven by the thesis that EU competition law could and should tackle excessive data collection. Hereby, it should be noted that the fact that this dissertation is driven by a thesis does not exclude the use of relevant and rational material for the analysis.[18] The analysis is founded upon relevant sources.

More precisely, the method of this dissertation is to apply legal analytical method by establishing different theories of harm[19] under Article 102 TFEU and to analyze how these theories of harm could be used to tackle excessive data collection. This makes it possible to demonstrate that EU competition law holds the tools to tackle excessive data collection. The method is furthermore to apply legal analytical method by establishing potential goals of EU competition law and to analyze how these goals may underpin tackling excessive data collection by means of EU competition law. This makes it possible to demonstrate that EU competition law plays an important role in tackling excessive data collection. The method is also to apply legal analytical method by analyzing the Digital Markets Act ("DMA"), which is a proposal to new legislation in the EU that among other things tackles extensive data collection practices operated by so-called gatekeepers. The analysis of the DMA demonstrates the role of EU competition law in tackling excessive data collection from a different perspective.

For the purpose of establishing potential theories of harm under Article 102 TFEU, case law by the CJEU and decisional practice by the Commission are

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[16] Kleineman, Jan, *Rättsdogmatisk metod*, Nääv, Maria & Zamboni, Mauro (eds.), Juridisk Metodlära, 2th edition, Studentlitteratur, Lund, 2018, p. 21.

[17] Sandgren, Claes, *Rättsvetenskap för uppsatsförfattare: ämne material, metod och argumentation*, 4th edition, Norstedts Juridik, Stockholm, 2018, pp. 50–52.

[18] Sandgren, p. 52.

[19] A theory of harm articulates in exactly what way the practice is or will be anti-competitive. See Jones & Surfin, p. 55. See also Zegner, Hans & Walker, Mike, *Theories of Harm in European Competition Law: A Progress Report*, Bourgeois, Jacques & Waelbroeck, Denis (eds.), Ten Years of Effects-Based Approach in EU Competition Law: State of Play and Perspectives, 1st edition, Bruylant, Bruxelles, 2012, p. 185.

crucial. Literature is also of significance as it provides guidance to the existing frameworks and explains the case law and the decisional practice in a systematic, logical way. The material is, however, not limited to EU case law and decisional practice, but theories of harm developed under German case law and decisional practice are also considered. More specifically, the BKartA and BGH's respective decisions in the German Facebook proceedings are considered. These cases are interesting as they may be the only cases where a firm's data collection practices have been considered as an abuse of dominant position under competition law.

The German cases that are considered in this dissertation concern the interpretation of national competition provisions, which raises the question about their value for EU law. As the cases concern national competition provisions, they cannot be used to establish existing law under Article 102 TFEU. However, this does not mean that they are irrelevant for the purpose of this dissertation. The German cases are not considered to establish the law under Article 102 TFEU. Rather, they are considered as sources of inspiration of what could constitute the law.

There are risks with considering national competition law. First, national competition law is applied in a legal context that differs from EU competition law (even though the competition authorities and courts of the Member States may apply EU competition provisions in parallel with national competition provisions).[20] Second, to the extent translations are used, there is a risk that they might contain inaccurate translations. The solution has been to approach the material with precaution and as already emphasized, solely as sources of inspiration.

The question about the goals of EU competition law and if they may promote tackling excessive data collection remains open. Consequently, when discussing EU competition policy and establishing potential goals of EU competition law, all kind of material is used, everything from Commission notices and guidelines to articles and speeches. As for the analysis of the DMA, it should be noted that the DMA still only is a proposal to legislation. The interpretation of provisions remains open and there is limited guidance of how provisions of the DMA should apply. Therefore, the analysis of the DMA is to a great extent built upon the author's own interpretation of provisions.

1.5.2 EU Legal Methodology

Within the framework of this dissertation, legal dogmatic method is applied with some modification. To establish existing law, legal dogmatic method analyzes aspects of the (Swedish) source of law doctrine.[21] However, the (Swedish) source of law doctrine is not convenient for this dissertation since the research only actualizes EU legal sources. Therefore, instead of analyzing the (Swedish) source

[20] See Article 3 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 1/1 ("Regulation 1/2003").
[21] Kleineman, p. 26.

of law doctrine, EU legal methodology is applied, which should be seen as a way of handling EU legal sources.[22] In the following, important aspects of EU legal methodology are outlined to illustrate how EU legal sources are approached within the framework of this dissertation.

To begin with, EU legal methodology is characterized by its emphasis on primary law, which is recognized as the superior legal source. The EU institutions are unable to question the validity of primary law since it forms the base of their existence.[23] In this regard, the CJEU has ascertained that it does not have the authorization to review the validity of primary law provisions.[24]

Another important aspect of EU legal methodology is the emphasis on case law by the CJEU. As regards several branches of law within the EU legal system, the jurisprudence is to an appreciable extent built upon case law instead of written legal sources. Not seldom are the provisions that vague and target-orientated that they do not provide much guidance. In such situations, problems in applying the law must be solved by the help of precedents.[25] EU competition law is a concrete example of such branch of law that to a great extent is based on case law. The role of case law is important to keep in mind when considering EU competition law provisions.

The CJEU interprets provisions with regard to their practical effect (*effet utile*), in other words, with a view to effectively achieving the intent of legislation.[26] The principle of effect utile explains the relevancy of considering the goals of EU competition law when determining the extent of EU competition provisions.

The approach to recommendations and opinions by the EU institutions is another aspect of EU legal methodology that should be stressed. The Commission regularly issues guidance regarding competition provisions. Even though the Commission's recommendations and opinions are non-binding, they have gained importance lately.[27] They provide valuable insights as to the Commission's view in competition law matters. Moreover, the Commission is the principal enforcer of EU competition provisions. The Commission may, if it finds that there is an infringement of Article 102 TFEU, by decision require that the undertaking concerned bring such infringement to an end. For this purpose, the Commission may impose on undertakings any behavioral or structural remedies, which are proportionate to bring the infringement effectively to an end.[28] Commission decisions do not serve as precedents. However, just as recommendations, they provide valuable insights as to the Commission's view in competition law matters.

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[22] Reichel, Jane, *EU-rättslig metod*, Nääv, Maria & Zamboni, Mauro (eds.), Juridisk Metodlära, 2th edition, Studentlitteratur, Lund, 2018, p. 109.
[23] Hettne, Jörgen, & Otken Eriksson Ida, *EU rättslig metod: teori och genomslag i svensk rättstillämpning*, 2th edition, Norstedts Juridik, Stockholm, 2011, p. 42.
[24] See joined Cases 31 and 35/86, *Levantina Agricola Industrial SA (LAISA) and CPC España SA v Commission*, EU:C:1998:211.
[25] Hettne & Otken Eriksson, pp. 40–41.
[26] Hettne & Otken Eriksson, p. 49.
[27] Hettne & Otken Eriksson, p. 47.
[28] Article 7 Regulation 1/2003.

1.6 Outline

Chapter 2 "Setting the Scene" provides for a contextual background by outlining the advertising-funded business model, the role of big data and the economic characteristics of online platforms. An understanding of these aspects is crucial for the understanding of online platforms and why they engage in excessive data collection. To concretize what is meant by excessive data collection, a concrete example of excessive data collection is provided for, more precisely, the concept of data collection through third-party tracking.

Chapter 3 "Excessive Data Collection and Different Theories of Harm" introduces the concept of abuse and establishes potential theories of harm that could be used to tackle excessive data collection under Article 102 TFEU. This Chapter explores the concepts of excessive pricing, unfair trading conditions, breach of data protection values and restriction of consumer choice and their ability to tackle excessive data collection as an abuse of dominant position. The structure of this dissertation is led by its thesis, which stipulates that EU competition law could and should tackle excessive data collection. By elaborating on different theories of harm, Chapter 3 demonstrates that excessive data collection *could* be tackled under EU competition law whereas Chapter 4, by elaborating on potential goals of EU competition law, demonstrates that excessive data collection *should* be tackled. Hence the order.

Chapter 4 "Excessive Data Collection and the Goals of EU Competition Law" seeks support in the goals of EU competition law for tackling excessive data collection. Since excessive data collection raises concerns as to values of consumer welfare, fairness, economic freedom, democracy, data protection and privacy, this Chapter analyzes these values as potential goals of EU competition law and how they may call for an EU competition law intervention to excessive data collection.

Chapter 5 "Some Thoughts on the DMA" reflects on the DMA, which, as set out above, is a proposal to new legislation in the EU that among other things, tackles excessive data collection operated by so-called gatekeepers. This Chapter considers the practical meaning of the proposal and discusses whether it puts EU competition law out of play in tackling excessive data collection. The DMA is not in the center of this dissertation. Still, some words about the proposal are inevitable. For that reason, a discussion is provided for at the end of this dissertation.

The petition finishes with Chapter 6 "Excessive Data Collection as an Abuse of Dominant Position" where the research questions are answered, and the purpose of this dissertation is achieved. The findings from each Chapter are convened and put in a wider context. Here, the author's own opinion of the law comes forward.

2 Setting the Scene

It is particularly online platforms that engage in excessive data collection.[29] For that reason, this Chapter outlines the advertising-funded business model, the role of big data and the economic characteristics of online platforms. This background is crucial for the understanding of online platforms and their incentives to collect vast quantities and varieties of data. Within the framework of this dissertation, the economic characteristics of online platforms refer to platforms multi-sidedness, the presence of economies of scale, network effects, switching costs and lock-in effects. After a review of the characteristics of online platforms, the concept of excessive data collection is concretized with the help of a concrete example, namely, data collection through third-party tracking.

2.1 The Special Characteristics of Online Platforms

2.1.1 The Advertising-Funded Business Model

A main characteristic of online platforms is the implementation of advertising-funded business models. Online platforms attract users by offering services "for free". Instead of monetary payment, consumers pay for services online by providing their data and paying their attention. This enables an online platform to combine data collected on its own platform with data collected outside the platform. In this way, an online platform can build up comprehensive user profiles that the platform can sell to advertisers that are interested in using the profiles for targeted advertising. Facebook and Google are by far the two most dominant firms that realize advertising-funded business models.[30]

2.1.2 The Role of Big Data

There are different kinds of data. This dissertation focuses on "personal data". Pursuant to Article 4(1) General Data Protection Regulation, personal data refers to "any information relating to an identified or identifiable individual (data

[29] See e.g., Ezrachi, Ariel & Roberson, Viktoria, *Competition, Market Power and Third-Party Tracking*, World Competition, Vol. 42, Issue 1, March 2019, pp. 5 & 8.
[30] CMA, "Online Platforms and Digital Advertising: Market Study", July 1, 2020, available at: https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf, pp. 43–44.

subject)." The concept of "big data" refers to the four Vs: the volume of data; the velocity at which data is collected, use, and disseminated; the variety of information aggregated; and the value of data. The use of big data and its value relates to "big analytics". Big analytics refers to the ability to design algorithms that can access and analyze vast quantities of information.[31] As indicated above, data is the key driver for advertising-funded business models. To be able to provide detailed profiles about users to advertisers, vast quantities and varieties of data are required. The more data and detailed profiles, the more valuable the platform becomes for advertisers.[32] Accordingly, data creates additional value for advertisers.[33] In this light, data is referred to as an input for advertising-funded business models.[34] The competitive strength of an online platform is determined by the amount and quality of data it collects. Firms in the digital economy, therefore, strive to acquire a data advantage.[35]

2.1.3 Multi-Sided Businesses

For a better understanding of advertising-funded platforms one must understand their multi-sided character. Advertising-funded platforms are known as multi-sided businesses since they rely on creating interactions between different groups of customers, more precisely, users and advertisers. The main feature of multi-sided businesses is the existence of indirect network effects that cross customer groups. The more users that join one side of the platform, the more valuable the platform becomes for users on the other side of the platform. As regards Facebook for instance, the more users that join Facebook, the more advertisers are interested in using Facebook for advertising campaigns.[36] Due to these network effects, an online platform must attract and make commitments to both customer groups. At the same time as an advertising-funded platform must attract users by giving them access to content it must make sure that there is a good balance between content and advertising. If not, users might be driven away from the platform. Advertising-funded platforms are special as only one side value the other side of the platform. Advertisers indeed value the user side. However, it is questionable whether users value the advertising side. Nevertheless, to qualify as a multi-sided business it is sufficient that only one side value the other.[37]

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[31] Ezrachi, Ariel & Stucke, Maurice E., *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy*, Harvard University Press, Cambridge, Massachusetts, 2016, p. 15.
[32] Graef, Inge, *Market Definition and Market Power in Data: The Case of Online Platforms*, World Competition, Vol. 38, Issue 4, December 2015, p. 473.
[33] That data creates additional value for advertisers is demonstrated by the CMA in a market study. See CMA, "Online Platforms and Digital Advertising", p. 316.
[34] Graef, *Market Definition and Market Power in Data*, p. 488.
[35] Ezrachi & Stucke, pp. 20–21. See also Graef, *Market Definition and Market Power in Data*, p. 473.
[36] Graef, Inge, *EU Competition Law, Data Protection and Online platforms: Data as Essential Facility* [Electronic Resource], Wolters Kluwer, Alphen aan den Rijn, 2016, pp. 26–29.
[37] Graef, *EU Competition Law, Data Protection and Online Platforms*, pp. 31–33.

2.1.4 Economies of Scale

A characteristic of online platforms is the existence of economies of scale, which refers to the situation where the average costs of providing products or services decrease as the scale of production increases.[38] To create a platform considerable investment in server infrastructure is required to enter the market. Moreover, investment in research and development may be necessary to develop advertising tools or search algorithms. However, once the initial investments are made, the incremental costs of creating additional units or facilitating additional interaction among users and advertisers decrease even though further investment might be necessary to improve quality.[39]

2.1.5 Network Effects

Another characteristic of online platforms is the presence of network effects.[40] Network effects can be either direct or indirect. Direct network effects occur when products or services become more valuable as the number of users grow whereas indirect network effects occur when the increasing number of users of a good lead to more complementary products or services that raises the value of the network. As for advertising-funded platforms, network effects are generally present on the user side of the platform. Taking Facebook as an example, the value of the social network directly increases for users the more people that join the platform (direct network effects). Also, interactions that the social network proposes become more relevant with the number of exchanges completed on the platform (indirect network effects). The more data, the better the algorithm becomes on proposing interactions.[41]

2.1.6 Switching Costs and Lock-In Effects

Moreover, a characteristic of online platforms is the existence of switching costs and lock-in effects. Switching costs are created the moment a consumer makes an investment specific to its current provider that must be duplicated for any new supplier. Because of switching costs consumers may become "locked-in" to a platform. The cost of changing to a different service may be so high that users have no option but to stay with their present platform even though they prefer another one. The higher the switching costs, the higher the lock-in effects. A social network may, for instance, create switching costs by limiting the possibility for users to transfer their profile and uploaded content to another service.[42]

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[38] Jones, Alison & Surfin, Brenda, *EU Competition Law: Text, Cases, and Materials*, 7th edition, Oxford University Press, Oxford, 2019, p. 7.
[39] Graef, *EU Competition Law, Data Protection and Online Platforms*, pp. 36–37.
[40] Note that these types of network effects are different from the indirect network effects that are particular for multi-sided businesses described in Chapter 2.1.2.
[41] Graef, *EU Competition Law, Data Protection and Online Platforms*, pp. 37–38.
[42] Graef, *EU Competition Law, Data Protection and Online Platforms*, pp. 43–44.

2.2 Data Collection Through Third-Party Tracking

Data collection through third-party tracking is a concrete example of how online platforms may collect vast quantities and varieties of data and engage in excessive data collection. According to Ezrachi and Robertson, data collection through third-party tracking refers to the mechanism through which a firm, a third-party tracker, connects to a first-party website or application and collects data about users. It often occurs when a first-party website embeds content from a third-party, which enables the third-party to track the online behavior of the first party's users. Data collection through third-party tracking, therefore, enables a platform to combine data from third-party sources with data collected on the platform or on other owned services to create comprehensive user profiles. In the view of Ezrachi and Roberson, data collection through third-party tracking may support the creation of market power by strengthening the data advantage that the dominant platform already is benefitting from.[43]

2.3 Conclusions

It follows from the above that data plays an important role for advertising-funded business models in the digital economy and that data is decisive for the competitive strength of an online platform. For that reason, platforms are driven by collecting vast quantities and varieties of data. A way to collect vast quantities and varieties of data is by engaging in excessive data collection (e.g., data collection through third-party tracking). Hereby, it can be concluded that excessive data collection may strengthen the market power of an online platform, which confirms that excessive data collection may affect competition on the market. This Chapter has established a link between excessive data collection and competition. The following Chapter will establish the potential harm of excessive data collection.

[43] Ezrachi & Roberson pp. 6–8.

3 Excessive Data Collection and Different Theories of Harm

Within the framework of this dissertation, excessive data collection refers to data collection practices that enable platforms to collect and combine excessive amounts of data (e.g., data collection through third-party tracking). The aim of this Chapter is to demonstrate that European Union ("EU") competition law holds the tools to tackle excessive data collection. Towards that end, this Chapter outlines the concept of abuse under Article 102 Treaty on the Functioning of the European Union ("TFEU"). Moreover, this Chapter establishes potential theories of harm[44] and analyzes how they could be used to tackle excessive data collection by means of EU competition law. The question of whether excessive data collection could be tackled under Article 102 TFEU has not yet been subject to an assessment by the Court of Justice of the European Union ("CJEU").

3.1 The Concept of Abuse

Article 102 TFEU stipulates the following:

> Any abuse by one or more undertaking of a dominant position within the internal market or a substantial part of it shall be prohibited as incompatible with the internal market insofar as it may affect trade between Member States. Such abuse may, in particular, consist in:
>
> a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> b) limiting production, markets or technical development to the prejudice of consumers;
>
> c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[44] A theory of harm articulates in exactly what way the practice is or will be anti-competitive. See Jones, Alison & Surfin, Brenda, *EU Competition Law: Text, Cases, and Materials*, 7th edition, Oxford University Press, Oxford, 2019, p. 55. See also Zegner, Hans & Walker, Mike, *Theories of Harm in European Competition Law: A Progress Report*, Bourgeois, Jacques & Waelbroeck, Denis (eds.), Ten years of effects-based approach in EU competition law: State of play and perspectives, 1st edition, Bruylant, Bruxelles, 2012, p. 185.

The provision is concerned with unilateral conduct by undertakings that holds a dominant position. Being dominant on the market is not itself prohibited but solely the "abuse" of such position. The dominant undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.[45] The categories in Article 102(a)–Article 102(d) provide a list of prohibited conduct. However, as follows from *Continental Can*[46], this list is not exhaustive.[47]

The concept of abuse encompasses conduct whereby a dominant firm takes advantage of its market power to exploit its trading parties or consumers (exploitative abuses) and conduct by which a dominant firm prevents or hinders competition on the market (exclusionary abuses).[48] This dissertation focuses on the exploitative abuses of EU competition law and, therefore, Article 102(a) TFEU, which prohibits conduct by a dominant firm that is "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions."

Jones and Surfin acknowledge that there is no limit to the specific forms of conduct which will fall within the scope of Article 102(a) TFEU. According to Jones and Surfin, the provision is wide enough to cover all types of exploitative behavior.[49]

3.2 Excessive Pricing

A monopolist may choose to take advantage of its market power by increasing the price of its products or services above competitive levels.[50] Such exploitative practice amounts to an abuse of dominant position under Article 102(a) TFEU when it consists in imposing unfair purchase or selling prices on consumers.

EU competition law is concerned with excessive pricing as the monopolist is utilizing its market power to "[r]eap trading benefits that [it] would not have reaped if there had been normal and sufficiently effective competition."[51] For that reason, a monopolist bears special responsibilities not to fully exploit its market power.[52]

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[45] Case 322/81, *Nederlandsche Banden Industrie Michelin v Commission of the European Communities*, EU:C:1983:313, para 57. The concept of special responsibility has not been specified and remains open textured. The concept is often related to exclusion. However, it may just as well apply in relation to exploitation. See Sauter, Wolf, *A Duty of Care to Prevent Online Exploitation of Consumers? Digital Dominance and Special Responsibility in EU Competition Law,* Journal of Antitrust Enforcement, Vol. 8, Issue 2, July 2020, p. 410.

[46] Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission*, EU:C:1973:22.

[47] *Continental Can*, para 26.

[48] Jones & Surfin, pp. 359–361.

[49] Jones & Surfin, p. 365.

[50] Ezrachi, Ariel, *EU Competition Law: An Analytical Guide to the Leading Cases*, 6th edition, Hart Publishing, Oxford, 2018, p. 219.

[51] Case 27/76, *United Brands v Commission*, EU:C:1978:22, para 249.

[52] S. Gal, Michael, *Abuse of Dominance – Exploitative Abuses*, Lianos, Ioannis & Geradin, Damien (eds.), Handbook on European Competition Law [Electronic Resource], Edward Elgar Publishing, 2013, p. 387.

3.2.1 Case Law by the CJEU

The starting point for excessive pricing is *General Motors*[53]. The European Commission ("Commission") had found that General Motors had abused its dominant position within the meaning of Article [102(a) TFEU] by requiring parallel importers of their vehicles to pay an excessive price for technical inspections and administrative costs in the issue of certificates of conformity and type-shields.[54]

On this subject, the CJEU concluded that:

> It is possible that the holder of the exclusive position referred to above may abuse the market by fixing a price – for a service which it is alone in a position to provide – which is to the detriment of any person acquiring a motor vehicle imported from another Member State and subject to the approval procedure.[55]

According to the CJEU:

> Such an abuse might lie, *inter alia*, in the imposition of a price which is excessive in relation to the economic value of the service provided, and which has the effect of curbing parallel imports […] or by leading to unfair trade in the sense of Article [102(a) TFEU].[56]

From *General Motors* it is clear that a firm may abuse its dominant position under Article 102(a) TFEU by imposing an excessive price in relation to the economic value of the service provided. However, the CJEU did not further specify how the excessiveness of a price should be assessed.

Instead, the CJEU expanded the concept of excessiveness in *United Brands*[57]. The Commission had found that United Brands had abused its dominant position on the market for bananas by charging excessive prices.[58] Pursuant to the CJEU, "the imposition by an undertaking in a dominant position directly or indirectly of unfair purchase or selling prices is an abuse to which exception can be taken under Article [102 TFEU]."[59] The Court held that "in this case charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse." Hereby, the Court confirmed its considerations in *General Motors*.[60]

The CJEU further developed the concept provided by *General Motors* by establishing a two-stage test for assessing the excessiveness of a price:

> This excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and it's cost of production, which would disclose the amount of the profit margin […].

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[53] Case 26/75, *General Motors Continental NV v Commission*, EU:C:1975:150.
[54] *General Motors*, p. 1369.
[55] *General Motors*, para 11.
[56] *General Motors*, para 12.
[57] *United Brands*. See footnote 50.
[58] *United Brands*. para 235.
[59] *United Brands*, para 248.
[60] *United Brands*, para 250.

> The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products.
>
> Other ways may be devised — and economic theorists have not failed to think up several — of selecting the rules for determining whether the price of a product is unfair.[61]

The key take away from *United Brands* is the two-stage test, which may be summarized as follows: the first step is to compare the selling price in question with its costs of production. After a considerable difference between costs and price has been established, the second step is to establish that the actual price charged is unfair either in itself or in comparison with competitors' products.

British Leyland[62] concerned a firm with a legal monopoly to issue certificates of conformity for vehicles in the United Kingdom. British Leyland ("BL") initially charged a single fee of 25 British Pound ("GBP") for the issue of certificates. BL then increased the fee for left-hand-drive vehicles to 150 GBP for dealers and 100 GBP for private individuals while the price for right-hand-drive vehicles remained at 25 GBP. After a statement of objections from the Commission, BL reduced the fee to 60 GBP.[63] The CJEU considered the evolution of prices over time and noted that "initially the fee for left-hand drive vehicles was six times greater than that for right-hand-drive vehicles."[64] This led to the conclusion that "the fee was fixed at a level which was clearly disproportionate to the economic value of the service provided" and therefore to the finding of an abuse.[65] The case is interesting as it illustrates the use of a comparison of prices across time to establish the excessiveness of a price.

Bodson[66] concerned a French provider of funeral services. In a preliminary ruling, the CJEU touched upon whether the excessiveness of a price could be established by comparing the prices charged in a particular area with the prices charged in other regions where the market was competitive. The CJEU held that "it must be possible to make a comparison between the prices charged by the group of undertakings which hold concessions and prices charged elsewhere."[67]

SACEM[68] concerned rates charged by a copyrights management society in France. In a preliminary ruling, the CJEU confirmed that a comparison could be done between the rates charged in different Member States to establish the excessiveness of a price:

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[61] *United Brands*, paras 251–253.
[62] Case 226/85, *British Leyland Plc v Commission*, EU:C:1986:421.
[63] *British Leyland*, para 25.
[64] *British Leyland*, para 28.
[65] *British Leyland*, para 30.
[66] Case 30/87, *Corinne Bodson v SA Pompes Funèbres des Régions Libérées*, EU:C:1988:225.
[67] *Bodson*, para 31. For a comparison of prices charged by the same undertaking in comparable markets see also Commission Decision of July 25, 2001, *Deutsche Post AG*, Case COMP/C-1/36.915.
[68] Case 395/87, *Ministère Public v Jean-Louis Tournier*, EU:C:1989:319.

> When an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position. In such a case it is for the undertaking in questions to justify the difference by reference to objective dissimilarities between the situation in the Member State concerned and the situation prevailing in all the other Member States.[69]

The *Bodson* and *SACEM* cases are significant since they confirm the use of comparison between prices charged in comparable geographic markets to assess the excessiveness of a price.

A more recent case by the CJEU is *AKKA/LAA*[70]. The case concerned rates charged by a copyrights management organization in Latvia. The organization was alleged to have abused its dominant position by imposing excessively high rates.[71] In a preliminary ruling, the Court elaborated on the method for assessing excessive prices. First of all, the CJEU confirmed the two-stage test provided by *United Brands* and that also other methods can be used to determine whether a price is excessive. Moreover, the Court confirmed its considerations in *SACEM* that a comparison of prices in different Member States can be used to establish the excessiveness of a price.[72] The CJEU further added some aspects to the case law by holding a comparison of prices in different Member States cannot be considered to be insufficiently representative because it regards a limited number of Member States. The Court held that:

> On the contrary, such a comparison may prove relevant, on condition, as observed by the Advocate General in point 61 of his Opinion, that the reference Member States are selected in accordance with objective, appropriate and verifiable criteria. Therefore, there can be no minimum number of markets to compare and the choice of appropriate analogue markets depends on the circumstances specific to each case.[73]

The CJEU further held that it will be for the referring court to assess the relevance of the criteria applied in the case in the main proceedings, while taking into account all the circumstances of the case.[74] Moreover, the Court added some aspects to its considerations in *SACEM* by holding that:

> There is no minimum threshold above which a rate must be regarded as "appreciably higher", given that the circumstances specific to each case are decisive in that regard. Thus, a difference between rates may be qualified as "appreciable" if it is both significant and persistent on the facts, with respect, in particular, to the market in question, this being a matter for the referring court to verify.[75]

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[69] *SACEM*, para 38. See also Joined Cases 110, 241 and 242/88, *François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others*, EU:C:1989:326, para 25.
[70] Case C-177/16, *Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība*, EU:C:2017:689.
[71] *AKKA/LAA*, paras 1–2.
[72] *AKKA/LAA*, paras 36–38.
[73] *AKKA/LAA*, paras 40–41.
[74] *AKKA/LAA*, para 42.
[75] *AKKA/LAA*, para 55.

The *AKKA/LAA* case is important in that the CJEU confirms its previous case law. Above all, the learning point from *AKKA/LAA* is that the selection of comparative benchmark must be done pursuant to objective, appropriate and verifiable criteria. Moreover, the learning point is that the assessment of whether a price is "appreciably higher" must be done with reference to the circumstances specific to each case and that the difference must be significant and persistent.

The CJEU confirmed the benchmarks mentioned above in *SABAM* (2020)[76]. The case concerned festival organizers, which complained about the fees charged by the Belgian Association of Authors, Composers, and Publishers ("SABAM").[77] The Court held that to determine the excessiveness of fees charged by a copyright's organization, one could, inter alia, make a comparison between the price in question and the price charged before by the same undertaking, the prices that undertaking charges for other services or in relation to other customers, or the prices other companies' charge for the same services or comparable products on other national markets.[78]

3.2.2 Commission Decisions

Scandlines[79] concerned a firm that lodged a complaint to the Commission alleging that another firm infringed [Article 102 TFEU] by charging excessive prices for services to ferry operators.[80] In its decision the Commission acknowledged that:

> […] The decisive test in United Brands focuses on the price charged, and its relation to the *economic value* of the product. While a comparison of prices and costs, which reveals the profit margin, of a particular company may serve as a first step in the analysis (if at all possible to calculate), this in itself cannot be conclusive as regards the existence of an abuse under Article [102 TFEU].[81]

According to the Commission:

> The economic value of the product/service cannot simply be determined by adding to the approximate costs incurred in the provision of this product/service…a profit margin which would be a pre-determined percentage of the production costs. [Rather, the] economic value must be determined with regards to the particular circumstances of the case and take into account also non-cost related factors such as the demand for the product/service.[82]
>
> The demand-side is relevant mainly because customers are notably willing to pay more for something specific attached to the product/service that they consider valuable. This specific feature does not necessarily imply higher production costs for the provider. However, it is

[76] Case C-372/10, *SABAM*, EU:C:2020:959.
[77] *SABAM* (2020), para 14.
[78] *SABAM* (2020), para 32.
[79] Commission Decision of July 23, 2004, *Scandlines Sverige AB v Port of Helsingborg*, Case COMP/A.36.568/D3.
[80] *Scandlines*, para 16.
[81] *Scandlines*, para 102.
[82] *Scandlines*, para 232. See also Commission Decision of July 23, 2004, *Sundbusserne v Port of Helsingborg*, Case COMP/A.36.570/D3, para 207.

valuable for the customer and also for the provider, and thereby increases the economic value of the product/service.[83]

After haven taken demand considerations into account when establishing the economic value of the service provided and its price, the Commission concluded that there is not sufficient evidence to establish that the firm in question charged excessive prices.[84] *Scandlines* illustrates a flexible approach to the concept of economic value and the second limb of the two-stage test provided by *United Brands*. The learning point from *Scandlines* is that the Commission emphasized the circumstances of each case by considering aspects of demand.

It can be noted that the cases established above are mostly business-to-business cases. Nonetheless, this case law applies in relation to end consumers as well, which is shown by recent decisions by the Commission targeting excessive prices in the pharmaceutical sector. For instance, this is shown by the Commission's decision in *Aspen*[85] concerning excessive prices for cancer medicines.

3.3 Unfair Trading Conditions

Article 102(a) TFEU does not only prohibit the imposition of unfair purchase and selling prices but also other unfair trading conditions. As follows from the heading in Article 102(a) TFEU, unfair trading conditions is a broader concept than excessive pricing whereby excessive pricing can be seen as a subcategory to the wider category of unfair trading conditions.

EU competition law is concerned with unfair trading conditions as the market power of a dominant firm allows it to impose trading conditions on its trading partners or consumers that it would not be able to in the absence of market power.[86]

3.3.1 Case Law by the CJEU

In a preliminary ruling, *SABAM* (1974)[87], the Court considered whether an undertaking that enjoys a de facto monopoly for the management of copyrights, abuses its dominant position under Article 102(a) TFEU by demanding the global assignment of all copyrights, both present and future and by demanding that the rights assigned would continue to be exercised for five years following the withdrawal of a member.[88]

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[83] *Scandlines*, para 227.
[84] *Scandlines*, paras 241–245.
[85] Commission Decision of January 28, 2021, *Aspen*, Case AT. 40394. See in particular paras 80–86 that refers to the two-stage test provided by *United Brands*.
[86] O'Donoghue, Robert & Padilla, Jorge, *The Law and Economics of Article 102 TFEU*, 3th edition, Hart Publishing, Oxford, 2020, p. 1023.
[87] Case 127/73, *BRT v SABAM*, EU:C:1974:25.
[88] *SABAM* (1974), paras 3–4.

The CJEU established that:

> According to the terms of Article [102 TFEU] an abuse must be regarded as consisting, in particular, in directly or indirectly imposing unfair trading conditions…it is therefore necessary to investigate whether the copyright association through its statutes or contracts concluded with its members, is imposing, directly or indirectly, unfair conditions on members or third parties in the exploitation of works, the protection of which has been entrusted to it.[89]

According to the CJEU:

> [T]he fact that an undertaking entrusted with the exploitation of copyrights and occupying a dominant position within the meaning of Article [102] imposes on its members obligations which are not absolutely necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright can constitute an abuse.[90]

The learning point from the case is that conditions that are not absolutely necessary for the attainment of their object may be found abusive when they encroach unfairly upon trading parties or customers freedom to exercise their rights.

3.3.2 Commission Decisions

GEMA statutes[91] concerned a German copyright collection society and a clause that prevented members from leaving the society for direct relationships with other undertakings such as record companies.[92] The Commission did not raise any objections against the clause in the actual case. The case is interesting as the Commission interpretated the test provided by *SABAM* (1974):

> It may also be inferred from [SABAM] that, in an examination of a collecting society's statues in the light of the Treaty rules, the decisive factor is whether they exceed the limits absolutely necessary for effective protection (indispensability test) and whether they limit the individual copyright holder's freedom to dispose of his work no more than need be (equity).[93]

DSD[94] concerned a packaging ordinance named Der Grüne Punkt-Duales System Deutcheland AG ("DSD") with the intention to prevent or reduce the impact of packaging waste on the environment.[95] DSD was found to have abused its dominant position on the market for collection and recycling of sales packaging in Germany by charging license fees in circumstances where its service was not used.

The Commission held that:

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[89] *SABAM* (1974), paras 6–7
[90] *SABAM* (1974), para 15.
[91] Commission Decision of December 4, 1981, *GEMA statutes*, Case IV/29.971.
[92] *GEMA statutes*, para 20.
[93] *GEMA statutes*, para 36.
[94] Commission Decision of April 20, 2001, *Duales System Deutschland*, Case COMP/34.493.
[95] *DSD*, para 1.

> Unfair commercial terms exist where an undertaking in a dominant position fails to comply with the principle of proportionality…by giving undertakings a choice between introducing separate packaging and distribution channels or paying an unreasonable license fee, DSD is imposing unfair commercial terms.[96]

This statement is what makes the case interesting and that the choice between the customer setting its own service or paying an unreasonable fee may breach the principle of proportionality and may be found abusive under Article 102(a) TFEU.

3.4 The Breach of Data Protection Values

3.4.1 The German Facebook Decision

In the German Facebook decision, the Bundeskartellamt ("BKartA") acted against Facebook's data collection terms, which allow Facebook to combine extensive amounts of data outside Facebook on third-party services with data collected directly on Facebook and other owned services (e.g., WhatsApp and Instagram). This data can then be assigned to the Facebook user's account.[97]

To start with, the BKartA considered whether the General Data Protection Regulation ("GDPR") should be considered within the framework of German competition law. In this regard, the BKartA held that:

> Abusive business terms can also be examined based on the general clause of Section 19(1) GWB. According to the case-law of the Federal Court of Justice, principles from provisions of the legal system that regulate the appropriateness of conditions agreed upon in unbalanced negotiations can be used as concepts for appropriateness in the assessment of abusive practices under Section 19(1) GWB. The principles of data protection law underlying the GDPR are thus a suitable standard for measuring the appropriateness of the data processing terms of a dominant supplier, all the more so since they must be taken into account anyway as a higher-ranking constitutional law that specifies constitutionally guaranteed rights.[98]

In the view of the BKartA, the European data protection regulations that are based on constitutional rights, can or, must be considered when assessing whether data collection terms are appropriate under competition law. The BKartA held that "[t]he abuse of a dominant position pursuant to Section 19(1) GWB […] must be assumed to exist where the data processing terms used by a

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[96] *DSD*, paras 111–112.

[97] BKartA, Press Release – "Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources", February 7, 2019, available in English at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.

[98] BKartA, decision of February 6, 2019, Case B6–22/16, *Facebook*, available in English at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5, para 526.

norm addressee, as a manifestation of market power, violate the principles of the GDPR."[99]

The BKartA then concluded that Facebook's data collection practices breached data protection values:

> The data processing from other Facebook-owned services and from Facebook Business Tools, which is imposed by Facebook […] breaches European data protection values pursuant to GDPR. For, the collection of user and device-related data and combining these data by assigning them to the respective Facebook user accounts and the use of this information actually involves the processing of personal data including special data categories and profiling (see a.). Facebook is responsible for the imposed processing of personal data under data protection law (see b.) There is no sufficient justification pursuant to Article 6 (1), Article 9 (2) GDPR (see c.) for the imposed processing of data from Facebook-owned services or Facebook Business Tools.[100]

The BKartA stressed that no voluntary consent is obtained from users under the GDPR. According to the BKartA:

> Users do not give their effective consent within the meaning of Article 6(1a), Article 9(2a) GDPR to the processing of personal data pursuant to Facebook's Data Policy in respect of processing of data collected from Facebook-owned services and Facebook Business Tools.
>
> The consent that needs to be given to Facebook when users sign up with the social network is not to be regarded as voluntary consent within the meaning of Article 6(1a) GDPR (see (a)). In relation to the special data categories covered by data processing pursuant to Article 9(1) GDPR, no explicit consent is given within the meaning of Article 9(2a) GDPR (see (b)).[101]

According to the BKartA, it cannot be assumed that individuals give their voluntarily consent since they are forced to consent to data processing terms when they sign up for a service of a company that has a dominant position in the market.[102] After concluding that Facebook's breach of data protection values was a manifestation of Facebook's market power, the BKartA concluded that an abuse of dominant position under German competition law existed.[103]

Worth mentioning is that the BKartA in its decision also considered the EU competition law approach to data protection breches. In this regard, the BKartA concluded that:

> [T]he examination has shown that the concept of protection developed by German case law on the general clause of Section 19(1) GWB, which relies heavily on decisions about values based on both fundamental rights and ordinary law in order to determine abusive conduct, has so far found no equivalent in European case law or application practice […].[104]

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[99] *Facebook* (BKartA), paras 525–534.
[100] *Facebook* (BKartA), para 573.
[101] *Facebook* (BKartA), paras 639–640.
[102] *Facebook* (BKartA), para 643.
[103] *Facebook* (BKartA), para 871.
[104] *Facebook* (BKartA), para 914.

The BKartA's decision is special in that the BKartA relies on other legal norms, namely, data protection values, to establish an abuse of dominant position under competition law.

3.4.2 Case Law by the CJEU

As noted by the BKartA, there is no equivalent case law by the CJEU that treats the breach of data protection values as an abuse of dominant position under EU competition law. Nevertheless, the cases to be described in the below are relevant for the question of whether or not that could be the case.

Asnef-Equifax[105] concerned a register run by a group of financial organizations with credit information about their customers. This register was subject to an assessment under EU competition law. As regards privacy-related questions the CJEU held that "[a]ny possible issues relating to the sensitivity of personal data are not, as such, a matter of competition law, they may be resolved on the basis of the relevant provisions governing data protection."[106]

In *Deutche Telecom*[107] the CJEU found that the legality of Deutche Telecom's conduct under national telecom regulation did not hinder the enforcement of Article [102 TFEU]. The CJEU held that:

> The mere fact that the appellant was encouraged by the intervention of a national regulatory authority such as RegTP to maintain the pricing practices which led to the margin squeeze of competitors who are at least as efficient as the appellant cannot, as such, in any way absolve the appellant from responsibility under Article [102 TFEU].[108]

Furthermore, in *AstraZeneca*[109] the CJEU held that the fact that AztraZeneca's conduct in markets for medicinal products was in conformity with a directive could not cause AstraZeneca to escape the prohibition laid down in Article [102 TFEU]. In this connection, the CJEU held that:

> [T]he illegality of abusive conduct under Article [102 TFEU] is unrelated to the compliance or non- compliance with other legal rules and, in the majority of cases, abuses of dominant positions consist of behavior which is otherwise lawful under branches of law other than competition law.[110]

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

[106] *Asnef-Equifax*, para 63. The Commission has confirmed this in the context of several mergers. For instance, in context of the merger between Facebook/WhatsApp the Commission held that "[a]ny 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 the EU competition law rules but within the scope of EU data protection rules." See Commission Decision of October 3, 2014, *Facebook/WhatsApp*, Case COMP/M.7217, para 164.

[107] Case C-280/08 P, *Deutche Telecom v Commission*, EU:C:2010:603.

[108] *Deutche Telecom*, paras 80–85.

[109] Case C-457/10 P, *AstraZeneca AB and AstraZeneca plc v Commission*, EU:C:2012:770.

[110] *AstraZeneca*, para 132.

From the *Asnef-Aquifax*, *Deutche Telecom* and *AstraZeneca* cases it can be concluded that the compliance or non-compliance of other regulatory framework, including data protection law, does not per se affect the legality of abusive conduct under Article 102 TFEU. However, this does not mean that other legal norms are completely irrelevant for competition law assessments.

Allianz Hungária[111] supports the view that other legal norms can be considered within the framework of competition law assessments. In a preliminary ruling, the CJEU held that the referring court could consider domestic law to determine whether agreements between an insurance company and car repair shops were anti-competitive.[112]

3.5 The Restriction of Consumer Choice

In its decision on interim proceedings on June 2020, the Bundesgerichtshof ("BGH") upheld the German Facebook decision by the BKartA. However, the BGH's interim decision was different from that of the BKartA in that the BGH did not rely upon the GDPR to establish an abuse of dominant position under German competition law. Instead, the BGH relied on a concept of restriction of consumer choice.[113] More precisely, the BGH embraced a theory of harm that considers the interest of those users who do not want to do without the use of Facebook but who value the limitation of the collection and processing of data to the minimum necessary for the use and for the financing of the social network.

The BGH's theory of harm was based on the fact that:

> [Users] are not given a choice of whether they want to use the network with a more intensive "personalization of the user experience", which is connected with a potentially unrestricted access by Facebook also to characteristics of their "off-Facebook" internet use, or whether they want to consent only to a personalization that is based on the data that they themselves supply on facebook.com.[114]

As a result, there is an expansion of the service to include a more intensive personalization of the user experience. In other words, users are forced to pay for a service they do not desire, a service that generates data based on the user's activity outside of the social network.[115]

The BGH declared that there are no serious doubts that Facebook's terms of use lead to an anti-competitive market result since these could not be expected under conditions of functioning competition.[116] The BGH further stressed that the anti-competitive effects are strengthened by network effects that lead to a high level of binding (lock-in effect) and ultimately to the users being more

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[111] Case C-32/11, *Allianz Hungária Biztosító Zrt. and Others v Gazdasági Versenyhivatal*, EU:C:2013:160.
[112] *Allianz Hungária*, see in particular paras 46–47.
[113] BGH, Case KVR 69/19, *Facebook*, ECLI:DE:BGH:2020:230620BKVR69.19.0, available in English at: https://link.springer.com/article/10.1007%2Fs40319-020-00991-2.
[114] *Facebook* (BGH), para 58.
[115] *Facebook* (BGH), para 58.
[116] *Facebook* (BGH), para 84.

willing to accept disadvantages.[117] The BGH established that under conditions of functioning competition, especially without the switching barriers arising from the lock-in effect:

> [A]n offer would be available on the market for social networks that accommodated users' preferences for greater autonomy in designing access to data that portray a general picture of their internet use in its entirety, and would give users the choice to use the network with a more intensive personalization of the use experience, as is entailed with the processing of "off-Facebook" data, or to permit only a personalization that is based on data they disclose while using the platform operator's service. Such an unrestricted alternative is not offered by Facebook.[118]

Accordingly, in a competitive market, users would have a choice between two models. A model with more intense data collection; data collection, which allow an online platform to generate data from third-party sources outside the platform and a model with less data collection; the minimum necessary for the use and financial of the social network.

The BGH held that Facebook's conduct, which cannot (at least in part) be judged as controlled by consumer preferences, may constitute an exploitation of scopes of action not sufficiently controlled by competition.[119] The BGH established a link between Facebook's market power and the abuse by holding that:

> In cases like the present one, in any case, in which the terms employed led to market outcomes detrimental to consumers that could not be expected in the event of functioning competition, and that at the same time are objectively capable of impeding competition, as a rule the causality required under Sec. 19(1) of the Act against Restraints of Competition cannot be denied.[120]

The BGH emphasized that there is not an option for users to go without the service as the access of users to Facebook, at least for some consumers, largely conditions their participation in social life. Thus, it is not reasonable to expect them to do without it according to the BGH. In this regard, the BGH held that the social network is an important form of social communication. The use of the forum opened for the purpose to reciprocal exchange and expression of opinions is of special significance due to the large number of users and network effects.[121]

The BGH further emphasized the constitutionally guaranteed right to informational self-determination:

> The constitutionally guaranteed right to informational self-determination, precisely in the context of the considerable political, societal and economic significance of internet communication, requires – in view of the scope and the depth of the data generated – a particular level of protection of users from an exploitation of these communication data by inappropriate disclosure for processing by the operator of a social network.[122]

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[117] *Facebook* (BGH), para 44.
[118] *Facebook* (BGH), para 86.
[119] *Facebook* (BGH), para 87.
[120] *Facebook* (BGH), paras 71–72.
[121] *Facebook* (BGH), para 102.
[122] *Facebook* (BGH), para 103.

Pursuant to the BGH, the right to informational self-determination guarantees the individual the possibility to influence in a differentiated manner the context and manner in which one's own data are made available to others and used by others. It thereby contains the guarantee to have a substantial say in decisions about attributions made to one's person. According to the BGH, the value of informational self-determination must be considered when interpreting general civil law clauses including the present competition provision.[123]

According to Wiedemann, the BGH's theory of harm is convincing since it is based on a breach of competition law where the BGH puts the role of users as market participants in the forefront and not their role as data subjects.[124] Pursuant to Scheele, data collection "becomes directly related to the abuse of users' cognitive biases and their inability to make well-informed decisions and that therefore there is a good reason to deem this practice anti-competitive."[125] The BGH's decision is interesting as a concrete example of how excessive data collection practices could be tackled under competition law.

3.6 Excessive Data Collection as an Exploitative Abuse

3.6.1 Excessive Data Collection as an Excessive Price

As follows from *General Motors*, a firm may abuse its dominant position under EU competition law by imposing an excessive price in relation to the economic value provided (excessive pricing). As concluded in Chapter 2 of this dissertation, consumers pay for services online by allowing firms to collect their data. Accordingly, excessive data collection, which enables a platform to collect and combine excessive amounts of data, can be seen as a price for services online and may be applied on the concept of excessive pricing.

However, for it to be possible to measure whether a firm's data collection is excessive in relation to the economic value of the service provided, data must be transferred into a quantifiable price.[126] By this time, economists have proposed different ways of quantifying the value of data. Methods based on market valuation, individual's valuation as well as hybrid models have been suggested.[127]

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[123] *Facebook* (BGH), paras 104–105.

[124] Wiedemann, Klaus, *A Matter of Choice: The German Federal Supreme Court's Interim Decision in the Abuse-of-Dominance Proceedings Bundeskartellamt v. Facebook (Case KVR 69/19)*, International Review of Intellectual Property and Competition Law, Vol. 51, Issue 9, November 2020, p. 1176.

[125] Scheele, Rachel, *Facebook: From Data Privacy to a Concept of Abuse by Restriction of Choice*, Journal of European Competition Law & Practice, Vol. 12, Issue 1, January 2021, p. 37.

[126] See also Butien, Caroline Miriam, *Exploitative Abuses in Digital Markets: Between Competition Law and Data Protection Law*, Journal of Antitrust Enforcement, 2020, jnaa041, p. 7.

[127] See e.g., Malgieri, Gianclaudio & Custers, Bart, *Pricing privacy: The Right to Know the Value of Your Personal Data*, Computer Law & Security Review, Vol. 34, Issue 2, April 2018, pp. 296–297. See also OECD, "Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value", 2013, available at: https://www.oecd-ilibrary.org/science-and-

It should be noted, however, that quantifying the value of data is not an easy task. This is the case as the value of data is regarded differently and since data may include non-monetary values such as privacy, which indeed can be difficult to quantify.[128] Accordingly, a fixed price for data may disregard the non-monetary values of data.

Provided that data is possible to transfer into a quantifiable price, then the two-stage test provided by *United Brands* should be applied to determine whether a firm's data collection is excessive in relation to the economic value of the service provided. The two-stage test still forms basis of today's approach to excessive pricing under Article 102(a) TFEU. The first limb of the test is to compare the selling price with the costs of production. Here, one could compare the data collected with what the user receives in return, the costs of the service and its economic value.

As mentioned, it can be challenging to establish a price for data. Establishing the costs of production may be challenging as well. As concluded in Chapter 2 of this dissertation, the existence of economies of scale is a main characteristic of online platforms. Because of economies of scale, it can be difficult to determine which costs should be considered when applying the first limb of the test, not least, to what extent initial investments and the recoupment of such investments should be considered.

After declaring a considerable difference between the data collected and the costs of the service provided, the second limb of the test is to establish that the actual price charged is unfair either in itself or by applying a comparative benchmark. As follows from the case law, several benchmarks may be devised to assess the excessiveness of a price. As long as the benchmark is selected pursuant to objective, appropriate and verifiable criteria.

Firstly, a comparison of an online platform's data collection practices across time can be made. In this regard, one could for instance, as Robertson suggests, retrospectively analyze if new market entry leads to more privacy-friendly data collection to determine the excessiveness of previous data collection.[129] A comparative benchmark that regards prices across time, receives support from the *British Leyland* case.

Secondly, one could make a comparison across national markets. In this regard, one could compare the data collection practices imposed on consumers in different Member States by the same platform. However, such comparison presupposes that a platform engages in different data collection practices across several Member States. Another option is to compare a firm's data collection practices with the practices of other platforms for the same services or comparable services in other geographic markets. The CJEU's findings in the *Bodson* and *SACEM* cases confirm the use of such benchmarks.

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technology/exploring-the-economics-of-personal-data_5k486qtxldmq-en;jsessionid=Euz3j9mP6yUB7aE-oX0Qx1FF.ip-10-240-5-180.

[128] Butien, p. 7.

[129] Robertson, Viktoria, *Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data*, Common Market Law Review, 2020, Vol. 57, Issue 1, p. 176.

However, comparing with other services may be challenging to the extent online platform markets are dominated by only a few numbers of platforms. Also, as Robertson notes, it can be difficult to find a comparable service because of the multi-sided character of online platforms. What may be a competing product on one side of the platform might not be a competing product on the other side of the platform. A comparison across services may also be complicated by the fact that platforms may have similar data collection terms, which not seldom can be vague.[130]

According to the Court in *AKKA/LAA*, there is no threshold according to which a price must be regarded as appreciably higher, but such assessment must be done with regard to the circumstances of each case. However, the difference must be significant and persistent. In this regard, it may be difficult to establish when a firm's data collection should be seen as appreciably more excessive in comparison to the benchmark used.

The benchmarks mentioned above are only examples of benchmarks to be applied. According to the Court, also other methods could be utilized to establish the excessiveness of a price. Furthermore, the Commission's decision in *Scandlines* supports a more flexible approach to the notion of economic value that considers the circumstances of each case. As concluded previously, the excessiveness of a price can also be determined by establishing a price as unfair in itself by directly estimating the economic value of the service.

In this regard, Robertson suggests that excessive data collection could be seen as unfair in itself where a firm degrades the quality of the product by reducing the user's privacy protection. Alternatively, where it collects amounts of data, which appear excessive considering the user's reasonable expectations. Robertson further proposes that the GDPR could be used as a guideline to assess the unfairness of a firm's data collection.[131] Graef suggests the possibility to rely on the purpose-limitation principle in Article 5(1)(b) GDPR or the principle of data minimization in Article 5(1)(c) GDPR. Those principles limit the collection of data to what is necessary to accomplish a specified and legitimate purpose and require that data is not retained longer than necessary to fulfill that purpose.[132]

3.6.2 Excessive Data Collection as an Unfair Trading Condition

As ascertained above, Article 102(a) TFEU prohibits the imposition of unfair trading conditions by a dominant firm in relation to its trading partners and consumers. The concept of unfair trading conditions does not involve as many

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[130] Robertson, *Excessive Data Collection*, p. 176.

[131] Robertson, *Excessive Data Collection*, p. 177. See also Ezrachi, Ariel & Robertson, Viktoria, *Competition, Market Power and Third-Party Tracking*, World Competition, Vol. 42, Issue 1, March 2019, p. 15.

[132] Graef, Inge, *Blurring Boundaries of Consumer Welfare: How to Create Synergies Between Competition, Consumer and Data Protection Law in Digital Markets*, Bakhoum, Mor, Conde Gallego, Beatriz, Mackenrodt, Mark-Oliver & Surblytė-Namavičienė, Gintarė (eds.), Personal Data in Competition, Consumer Protection and Intellectual Property Law [Electronic Resource], Springer Berlin Heidelberg, 2018, pp. 139–140.

aspects as excessive pricing, which may have to do with the limited case law on unfair trading conditions. Accordingly, it is challenging to define a definite test for unfair trading conditions. Still, following *SABAM* (1974), *GEMA statues* and *DSD*, an abstract test for unfair trading conditions can be derived. Trading conditions may be seen as unfair within the meaning of Article 102(a) TFEU when they are not necessary or proportionate in the view of their object and limit trading partners or consumers rights more than needed.

In line with the case law, excessive data collection could potentially be established as an unfair trading condition to the extent it is seen as not necessary or proportionate for the attainment of the service and encroaches upon the user's privacy, informational self-determination, or commercial autonomy more than needed. The German Facebook proceedings illustrate an impact to these values.

The challenging part with applying excessive data collection on the concept of unfair trading conditions is to establish at what stage a firm's data collection is not necessary or not proportionate for the attainment of the service and encroaches upon the user's privacy, informational self-determination, or commercial autonomy more than needed. The question is if certain practices, for instance, data collection through third-party tracking, always should be seen as not necessary or proportionate for the attainment of the service and always should be seen to encroach upon the user's privacy, informational self-determination, or commercial autonomy more than needed. Such finding can be challenged by that the user might in fact desire the platform to engage in excessive data collection for the experience of a more personalized service.

As concluded previously, the undertaking in *DSD* abused its dominant position by giving its trading partners a choice between introducing separate packaging and distribution channels or paying an unreasonable license fee. Hereby, the dominant firm failed to comply with the principle of proportionality.

Taking inspiration from *DSD*, one may, as Robertson suggests, establish an unfair trading condition when a platform gives the user the choice between setting up its own service or agreeing to excessive data collection.[133] Alternatively, Roberson suggests that an unfair tradition condition could be found when excessive data collection goes beyond the user's reasonable expectations at the time the user consent to data collection terms. Moreover, Robertson suggests that data protection values can provide guidance when data collection practices must be seen as unfair within the meaning of Article 102(a) TFEU.[134]

3.6.3 Excessive Data Collection as a Breach of Data Protection Values

In the German Facebook decision, the BKartA established that an abuse of dominant position under German competition law exists where a firm, through its data collection practices, breaches principles of the GDPR as a manifestation of market power.

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[133] Robertson, *Excessive Data Collection*, pp. 180–181.
[134] Robertson, *Excessive Data Collection*, p. 181.

The question is if a similar approach could be taken under Article 102 TFEU. As ascertained above, Article 102(a) TFEU in principle encompasses all types of exploitative behavior as the scope of that provision is outmost wide. Solely from this perspective, excessive data collection as a breach of data protection values could in principle amount to an abuse of dominant position under Article 102(a) TFEU. However, considering the CJEU's assessment in the *Asnef-Equifax* case, there seems to be limited space for such to apply. In that case, the CJEU held that case that issues relating to the sensitivity of personal data are not, as such, a matter of competition law. Furthermore, from the *Deutche Telecom* and *AstraZeneca* cases it is clear that the breach of other regulatory framework does not per se affect the legality of abusive conduct under Article 102 TFEU

Nevertheless, it should be noted that the *Asnef-Aquifax* case is from the year of 2006 and that platforms engagement in excessive data collection is a recent phenomenon. The Court has not yet ruled on the specific question if excessive data collection as a breach of data protection values could amount to an abuse of dominant position under Article 102(a) TFEU. In this regard, the Court may change its position in the context of the digital economy and excessive data collection. The possibility for EU competition law to tackle excessive data collection as a breach of data protection values should, therefore, not be completely left behind.

3.6.4 Excessive Data Collection as a Restriction of Consumer Choice

As concluded previously, the BGH found in the German Facebook proceedings that users of Facebook have no other choice but to comply with a service that involves more intense data collection. The BGH found that this lack of choice amounted to an abuse of dominant position under German competition law. As for the question if a similar theory of harm could be applied under Article 102(a) TFEU, it has been established above that the scope of that provision is outmost wide. Therefore, excessive data collection as a restriction of consumer choice could in principle be established as a theory of harm under Article 102(a) TFEU. Unlike the BKartA's decision, the BGH's theory of harm is not based on other legal norms, such as data protection values, which makes it easier to apply under EU competition law. As Wiedemann notes, the BGH emphasizes users' role as market participants, rather, than their role as data subjects.

A theory of harm based on the restriction of consumer choice may already gain support from the case law under unfair trading conditions. As concluded above, Robertson suggests, based on the Commission's decision in *DSD*, that excessive data collection could be established as an unfair trading condition when the user is given the choice between setting up its own service or agreeing to excessive data collection. The BGH's theory of harm has similarities with this concept. Both concepts are based on a lack of choice. The *DSD* concept is based on the unfair choice between the user setting up its own service or agreeing to excessive data collection. Comparably, the BGH's concept is based on the

restriction of choice between two services: a service that involves more intense data collection (which allows a platform to generate data from third-party sources) and a service that involves less data collection (the minimum necessary for the use and financial of the social network).

Against this background, excessive data collection as a restriction of consumer choice could be established as an abuse of dominant position under Article 102(a) TFEU. In this regard, excessive data collection potentially could be tackled under that provision when a dominant firm's market power enables it force consumers to pay for a service that involves more intense data collection and thus restrict consumer choice in a way that it would not have under conditions of functioning competition.

3.7 Conclusions

This Chapter has demonstrated that excessive data collection could be tackled by several means under Article 102 TFEU. In this regard, the concepts of excessive pricing, unfair trading conditions and restriction of consumer choice could be used to tackle excessive data collection by means of EU competition law. The concept of excessive pricing is the most developed of these concepts but may cause interpretation difficulties when applied in relation to excessive data collection. Moreover, the concept of unfair trading conditions is a bit diffuse because of limited case law. The option that raises least interpretation difficulties is the concept of restriction of consumer choice, which is simply based on an obligation to provide users the choice between two services: a service that involves more intense data collection and a service that involves less data collection. The breach of data protection values as a manifestation of market power is another concept that potentially could be used to tackle excessive data collection. However, this concept does not gain support by EU case law. To be able to use this concept to tackle excessive data collection, the CJEU must reverse its previous case law. This Chapter has demonstrated that excessive data collection *could* be tackled by means of EU competition law. The following Chapter will demonstrate that such also *should* be the case.

4 Excessive Data Collection and the Goals of EU Competition Law

To understand the extent of European Union ("EU") competition provisions and the role of EU competition law in tackling excessive data collection, one must understand the goals of EU competition law. The competition provisions may contain wide legal terms that give the enforcer considerable autonomy in its decision-making. In this regard, the goals of EU competition law limit the enforcer to make decision that comply with the goals.[135] An understanding of the goals of EU competition law ensures that the aims of the competition provisions are realized and enables coherency in competition law enforcement. Moreover, it is crucial for setting enforcement priorities.[136] By elaborating on the goals of EU competition law and the extent of EU competition policy, the aim of this Chapter is to demonstrate that EU competition law plays an important role in tackling excessive data collection. First, the foundations of the Union are outlined. Second, some general considerations on the goals of EU competition law are made. Finally, potential goals of EU competition law are analyzed and how they may promote tackling excessive data collection. The goals have been selected based on their relevancy for excessive data collection.

4.1 The Foundations of the Union

First, it should be emphasized that the goals of EU competition law must be seen in the light of the foundations of the Union.[137] The foundations of the Union can be found in Articles 2 and 3 Treaty on European Union ("TEU"). Article 2 stipulates that "the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights." Moreover, Article 3(1) stipulates that "the Union's aim is to promote peace, its values and the well-being of its people." Pursuant to Article 3(3), the Union should establish an internal market and work for "the sustainable development of the Europe based on balanced economic growth and price stability, a high competitive social market economy, aiming at full employment and social

[135] Wasastjerna, Maria, *Competition, Data and Privacy in the Digital Economy: Towards a Privacy Dimension in Competition Policy?* [Electronic Resource], Kluwer Law International, 2020, p. 64.
[136] Witt, Anne C., *The More Economic Approach to EU Antitrust Law*, Hart publishing, Oxford, 2016, p. 77.
[137] O'Donoghue, Robert & Padilla, Jorge, *The Law and Economics of Article 102 TFEU*, 3th edition, Hart Publishing, Oxford, 2020, pp. 8–11.

progress." In line with Protocol No 27 on the internal market and competition "the internal market as set out in Article 3 TEU includes a system ensuring that competition is not distorted." EU competition law is therefore a means to advance the foundations of the Union. Article 7 Treaty on the Functioning of the European Union ("TFEU") stipulates that "the Union shall ensure consistency between its policies and activities, taking all of its objectives into account." The provision confirms that EU competition policy as well as other Union policy should be interpreted in the light of the Union's foundations.

4.2 General Aspect about the EU Competition Goals

It is not clear from the treaties which goals EU competition law should pursue. The goals of EU competition law are subject to recurrent debate. The crux of the debate is whether EU competition law solely pursues economic goals or also non-economic goals. The debate is currently at a peak with the conduct of Big Tech[138] in the context of the digital economy, which have raised concerns in relation to social values.[139] In line with the "the more economic approach" to EU competition law, the European Commission's ("Commission") perception of the goals of EU competition law has become narrower. The Commission recognizes consumer welfare as the main goal of EU competition law.[140]

In a speech given in 2001, former Commissioner Monti held that:

> The goal of competition policy in all its aspects, is to protect consumer welfare by maintaining a high degree of competition in the common market. Competition should lead to lower prices, a wider choice of goods, and technological innovation all in the interest of the consumer.[141]

Further, in a speech given in 2005, former Commissioner Kroes held that:

> Consumer welfare is now well established as the standard the Commission applies when assessing mergers and infringements of the Treaty rules on cartels and monopolies. Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources […].[142]

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[138] The term "BigTech" refers to Facebook, Google, Twitter, Amazon, Apple, etc.

[139] See e.g., Gerbrandy, Anna, *General Principles of European Competition Law and the 'Modern Bigness' of Digital Power: The Missing Link Between General Principles of Public Economic Law and Competition Law*, Bernitz, Ulf, Groussot, Xavier, Paju, Jaan & Vries, Sybe Alexander de (eds.), General Principles of EU law and the EU Digital Order, Wolters Kluwer, Alphen aan den Rijn, 2020, pp. 309–313.

[140] Witt, p. 109.

[141] Monti, Mario, "The Future for Competition Policy in the European Union", London, July 9, 2001, available at: https://ec.europa.eu/commission/presscorner/api/integration/rapid2/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/01/340|0|RAPID&lg=EN.

[142] Kroes, Neelie, "European Competition Policy – Delivering Better Markets and Better Choices", London, September 15, 2005, available at: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_05_512.

The Commission's embrace of consumer welfare as the main goal of EU competition law has been criticized for being a construction of the Commission and not of the Court of Justice of the European Union ("CJEU").[143] The CJEU indeed regards consumer welfare as a goal of EU competition law. However, the Court has emphasized other goals as well. For instance, in *GlaxoSmithKline*[144] the Court held that "like other competition rules laid down in the Treaty, Article [101 TFEU] aims to protect not only interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such." In *TeliaSonera*[145], the CJEU concluded an even broader perception of EU competition law that connects to the treaties. The Court held that:

> Article 102 TFEU is one of the competition rules referred to in Article 3(1)(b) TFEU which are necessary for the functioning of that internal market…The function of those rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, therefore by ensuring the well-being of the European Union.[146]

Several competition lawyers emphasize the dynamism of EU competition law and argue that EU competition law may pursue multiple goals depending on the market and social context.[147] In the view of Ezrachi, dynamism enables EU competition law to address a wide range of market and social realities and safeguards EU competition law from turning into a closed system, detached from domestic needs and provides a reflection of the changing political landscape and forms part of the democratic process.[148] Moreover, Whish and Bailey ascertain that "competition policy does not exist in a vacuum: it is an expression of the current values and aims of society and is suspectable to change as political thinking generally."[149] Pursuant to Wasastjerna:

> Competition policy should respond to the problems of our time as the law exists to correct market problems and failures. This entails that competition policy goals should reflect the values we need to protect in today's digital age, such as data privacy.[150]

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[143] See e.g., Wasastjerna, p. 100.

[144] Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, *GlaxoSmithKline Services Unlimited v Commission*, EU:C:2009:610, para 63. See furthermore Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v Commission*, EU:C:1973:22, para 26 where the CJEU held that Article 102 TFEU "is not only aimed at practices which may cause damage to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure." See also Case C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, EU:C:2009:343, para 38 and Case C-68/12, *Protimonopolný úrad Slovenskej republiky v Slovenská sporiteľňa a.s.*, EU:C:2013:71, para 18.

[145] Case C-25/09, *Konkurrensverket v TeliaSonera Sverige AB*, EU:C:2011:83.

[146] *TeliaSonera*, paras 21–22.

[147] See e.g., Wasastjerna, p. 71.

[148] Ezrachi, Ariel, *Sponge*, Journal of Antitrust Enforcement, Vol. 5, Issue 1, April 2017, p. 67.

[149] Bailey, David & Whish, Richard, *Competition Law* [Electronic Resource], 9th edition, Oxford University Press, Oxford, 2018, p. 19.

[150] Wasastjerna, p. 133.

As promoted by the Commission before the more economic approach:

> Alongside the establishment of a common market, competition policy is one of the two great strategies by which the Treaty of Rome sets out to achieve the Community's fundamental objectives: the promotion of harmonious and balanced economic development throughout the Community, an improved standard of living, and closer relations between the Member States. Competition policy cannot therefore be pursued in isolation, as an end in itself, without reference to the legal, economic, political, and social context.[151]

In the light of the foregoing, and as noted by Lianos, Korah and Siciliani, the issue of goals of EU competition law remains an open question.[152] In the following, a wider perception of the goals of EU competition law is concluded whereby several goals are explored.

4.3 Consumer Welfare

From an economic point of view, consumer welfare corresponds to consumer surplus, the difference between the sum of the consumers' willingness to pay for a product and the sum of what they actually pay. A firm's behavior that through the exercise of market power results in higher prices or lower output reduces consumer surplus. This results in allocative inefficiencies since the decreased consumer surplus is greater than the increased profits.[153] The consumer welfare standard is concerned with distributive effects, the transfer of surplus from producers to consumers.[154] The mere increases in society's total welfare are not sufficient to assess a business strategy under EU competition law, but the benefits arising from increases in efficiency must also be transferred to consumers.[155]

From a policy perspective, consumer welfare may be discussed in narrower respective wider terms. A narrower approach to consumer welfare corresponds to the economic interests of consumers in terms of lower prices, better quality, and wider choice for consumers whereas a wider approach to consumer welfare also encompasses public interests or the non-economic interests of consumers. These interests can only take place in consumer welfare if they can be translated into economic terms.[156]

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[151] Commission, "XXIInd Report on Competition Policy 1992", p. 13.
[152] Lianos, Ioannis, Korah, Valentine & Siciliani, Paolo, *Competition Law: Analysis, Cases & Materials*, Oxford University Press, Oxford, 2019, p. 86.
[153] Motta, Massimo, *Competition Policy: Theory and Practice*, Cambridge University Press, New York, 2004, p. 19.
[154] Jones, Alison & Surfin, Brenda, *EU Competition Law: Text, Cases, and Materials*, 7th edition, Oxford University Press, Oxford, 2019, p. 12.
[155] Geradin, Damien, Farrar, Anne, Layne & Petit, Nicolas, *EU Competition Law and Economics*, 1st edition, Oxford University Press, Oxford, 2012, p. 22.
[156] Ioannidou, Maria, *Consumer Involvement in Private EU Competition Law Enforcement* [Electronic Resource], Oxford University Press, Oxford, 2015, pp. 24–25

It can be seen from the Commission's guidelines that it embraces a narrower approach to consumer welfare that excludes the non-economic interests of consumers. In the context of [Article 101(3)] the Commission elaborates that "the aim of Community competition rules is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources."[157] Furthermore, in the context of Article 102 TFEU, the Commission declares that the aim of the Commission's enforcement:

> Is to ensure that dominant undertakings do not impair effective competition by foreclosing their competitors in an anti-competitive way, thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would otherwise prevailed or in some other form such as limiting quality or reducing consumer choice.[158]

The Commission's narrow approach to consumer welfare has been criticized for being too focused on economic efficiency and prices whilst non-price parameters, such as quality, have been given less attention. Critics argue that the current approach is out of touch in the context of the digital economy.[159] Pursuant to Ezrachi:

> A price-centric approach to consumer welfare, may produce a distorted picture of effects. In the digital environment, where the price is often ostensibly free for consumers, quality forms an important dimension of competition. For example, quality degradation of services or product characteristics may result in harm to consumer welfare, despite the absence of price effects. It is likely that the digital landscape will increasingly require enforcers to consider a range of variables that impact on welfare, even when these are not easily quantifiable.[160]

Today, where consumers pay for services through their data, Wasastjerna promotes a wider approach to consumer welfare that embraces non-economic or social values and better takes into account the value of data by making room for non-price interest such as quality and privacy as a subcategory of quality.[161] It is argued that privacy aspects may be accommodated to the category of quality under consumer welfare to the extent the lack of data protection can be seen as a lack of quality of the product,.[162] Pursuant to Ezrachi, consumer welfare makes a central pillar for intervention in digital markets and may be used to address exploitation.[163]

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[157] Communication from the Commission – Notice – Guidelines on the application of Article 81 (3) of the Treaty, 2004, OJ C 101/97, para 33.
[158] Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009, OJ C 45/7, para 19.
[159] Wasastjerna, pp. 137–138.
[160] Ezrachi, Ariel, *EU Competition Law Goals and the Digital Economy*, Oxford Legal Studies Research Paper No. 17/2018, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3191766, pp. 6–7.
[161] Wasastjerna, pp. 137–138.
[162] See e.g., Stucke, Maurice E., *Should We Be Concerned About Data-opolies?*, Gerogetown Law Technology Review, Vol. 2, Issue 2, July 2018, p. 285 & Wasastjerna, pp. 185–191.
[163] Ezrachi, *EU Competition Law Goals*, p. 6.

4.4 Fairness

Fairness has different meanings in different contexts.[164] Within the framework of this dissertation, fairness is discussed in relation to consumers and as a value that reflects the interpretation of the consumer welfare standard. According to Ezrachi, the concept of fairness ensures fair results of market outcomes, cultivates trust in markets and crystallizes legitimate expectations of market participants and thereby stimulates competition. Pursuant to the concept of fairness, EU competition law should be used to prevent unfair transfers of wealth.[165] A concrete example of the concept of fairness embedded in the law is Article 102(a) TFEU, which targets the distributional injustices of unfair purchase or selling prices and other unfair trading conditions.[166]

As concluded above, the Commission emphasizes consumer welfare as the main goal of EU competition law. More recently, however, the Commission has started to embrace fairness considerations as a value alongside consumer welfare. The Commission has concluded that "competition policy has a direct impact on people's lives, and one of its key features is promoting markets so that – everyone – businesses and citizens – can get a fair share of the benefits of growth."[167] Executive Vice-President Vestager has held that "we have competition rules because we believe they make our society a better place to live. That they make our markets work more fairly for consumers."[168] Vestager has further held that "[o]ur only goal, as competition authorities, is to make sure that consumers get a fair deal."[169] Juncker, former President of the EU, has held that "a fair paying field also means that in Europe, consumers are protected against cartels and abuses by powerful companies […]. The Commission watches over this fairness."[170]

As regards privacy aspects in the context of the digital economy, Wasastjerna notes that:

> In the context of fairness, concerns regarding possible data- and privacy-related activities, which have exploitative effects, are relevant. Privacy can be vowed into discussion of fairness as a value since the role played by data and privacy has become important in shaping digital markets.[171]

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[164] Jones & Surfin, p. 32.
[165] Ezrachi, *EU Competition Law Goals*, pp. 13–16.
[166] Motta, p. 25.
[167] Commission, "Report on Competition Policy 2016", p. 2.
[168] Vestager, Margrethe, "Fairness and Competition", Brussels, January 25, 2018, available at: https://wayback.archive-it.org/12090/20191129212136/https:/ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/fairness-and-competition_en.
[169] Vestager, Margrethe, "Making the Decisions that Count for Consumers", Sofia, May 31, 2018, available at: https://wayback.archive-it.org/12090/20191129210951/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/making-decisions-count-consumers_en.
[170] Economic and Social Committee, Opinion on the "Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Competition Policy 2016", OJ C 81/111, para 2.
[171] Wasastjerna, p. 76.

According to Ezrachi:

> Fairness may support intervention when it comes to unfair market practices or when confronted with illegitimate transfers of wealth from consumers to service providers. Fairness may play a role when data handling, data protection and privacy violations lead to distortions of competition or unfair exploitation.[172]

4.5 Economic Freedom and Democracy

A potential goal of EU competition law is the protection of constitutional fundamental values against the misuse of private economic power. Pursuant to this view, EU competition law should protect the fundamental value of individual economic freedom. More specifically, the freedom of individuals to participate in the market and their commercial autonomy against unfair business strategies of economically powerful businesses.[173]

Apart from protecting individual economic freedom, some argue that EU competition law plays a role in safeguarding the political system. In line with this view, the concentration of private economic power in the hands of a few corporate giants threatens democratic institutions. Such approach manifests an ordoliberal approach to EU competition law. Ordoliberalism was developed in Germany in the early 1930's. It recognizes individual economic freedom as a condition for a democratic society and considers the concentration of power as the greatest threat to individual economic freedom. Ordoliberalism recognizes monopolism as the most dangerous form of private power, which could be used to corrupt the political system. It sees the law as means to restraint private power to protect individual economic freedom.[174]

The promotion of individual economic freedom and democracy goals do not necessarily presuppose ordoliberal thinking but some competition lawyers simply argue that the role of EU competition law is to secure that democratically enacted policies and values are respected, implemented and amended as needed.[175] In the view of Ezrachi, freedom of choice is key to the realization of the Unions undergirding democratic values and freedoms. Ezrachi establishes that in the context of the digital economy, democratic values and freedoms may promote intervention where firms distort markets and accordingly have an impact on consumers' freedom.[176]

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[172] Ezrachi, *EU Competition Law Goals*, pp. 16–17.
[173] Witt, p. 83.
[174] Witt, pp. 83–84.
[175] OECD, "Competition and Democracy", 2017, available at: https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2017)6&docLanguage=En, para 120.
[176] Ezrachi, *EU Competition Law Goals*, pp. 17–18.

4.6 Data Protection and Privacy

There is also the view that EU competition law may be used to advance privacy-related goals, not least the fundamental rights of data protection and privacy.[177] In this view, data protection may be distinguished from other public policy goals due its inclusion in the Charter of Fundamental Rights of the European Union ("Charter"). Therefore, data protection can be said to enjoy privileged status in EU law.[178] The Charter contains an explicit right to the protection of personal data. Article 8 of the Charter stipulates that "everyone has the right to the protection of personal data concerning him or her" and that "such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law."[179] The right to the protection of personal data is also to be found in Article 16(1) TFEU. Moreover, the fundamental right to data protection forms part of the right to private and family life, home and correspondence in Article 8 of the European Convention on Human Rights.

Data protection and privacy are usually not recognized as matters for EU competition law but rather EU data protection law, more precisely, the General Data Protection Regulation ("GDPR"), which seeks to protect the fundamental right to data protection.[180] Nevertheless, critics argue that the GDPR is insufficient to deal with data collection practices in the digital economy. The GDPR rely on consent as a legitimating ground for data processing. According to critics, consent is theoretical and has no practical meaning as users tick consent boxes on platforms without reading or understanding the privacy statements. Moreover, even those consumers that understand the privacy statements have no other option but to comply with the conditions as there are no alternative options.[181] According to critics, consumers are therefore left with a "take it or leave it situation" leaving little scope for choice and this market failure is not dealt with under the GDPR.[182]

Pursuant to Wasastjerna, the limits of data protection law justify an intervention by EU competition law as a gap-filler. Wasastjerna claims that the gaps of data protection law support the view that EU competition law should secure values of data privacy in the context of the digital economy. Accordingly, Wasastjerna claims that EU competition law should play a role in protecting the personal data of consumers.[183]

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[177] Wasastjerna, pp. 72 & 141.

[178] Costa-Cabral, Francisco & Lynskey, Orla, *Family Ties: Intersection Between Data Protection and Competition in EU law*, Common Market Law Review, Vol. 54, Issue 1, February 2017, p. 14.

[179] However, it should be noted that the right to data protection is not an absolute right and that there are also other rights that may contain opposing interests. For instance, Article 16 of the Charter promotes the freedom conduct a business.

[180] See Article 1(2) GDPR.

[181] Koops, Bert-Jaap, *The Trouble with European Data Protection Law*, International Data Privacy Law, Vol. 4, Issue 4, November 2014, p. 251.

[182] Wasastjerna, p. 140.

[183] Wasastjerna, pp. 144–145.

Costa-Cabral and Lynskey rely on Article 51(1) of the Charter to support their view that the Commission has a positive obligation to respect and promote the Charter and consequently the right to data protection. They argue that the Commission has an obligation to take affirmative action to ensure that all areas of EU policymaking, including EU competition law, are compliant with the Charter.[184] Article 51(1) of the Charter stipulates that the EU institutions and bodies and Member States should respect the Charter rights, observe the principles, and promote the application thereof in accordance with their respective powers when they are implementing EU law.

4.7 Values that Promote Tackling Excessive Data Collection

Considering the above, it can be concluded that several values may promote tackling excessive data collection under EU competition law. Starting with the concept of consumer welfare, it may promote tackling excessive data collection to the extent a wider perception of consumer welfare is applied that embraces the non-economic values of consumers that can be transferred into economic terms. Pursuant to a wider consumer welfare standard, excessive data collection may reduce consumer welfare from two perspectives. Provided that data can be transferred into a quantifiable price, then consumer welfare may be reduced in terms of higher prices. Furthermore, provided that the lack of privacy protection can be regarded as a quality reduction, then consumer welfare may be reduced in terms of quality reductions. Whether excessive data collection reduces consumer welfare in terms of higher prices or quality reductions, a wider consumer welfare standard calls for an intervention to excessive data collection as it exceeds consumers' willingness to pay and since the benefits that online platforms arise from advertising revenue are not transferred to consumers.

Furthermore, the concept of fairness may promote an EU competition law intervention against excessive data collection. In line with fairness considerations, distributional outcomes must be *fair* in relation to consumers. Accordingly, the concept of fairness calls for an EU competition law intervention to the extent excessive data collection can be regarded as an unfair distribution of wealth. In this regard, it can be argued that excessive data collection constitutes an unfair market practice since consumers do not get a fair share of the benefits that the platform arises from advertising revenue. This may cause unfair market results that negatively affect trust in markets and that go beyond consumers legitimate expectations. If such is the case, excessive data collection can be regarded as *unfair* exploitation.

The concept of economic freedom calls for an intervention to excessive data collection to the extent it can be regarded as a misuse of economic power because

[184] Costa-Cabral & Lynskey, pp. 11 & 40–44.

of an unfair business strategy, which limits consumers commercial autonomy and their freedom to participate in the market. The Bundesgerichtshof's theory of harm in the German Facebook proceedings illustrates such concerns. Moreover, to the extent economic freedom is seen as a precondition for democracy, then tackling excessive data collection is promoted by the concept of democracy to secure democratic values and freedoms.

Finally, values of data protection and privacy may promote tackling excessive data collection under EU competition law. To the extent excessive data collection causes harm to the fundamental rights of data protection and privacy, then EU competition law can facilitate those rights by tackling excessive data collection. As mentioned previously, competition law could be regarded as a gap-filler to tackle data collection practices that data protection law is not able to. Dealing with excessive data collection under EU competition law can furthermore be regarded as a way to promote the Charter rights, which gains support from Article 51(1) of the Charter.

The aim of this Chapter has been to demonstrate that the goals of EU competition law allow and promote tackling excessive data collection under EU competition legislation. The answer to that question is decisive for the role of EU competition in tackling excessive data collection. As this Chapter demonstrates, the concepts of consumer welfare, fairness, economic freedom, democracy, data protection and privacy allow and promote tackling excessive data collection under EU competition law to the extent excessive data collection causes harm to those values. Nevertheless, only if these values amount to EU competition goals, does EU competition law play a role in tackling excessive data collection. As concluded above, the question about the goals of EU competition law remains open. In this regard, there are narrower respective wider perceptions. However, in the context of the digital economy, there are several arguments that speak in favor of a wider perception of the goals of EU competition law that embraces wider, social goals.

As for the concept of consumer welfare, there is quite broad support for that it constitutes a goal of EU competition law, even though its content is disputed. The Commission embraces a narrow, economic approach to the concept of consumer welfare. However, today, as can be seen from the above, a wider consumer welfare standard is gaining ground, which considers the non-economic values of consumers that can be transferred into economic terms. In this regard, it can be concluded that the non-economic values of consumers, not least privacy, play an increasing role in the digital economy as consumers pay for services online through their data. Since data is the new currency of twenty-first century, a wider consumer welfare standard is required that considers harms to the privacy and other non-economic values of consumers.

Furthermore, this Chapter reveals that in the context of the digital economy and excessive data collection, the values of fairness, economic freedom, democracy, data protection and privacy increase in relevance. Their increased relevance speaks in favor of them to be considered as goals of EU competition law. It is further apparent from the above that there is a growing support for these values in the literature. Moreover, a wider perception of the goals of EU

competition law, which embraces multiple values, gains support from the dynamism of EU competition law and from the fact that EU competition law is an expression of the current values of society that responds to the problems of our time.

As concluded in the beginning of this Chapter, the goals of EU competition law should be interpretated in the light of the foundations of the Union. The Union is founded upon respect for human dignity, freedom, democracy, and human rights and aims to promote these values and the well-being of its people. In this regard, a wider consumer welfare standard, fairness, economic freedom, democracy, data protection and privacy as goals of EU competition law may receive support from the foundations of the Union. By shaping EU competition policy, for instance, by tackling excessive data collection, these goals may advance the Union's values of human dignity, freedom, democracy, human rights, and well-being.

Finally, as established by the CJEU in *TeliaSonera*, the function of EU competition provisions is to prevent competition from being distorted to the detriment of the public interest, undertakings, and consumers, thereby ensuring the well-being of the Union. By shaping markets as well as market outcomes, a wider consumer welfare standard, fairness, economic freedom, democracy, data protection and privacy as goals of EU competition law may prevent competition from being distorted to the detriment of the public interest and secure the well-being of the Union. The German Facebook proceedings illustrate the impacts of excessive data collection on competition.

4.8 Conclusions

This Chapter has demonstrated that the values of consumer welfare, fairness, economic freedom, democracy, data protection and privacy as potential goals of EU competition law allow and promote tackling excessive data collection under EU competition legislation. Still, there is no definite answer to the question if these values are definite goals of EU competition law. That question is ultimately for the Court to decide. However, the broader perception of EU competition policy that was concluded by the CJEU in *TeliaSonera* should not be forgotten. As this Chapter reveals, the values of consumer welfare, fairness, economic freedom, democracy, data protection and privacy have increased in relevance in the context of the digital economy and excessive data collection. Together with the foundations of the Union, this speaks in favor of these values to be considered as goals of EU competition law and for that EU competition law has a role to play in tackling excessive data collection. This role of EU competition law will further be elaborated on in the following Chapter where a proposal to new legislation in the EU is considered and how it may affect the practical significance of EU competition law tackling excessive data collection.

5 Some Thoughts on the DMA

This Chapter considers the Digital Markets Act ("DMA"), which is a proposal to new legislation in the European Union ("EU") by the European Commission ("Commission"). The proposal presents rules for platforms that act as so-called gatekeepers. Gatekeepers are "platforms that have a significant impact on the internal market, serve as an important gateway for business users to reach their customers, and which enjoy or will foreseeably enjoy, an entrenched and durable position."[185] The purpose of the DMA is to complement the competition provisions and "to ensure that markets where gatekeepers are present are and remain contestable and fair, independently from the actual, likely or presumed effects of the conduct of a given gatekeeper […] on competition on a given market."[186]

The DMA establishes several obligations for gatekeepers. For the purpose of this dissertation, Article 5(a) DMA is of significance. Pursuant to that provision a gatekeeper should:

> Refrain from combining personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services, and from signing in end users to other services of the gatekeeper in order to combine personal data, unless the end user has been presented with the specific choice and provided consent in the sense of [the GDPR].

As can be seen from the provision, Article 5(a) DMA prevents a gatekeeper from combining data collected on the platform with data collected on other owned services or on third-party services. Consequently, Article 5(a) DMA raises questions about the role and practical significance of EU competition law tackling excessive data collection under Article 102 Treaty on the Functioning of the European Union ("TFEU") if the DMA enters into force.

On this subject, Article 1(5) DMA stipulates that:

> [N]othing in this Regulation precludes Member States from imposing obligations, which are compatible with Union law, on undertakings, including providers of core platform services where these obligations are unrelated to the relevant undertakings having a status of gatekeeper within the meaning of this Regulation in order to protect consumers or to fight against acts of unfair competition.

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[185] Commission – Press release, "Digital Markets Act: Ensuring Fair and Open Digital Markets", December 15, 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349.

[186] See preamble 10 of the DMA.

Moreover, Article 1(6) DMA stipulates that "[the DMA] is without prejudice to the application of Articles 101 and 102 TFEU." In this light, EU competition law may still target excessive data collection to the extent it is unrelated to the undertaking having a status of a gatekeeper in the sense of the DMA. Therefore, EU competition law may still be relevant to excessive data collection operated by platforms that are dominant pursuant to Article 102 TFEU. The thresholds for qualifying as a gatekeeper are seemingly high. According to Article 3(1) DMA, a provider of a core platform services should be designated as a gatekeeper if:

(a) it has significant impact on the internal market;

(b) it operates a core platform service which serves as an important gateway for business users to reach end users; and

(c) it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future.

Article 3(2) DMA provides for certain thresholds when the requirements in Article 3(1) should be presumed to be fulfilled. For instance, Article 3(2)(a) DMA may be fulfilled if the undertaking has an annual European Economic Area turnover equal to or above 6.5 billion euro in the three last years and the undertaking in question provides a core platform service in at least three Member States.

Since Article 5(a) DMA targets extensive data collection practices operated by gatekeepers, it may have an impact on the practical significance of EU competition law tackling excessive data collection operated by firms that are dominant under EU competition law but at the same time amount to gatekeepers. While the DMA is an *ex-ante* regulation, Article 102 TFEU targets anti-competitive conduct *ex-post*. This means that the DMA may have already dealt with the problem in advance.[187] However, depending on the practical meaning of Article 5(a) DMA, one may argue that the DMA is insufficient.

Pursuant to Article 5(a) DMA, combining data from different sources is legal if the end user has been "presented with the specific choice and provided consent in the sense of [the General Data Protection Regulation]." The question is what this statement means in practice. Does it mean, comparable with the Bundesgerichtshof's decision in the German Facebook proceedings, that the user must be given a choice between a service that involves the combination of data from a variety of sources and a service that involves the minimum data necessary for the use and financial of the service? Alternatively, does it simply mean a stricter obligation to provide information about the intent of data collection? Aiming to prevent excessive data collection, the former is a step in the right direction whereas the latter would be insufficient. As the DMA still only is a proposal to legislation, the scope of interpretation is quite broad. Time will tell if the DMA enters into force and what it will mean in practice.

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[187] For a discussion on how the DMA and the competition rules may collide see e.g., Fernández, Cani*, A New Kid on the Block*: *How Will Competition Law Get along with the DMA?*, Journal of European Competition Law & Practice, Vol. 12, Issue 4, April 2021.

6 Excessive Data Collection as an Abuse of Dominant Position

The subject of this dissertation has been excessive data collection as an abuse of dominant position under European Union ("EU") competition law. Excessive data collection refers to data collection practices that enable platforms to collect and combine excessive amounts of data to create comprehensive user profiles (e.g., data collection through third-party tracking). As mentioned in the introducing Chapter of this dissertation, excessive data collection has raised concerns as to the misuse of personal data. As mentioned also, data collection is typically recognized as a matter for data protection law. However, data protection law has been regarded as insufficient to tackle the challenges posed by platforms data collection practices in the digital economy. Therefore, it has been suggested that EU competition law could and should be used to tackle excessive data collection. The purpose of this dissertation has been to demonstrate that EU competition law holds the tools to tackle excessive data collection and that EU competition law plays an important role in tackling excessive data collection. Towards that end, the following research questions were listed:

i. Which theories of harm could be utilized to tackle excessive data collection by means of Article 102 Treaty on the Functioning of the European Union ("TFEU")?
ii. Do the goals of EU competition law allow and promote tackling excessive data collection under EU competition legislation?

This dissertation has been driven by the thesis that EU competition law could and should tackle excessive data collection in the light of an urgent need to tackle excessive data collection to secure the foundations of the Union and to ensure the well-being of the Union's people.

The aim of this concluding Chapter is to answer the research questions and to achieve the purpose of this dissertation. The aim is to conclude a broader analysis by convening the findings from each Chapter of this dissertation and to put them in a wider context. Moreover, in this final Chapter, the author's opinion of the law is revealed.

6.1 The EU Competition Law Toolbox to Tackle Excessive Data Collection

This dissertation demonstrates that Article 102 TFEU could be used in various ways to tackle excessive data collection. After having reviewed the case law under Article 102(a) TFEU, it can be concluded that the concepts of excessive pricing, unfair trading conditions and restriction of consumer choice could be used for this purpose. Moreover, provided that the Court of Justice of the European Union ("CJEU") reverses its previous case law, a theory of harm based on the breach of data protection values as a manifestation of market power could potentially be used to tackle excessive data collection.

Chapter 3 of this dissertation reveals the concept of excessive pricing tackles the imposition of an excessive price in relation to the economic value provided. As consumers pay for services online through their data, excessive data collection could be regarded as an excessive price to the extent the data collected do not correspond to the economic value of the service provided.[188]

However, several challenges arise when applying excessive data collection on the concept of excessive pricing. First, excessive pricing requires that data can be transferred into a quantifiable price. While it is fairly uncontroversial that data has a value, it is challenging to quantify the value of data as it may include non-monetary values. Second, excessive pricing requires that the costs of production can be established, which can be challenging in relation to online platforms. Third, simply establishing a considerable difference between the price charged and the costs of production is not sufficient for the finding of an excessive price under Article 102(a) TFEU. The price must be established as unfair either in itself or after having applied a comparative price benchmark.[189]

As Chapter 3 of this dissertation shows, several comparative benchmarks could in principle be used to establish the excessiveness of excessive data collection. However, in practice, it can be challenging to find a comparative price benchmark in the context of today's platform markets. Instead, some competition lawyers suggest using the General Data Protection Regulation ("GDPR") as a guideline to establish the excessiveness of excessive data collection.[190]

Regardless of the challenges described above, this dissertation demonstrates that the concept of excessive pricing is a tool by which EU competition law could tackle excessive data collection. However, there are also other tools that could be used for the same purpose. Even though the test for unfair trading conditions is not as developed as the one for excessive pricing, the concept of unfair trading conditions could also be used to tackle excessive data collection.[191]

As concluded in Chapter 3 of this dissertation, an unfair trading condition could be found when excessive data collection is not necessary or proportionate

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[188] See Chapter 3.6.1.
[189] See Chapter 3.6.1.
[190] See Chapter 3.6.1.
[191] See Chapter 3.6.2.

for the attainment of the service and encroaches upon the user's privacy, informational self-determination, or commercial autonomy more than needed. In this regard, it may be challenging to establish when excessive data collection goes beyond what is necessary or proportionate for the attainment of the service and encroaches upon the user's rights more than needed. Taking inspiration from case law, competition lawyers have suggested that an unfair trading condition could be found when an online platform gives the user the choice between setting up its own service or agreeing to excessive data collection.[192]

Competition lawyers have also suggested that an unfair trading condition could be established when excessive data collection goes beyond the user's reasonable expectations at the time the user consent to data collection terms. In this regard, they suggest that data protection values of the GDPR could be used to indicate when terms must be regarded as unfair.[193] In the light of the foregoing, this dissertation shows that the concept of unfair trading conditions is a tool by which EU competition law could tackle excessive data collection.

Further, the German Facebook decision by the Bundeskartellamt ("BKartA") should be mentioned and whether excessive data collection as a breach of data protection values could constitute an abuse of dominant position under EU competition law. In its decision, the BKartA held that a firm may abuse its dominant position under German competition law when it, through its data collection, breaches principles of the GDPR as a manifestation of market power. Article 102(a) TFEU is outmost wide and could in principle cover all types of exploitative behavior. Still, considering the case law by the CJEU, there seems to be limited space to take a similar approach under EU competition law. The Court has held that issues relating to the sensitivity of personal data are not, as such, a matter of competition law. Moreover, the Court has held that the compliance or non-compliance of other regulatory framework, does not per se affect the legality of abusive conduct under Article 102 TFEU.[194] For that reason, the breach of data protection values seems not to be a tool by which EU competition law could tackle excessive data collection.

However, the case according to which issues relating to the sensitivity of personal data are not, as such, a matter of competition law is from the year of 2006. The Court may thus change its position in the context of the digital economy and excessive data collection.[195] Only if the Court reverses its previous case law, may EU competition law tackle excessive data collection as a breach of data protection values. The German Facebook proceedings are still going. Oberlandesgericht Düsseldorf ("OLG Düsseldorf") has recently announced that it will refer questions to the CJEU as regards Facebook's data collection practices and whether Facebook is abusing its dominant position by engaging in data collection practices that breaches principles of the GDPR. Potentially, time will tell how the Court views this matter.

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[192] See Chapter 3.6.2.
[193] See Chapter 3.6.2.
[194] See Chapter 3.6.3.
[195] See Chapters 3.4.2 & 3.6.3.

The fact that issues relating to the sensitivity of personal data are not, as such, a matter of competition law, does not mean that data protection values cannot be considered in competition law assessments.[196] As noted above, competition lawyers suggest that data protection values could be used to indicate when excessive data collection amounts to an excessive price or an unfair trading condition.

However, relying on the GDPR, whether as a guideline or as such, might not always be adequate. As concluded throughout this dissertation, the GDPR has been regarded as insufficient to tackle the challenges posed by platforms data collection practices in the digital economy. Thus, there might be better options available than relying on the GDPR to tackle excessive data collection under EU competition law. In fact, a better option may be to take inspiration from the Bundesgerichtshof's ("BGH") theory of harm that was established in the German Facebook proceedings.

As established in Chapter 3 of this dissertation, the BGH found that Facebook had abused its dominant position by giving users of Facebook no other choice but to pay for a service that involves more intense data collection. The BGH established that the user must be given the opportunity to choose between two services: a service that involves more intense data collection and a service that involves less data collection.[197]

It has previously been concluded that the scope of Article 102(a) TFEU is outmost wide. Furthermore, the BGH's theory of harm has similarities with the case law under unfair trading conditions. Therefore, excessive data collection as a restriction of consumer choice could potentially be established as an abuse of dominant position under Article 102(a) TFEU.[198] Consequently, the restriction of consumer choice is another tool by which EU competition law could tackle excessive data collection.

Based on the findings above, the first research question of this dissertation may be answered in the way as follows. To date, excessive data collection could be tackled by means of three different theories of harm under Article 102(a) TFEU: excessive pricing, unfair trading conditions and the restriction of consumer choice, whereby, excessive pricing and the restriction of consumer choice could be seen as subcategories to the category of unfair trading conditions. This dissertation therefore confirms that EU competition law holds the tools to tackle excessive data collection.

As several tools may be used to tackle excessive data collection, the question arises which theory of harm is preferable. In this regard, applying a theory of harm that is based on the restriction of consumer choice is to prefer since it emphasizes the role of users as market participants and not their role as data subjects. Above all, a theory of harm based on the restriction of consumer choice is founded upon a breach of competition law and not data protection law, which makes it more convincing from a competition law perspective.[199]

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[196] See Chapters 3.4 & 3.6.3

[197] See Chapters 3.5 & 3.6.4.

[198] See Chapter 3.6.4.

[199] See Chapter 3.5.

Moreover, a theory of harm based on the restriction of consumer choice is easier to apply and seems not to cause as many interpretation difficulties as the concepts of excessive pricing and unfair trading conditions. As concluded above, the concept of excessive pricing involves several aspects that may be challenging to apply in relation to excessive data collection, and the concept of unfair trading conditions is a bit diffuse. In contrast, the concept of restriction of consumer choice is simply based on the lack of choice between two services and may be easier to apply. Moreover, the concept of restriction of consumer choice eliminates the risk for limiting the commercial autonomy of those users who desire a more personalized service, in other words, a service that involves more intense data collection. Finally, as will be seen, the concept of restriction of consumer choice receives support from several values, namely, the values of consumer welfare, fairness, economic freedom, democracy, data protection and privacy.

6.2 The Role of EU Competition Law in Tackling Excessive Data Collection

Chapter 4 of this dissertation demonstrates that potential goals of EU competition law may call for an EU competition law intervention to excessive data collection. This finding requires that a wider perception of the goals is concluded. Some, not least the European Commission ("Commission"), embrace a narrow economic approach to the goals of EU competition law whereas others embrace a wider approach, which pursues multiple goals – economic and non-economic goals.[200]

Within the framework of this dissertation, a wider approach to the goals of EU competition law has been explored. In this regard, the values of consumer welfare, fairness, economic freedom, democracy, data protection and privacy have been established as potential goals of EU competition law. This dissertation has further analyzed whether these values may promote tackling excessive data collection under EU competition legislation.

Starting with the concept of consumer welfare, it promotes tackling excessive data collection under EU competition law to the extent excessive data collection reduces aspects of consumer welfare. In this regard, excessive data collection may reduce consumer welfare in forms of higher prices or quality reductions due to the lack of privacy protection. However, these findings presuppose a wider consumer welfare standard, which embraces the non-economic values of consumers that can be transferred into economic terms.[201] Pursuant to a wider consumer welfare standard, EU competition law has a role to play in tackling excessive data collection to secure consumer welfare.

Furthermore, fairness considerations promote tackling excessive data collection under EU competition law to the extent excessive data collection can

[200] See Chapters 4.2 & 4.7.
[201] See Chapter 4.7.

be seen as an unfair distribution of wealth that causes an unfair market result and goes beyond consumers legitimate expectations.[202] In line with fairness considerations, EU competition law may therefore tackle excessive data collection to prevent unfair exploitation.

Also, the concepts of economic freedom and democracy promote tackling excessive data collection under EU competition law. However, this presupposes that excessive data collection can be seen as an unfair business strategy that limits the commercial autonomy of consumers and their ability to participate in the market, in other words, aspects of economic freedom, which is a precondition for democracy.[203] Pursuant to the values of economic freedom and democracy, EU competition law has a role to play in tackling excessive data collection to secure undergirding values of the Union.

Moreover, the concepts of data protection and privacy promote tackling excessive data collection to the extent EU competition law can be seen as a gap-filler to the gaps that data protection law leaves behind or as a means to promote the fundamental rights of data protection and privacy.[204] In line with values of data protection and privacy, EU competition law plays a role in tackling excessive data collection so as to advance fundamental rights.

In the light of the foregoing, the second research question of this dissertation may be answered in the following way; the concepts of consumer welfare, fairness, economic freedom, democracy, data protection and privacy allow and may promote tackling excessive data collection under EU competition legislation to secure these values. While there is no definite answer to the question if these values constitute definite goals of EU competition law, this dissertation shows that the relevancy of these values increases in the context of the digital economy and excessive data collection.

As demonstrated in Chapter 4 of this dissertation, the concepts of consumer welfare, fairness, economic freedom, democracy, data protection and privacy as goals of EU competition law may receive support from the foundations of the Union. In this regard, the concepts of consumer welfare, fairness, economic freedom, democracy, data protection and privacy as goals of EU competition law may be used to advance the Union's values of human dignity, freedom, democracy, human rights, and well-being. [205]

The different goals are more or less important depending on which theory of harm is applied. As indicated, tackling excessive data collection as a restriction of consumer choice is the best alternative. For the concept of restriction of consumer choice, all the values outlined above are relevant. Economic freedom and democracy are actualized due to the lack of choice between two services: a service that involves more intense data collection (e.g., data collection through third-party tracking) and a service that involves less data collection (the minimum necessary for the use and financial of the service). In other words, the economic freedom of consumers is limited, which is a precondition for democracy. Further,

[202] See Chapter 4.7.
[203] See Chapter 4.7.
[204] See Chapter 4.7.
[205] See Chapter 4.7.

consumer welfare becomes relevant as consumers are forced to agree to excessive data collection, which exceeds their willingness to pay. Pursuant to fairness considerations, this can be regarded as an unfair distribution of wealth. Finally, data protection and privacy are actualized as more intense data collection may cause harm to the data protection and privacy of consumers.

Furthermore, there is a proposal to new legislation in the EU that might affect the role of EU competition law in tackling excessive data collection. As discussed in Chapter 5 of this dissertation, Article 5(a) of the so-called Digital Markets Act ("DMA") tackles extensive data collection practices operated by gatekeepers. Gatekeepers are, inter alia, platforms that have significant impact and enjoy an entrenched and durable position.

As concluded in Chapter 5, the DMA does not withdraw the practical significance of EU competition law tackling excessive data collection. Even if the DMA enters into force, it will still be relevant for EU competition law to tackle excessive data collection operated by dominant firms that do not amount to gatekeepers, but which enjoy a dominant position within the meaning of Article 102 TFEU. As long as there is no functioning competition, the problem of excessive data collection might be present. Moreover, depending on how Article 5(a) DMA should be interpretated, it might be insufficient. In the light of the foregoing, EU competition law will still play an important role in tackling excessive data collection to secure the values of consumer welfare, fairness, economic freedom, democracy, data protection and privacy.

Furthermore, it should be noted that the DMA focuses on the combination of data collected on the platform with data collected on other owned services or on third-party sources (e.g., data collection through third-party tracking). As mentioned in Chapter 2 of this dissertation, data collection through third-party tracking is, at least to date, an efficient way for platforms to collect vast quantities and varieties of data.

Nonetheless, in the future, online platforms might come up with other ways to collect vast quantities and varieties of data than by combining data from third-party and first-party sources. Furthermore, for large platforms such as Google and Facebook, first-party data might be sufficient to create comprehensive user profiles because of the wide-spread use of those services. In these circumstances, focusing on specific data collection, as the DMA does, is less favorable. Targeting excessive data collection through a wider concept of restriction of consumer is preferable as it must not be bound to tackling certain types of data collection practices. Rather it may tackle the imposition of more intense data collection whatever it may be.

6.3 Final Remarks

To be able to keep up with fast changing markets in the digital economy, EU competition law must be flexible and be allowed to adapt to current values and market realities. This applies as values and markets change over time. Such perception was indeed reflected in the quote mentioned in the first pages of this

dissertation whereupon Whish and Bailey described competition law as not existing in a vacuum but as an expression of the current values and aims of society and something that is suspectable to change as political thinking generally. This view has permeated the discussion of this dissertation.

The market reality of today is that consumers pay for services online through their data and that platforms are driven by collecting vast quantities and varieties of user data to create comprehensive user profiles that they can sell to advertisers or others interested in user profiling. For that reason, online platforms engage in excessive data collection practices, which have caused concerns as to the misuse of personal data. The Cambridge Analytica scandal confirms the reality of such concerns.[206] This dissertation shows how the values and market context of today could be considered under EU competition legislation by putting excessive data collection as an abuse of dominant position in the spotlight and by exploring relevant social values.

After having analyzed the extent of Article 102 TFEU, it has become evident that EU competition law *could* tackle excessive data collection through a theory of harm that is based on the restriction of consumer choice. Moreover, after having analyzed the goals of EU competition law, it has become apparent that excessive data collection *should* be tackled to secure the values of consumer welfare, fairness, economic freedom, democracy, data protection and privacy. By securing these values, EU competition law may secure the foundations of the Union, ensure the well-being of the Union's people, and avoid competition law from being distorted to the detriment of the public interest.

It might be asked why EU competition law of all EU policy should be given the task to tackle excessive data collection to secure the foundations of the Union and to ensure the well-being of the Union's people. The answer to that question is that EU competition law already holds the tools to tackle excessive data collection and could act rapidly. In contrast to other frameworks, EU competition law considers market dominance, which is an important aspect when it comes to excessive data collection. In line with the BKartA and BGH's findings in the German Facebook proceedings, excessive data collection may be regarded as a direct result of dominant platforms market power. It can, therefore, be argued that in the absence of market power, the problems of excessive data collection would not be present.

To bring EU competition law closer to current values of society, the Commission's narrow perception of the goals of EU competition law should be left behind. Instead, a wider perception of the goals of EU competition law should be embraced as well as the Commission's previous approach to EU competition policy. As promoted by the Commission before the more economic approach, EU competition policy should be seen in its economic, political, and social context. Considering the values and market context of today, consumer welfare, fairness, economic freedom, democracy, data protection and privacy should reflect EU competition policy by tackling excessive data collection as a restriction of consumer choice under Article 102 TFEU.

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[206] See Chapters 1.1 and 2.

However, these findings are not without prejudice. A wider perception of the goals of EU competition law that promotes tackling excessive data collection as an abuse of dominant position under Article 102 TFEU can be regarded as far-reaching. Furthermore, it can be argued that such approach to EU competition law causes vague lines of action and legal uncertainty to the disadvantage of national competition authorities and firms. Still, the values and market context of today cannot be ignored. If such is the case and the problem of excessive data collection is not dealt with, the foundations of the Union will be at stake as well as the well-being of the Union's people. Furthermore, EU competition law will risk becoming distorted to the detriment of the public interest.

Whether EU competition law could and should tackle excessive data collection is ultimately for the Court to decide. As mentioned previously, the CJEU's view on the matter will potentially be revealed in the near future as OLG Düsseldorf has announced that it will refer questions to the Court. Until then, the question of whether EU competition law could and should tackle excessive data collection remains open. This dissertation has indeed highlighted arguments that speak in favor of tackling excessive data collection as an abuse of dominant position under EU competition law.

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