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Excessive Data Collection as Anticompetitive Conduct – The German Facebook Case

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Excessive Data Collection as Anticompetitive Conduct – The German Facebook Case

Anne C. Witt*

Abstract

In a high-profile decision of 6 February 2019, the German Federal Cartel Office prohibited Facebook’s data collection policy as an abuse of dominance for infringing its users’ constitutional right to privacy. The case triggered a remarkable inter-institutional dispute between the key players in German competition law. Conflicting rulings by the Düsseldorf Higher Regional Court and the German Federal Court of Justice further illustrate how deeply divided the antitrust community is on the role of competition law in regulating excessive data collection and other novel types of harm caused by dominant digital platforms. This contribution discusses the original prohibition decision, the ensuing courts orders and legislative reform proposals in the broader context of EU and US competition law.

Introduction

For the past few years, digital platforms have been firmly on the radar of the European competition agencies. US mega platforms Google, Amazon, Facebook and Apple (GAFA) have attracted particular scrutiny. The European Commission and national competition agencies have not only examined GAFA’s acquisitions and contractual agreements, but, unlike their US counterparts, have also vigorously enforced Article 102 TFEU and the equivalent national prohibitions on abuse of dominance against these digital giants.¹ The great majority of these unilateral conduct cases have concerned

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¹ Eg Commission decision of 27 June 2017 in Case AT.39740 - *Google Search (Shopping)*; Commission decision of 18 July 2018 in Case AT.40099 – *Google Android*; European Commission, ‘Commission fines Google €1.49 billion for abusive practices in online advertising’, Press Release of 20 March 2019. The final decision in Case AT.40411 - *Google Search (AdSense)* has not yet been published.

exclusionary abuses, i.e. business practices through which a dominant undertaking excludes competitors from the market and thus acquires market power, which gives them the ability to reduce consumer welfare.

However, there are many other ways in which dominant platforms can cause or at least contribute to inflicting other types of harm upon society. For example, individual citizens' ability to distribute untrue or harmful content in real time via worldwide digital platforms, which are not subject to the ethical standards and editorial control of the traditional media, can create serious problems for society by endangering public health,² social stability, the democratic system³ or the rule of law.⁴ Platforms have also been accused of harming individuals more directly by invading their privacy through extensive data collection and profiling.⁵ Even the platforms do not dispute that these are serious dangers.⁶ This raises the question whether these novel types of harm are a matter for competition law.

This paper critically examines the German Federal Cartel Office's both pioneering and controversial decision to prohibit US social media giant Facebook's data collection policy under German competition law.⁷ Part I sets the scene by explaining the concept of exploitative abuse and its treatment under EU competition law. Part II briefly looks at the position of US antitrust law. Part III discusses the German competition agency's Facebook decision, as well as the interim order by Düsseldorf Higher Regional Court, the follow-up order by the Federal Court of Justice, and the legislative aftermath. Part IV provides a critical analysis of the decision, and Part V concludes with a few thoughts on

² Przemyslaw M. Waszak, Wioleta Kasprzycka-Waszak and Alicja Kubanek, 'The spread of medical fake news in social media – The pilot quantitative study', (2018) 7(2) *Health Policy and Technology* 115.

³ Nathaniel Persily, 'Can Democracy Survive the Internet?' (2017) 28(2) *Journal of Democracy* 63.

⁴ Oren Gruenbaum, 'Commonwealth Update, India - Death by Social Media' (2018) 107(4) *The Round Table* 389, 392-394; Kevin Roose, 'Shut the Site Down,' Says the Creator of 8chan, a Megaphone for Gunmen', *The New York Times* (4 August 2019).

⁵ Roger McNamee, 'A Brief History of How Your Privacy Was Stolen', *The New York Times* (3 June 2019).

⁶ Facebook is currently trying to address the issue of harmful content through self-regulation: Facebook, *Oversight Board Charter* (September 2019), available at: fbnewsroomus.files.wordpress.com/2019/09/oversight_board_charter.pdf. Microsoft's President, by contrast argues in favour of more public regulation: Brad Smith and Carol Ann Browne, *Tools and Weapons* (Penguin Press, 2019).

⁷ Bundeskartellamt, decision no B6-22/16 of 6 February 2019.

whether the German Federal Cartel Office should also have applied EU in addition to German competition law.

I. The concept of exploitative abuse in EU competition law

EU competition law is no stranger to the concept of exploitative abuse. It is well-established that Article 102 TFEU not only prohibits anticompetitive exclusionary conduct through which the dominant undertaking restricts competition by excluding rivals from the market, thereby potentially acquiring sufficient market power to reduce consumer welfare. It also outlaws so-called exploitative abuses by means of which the dominant undertaking reduces consumer welfare directly without further restricting competition. Article 102(a) TFEU thus prohibits “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions”, and Article 102(b) TFEU bans a dominant undertaking from “limiting production, markets or technical development to the prejudice of consumers”. Neither Article 102 (a) or (b) TFEU requires that the harm to consumers result from exclusionary or collusive conduct. Rather, the wording of these provisions implies that once the undertaking in question has acquired a position of dominance, it must refrain from exploiting this position to the detriment of consumers.

To date, the European Court of Justice’s case law on exploitative abuses has focused on consumer exploitation in the form of excessive pricing. It established the key principles on excessive pricing in *United Brands*.⁸ In this seminal case from 1978, the Court was asked to review a decision by the European Commission, finding United Brands, a Dutch company, guilty of engaging in several anticompetitive business practices in the market for bananas. Amongst others, the Commission had accused United Brands of abusing its dominant position in this market by charging distributors in various EU Member States different prices despite similar market conditions. In addition to considering this practice discriminative, the Commission held that United Brands had charged a number of distributors excessive prices. On review, the Court ruled that a price should be considered unfair within the meaning of Article 102(a) TFEU if the dominant

⁸ Case 27/76 *United Brands v Commission*, ECLI:EU:C:1978:22.

undertaking had taken advantage of its position of dominance in such a way as to reap trading benefits which it could not have achieved if there had been normal and sufficiently effective competition. It further held that a price should be considered excessive if it had no reasonable relation to the economic value of the product. While recognising that other tests might also be appropriate, the Court suggested the following 2-step test for assessing the excessiveness of a price: (1) the difference between the costs incurred and the price charged had to be excessive, and (2) the price had to be either unfair in itself or when compared to that of competing products.⁹ To this day, this remains the standard test for assessing whether a price is excessive within the meaning of Article 102(a) TFEU.¹⁰

The concept of exploitative abuse generally, and excessive pricing in particular, is highly controversial, and the arguments against intervening against excessive prices by means of competition law are well known.¹¹ A particular economic concern is that prohibiting an undertaking from reaping the rewards of a position of dominance, which it acquired on the merits of a superior product or greater efficiency, may discourage undertakings from striving to develop superior products or cost savings in the first place. In other words, it might discourage innovation and aggressive competition to the detriment of consumers. Article 102 TFEU, like the other EU competition rules, however, aims to enhance competition, and insofar prohibiting excessive pricing could result in the very situation that competition law seeks to prevent. Some economists warn that, even in cases where the dominant position was not the result of superior business acumen but of state intervention or historic accident, the long-term welfare effects of a competition agency intervening against excessive prices are far from certain.¹² In their view, Article 102 TFEU should not be enforced against high prices, and that, in the rare cases, in which

⁹ *Supra*, paras 249-252. In *United Brands*, the Court found that the Commission had failed to provide adequate proof that United Brands' prices were excessive (para 267).

¹⁰ C-52/07 *Kanal 5 and TV 4*, EU:C:2008:703, para 28. In *AKKA/LAA*, the Court held that another valid way of establishing whether the price was excessive would be to compare the prices applied in the Member State concerned with those applied in other Member States (C-177/16 *AKKA/LAA*, ECLI:EU:C:2017:689, para 38).

¹¹ See e.g. Richard Whish and David Bailey, *Competition Law*, (9th edn OUP 2018), pp. 735 et seq.

¹² David S. Evans and A. Jorge Padilla, 'Excessive Prices: Using Economics to Define Administrable Legal Rules' (2005) 1(1) *Journal of Competition Law & Economics* 97, 120.

the market would not eventually self-correct, ex-ante price regulation might be a more sensible approach than applying Article 102 TFEU.¹³ They also find the idea of competition agencies or courts deciding on what is an appropriate price incompatible with the fundamental premise of a market economy, in which the market and not the State determines the conditions of supply. From a legal point of view, finally, the concept of an unfair or excessive price is notoriously difficult to define. Even the Court of Justice's 2-step test from *United Brands* is hardly a model of precision and predictability.

It is therefore not surprising that the European Commission and the national competition agencies have enforced the prohibition against excessive pricing only sparingly when compared to its enforcement against exclusionary abuses. The European Commission's 2009 Guidance on Article 102 TFEU does not even cover exploitative abuses,¹⁴ and actual prohibition decisions have traditionally been few and far between. Only occasionally has the Commission prohibited excessive prices on the part of a dominant undertaking.¹⁵ Prohibitions against other types of exploitative conduct are even rarer, albeit not unheard of. Examples of non-pricing exploitative abuses are an infringement decision against unfair terms of sales for tickets to the 1998 Football World Cup in France that imposed higher burdens on non-French citizens than on French nationals,¹⁶ or limiting the provision of a service for which there was consumer demand.¹⁷

¹³ David S. Evans, A. Jorge Padilla (supra); Claudio Calcagno, Antoine Chapsal, and Joshua White, 'Economics of Excessive Pricing: An Application to the Pharmaceutical Industry' (2019) 10(3) *Journal of European Competition Law & Practice* 166; R. O'Donoghue and A.J. Padilla, *The Law and Economics of Article 102 TFEU*, Hart Publishing (2012), Chapter 14; S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, Sweet & Maxwell (2010), Chapter 6.

¹⁴ The Commission's only soft law instrument on Article 102 TFEU only treats exclusionary abuses (Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, [2009] OJ C45/7/, para 7).

¹⁵ Commission Decision 75/75/EEC of 19 December 1974 (IV/28.851 - General Motors Continental), [1975] OJ L29/14.; Commission Decision 84/379/EEC of 2 July 1984 (IV/30.615 - BL), [1984] OJ L207/11; Commission Decision 2001/463/EC of 20 April 2001 (Case COMP D3/34.493 - DSD), [2001] OJ L166/1. See also the following decisions rejecting complaints of excessive pricing: Decision of 23 July 2004 (COMP/A.36.568/D3 - Scandlines Sverige AB v Port of Helsingborg), and decision of 23 July 2004 (COMP/A.36.570/D3 - Sundbusserne v Port of Helsingborg).

¹⁶ Commission Decision 2000/12/EC of 20 July 1999 (IV/36.888 - 1998 Football World Cup) [2000] OJ L5/55.

¹⁷ Commission Decision 2001/892/EC of 25 July 2001 (COMP/C-1/36.915 - Deutsche Post AG - Interception of cross-border mail), [2001] OJ L331/40, recitals 168-172.

That being said, the national competition agencies appear to have rediscovered the concept in recent years, in particular as a tool for intervening against excessive price increases in the pharmaceutical sector. In 2016, the UK Competition and Market Authority (CMA) fined Pfizer and Flynn Pharma under Article 102 TFEU and the equivalent UK provision for increasing prices for an epilepsy drug by up to 2,600% overnight after de-branding the drug,¹⁸ and opened proceedings against Actavis for charging the NHS excessive prices on hydrocortisone tablets.¹⁹ In the same year, the Italian competition authority fined the Aspen pharmaceutical group for increasing the price of 5 anti-cancer drugs by 300%-1500%,²⁰ and in 2017, the European Commission opened proceedings regarding the same conduct for the remainder of the European Union.²¹ In 2018, the Danish Konkurrencerådet adopted an infringement decision against CD Pharma for increasing the price of Syntocinon by 2000% within a period of a few months.²²

To date, however, neither the European Commission nor the national enforcement agencies have found a dominant platform guilty of violating Article 102 TFEU by imposing excessive prices. In theory, this would be possible. Even though platforms often do not charge end-consumers a monetary price for their services, they tend to cross-subsidise the provision of this “free” service by charging businesses on the other side of the platform. If a platform were to impose excessive prices on the business side, this could very well amount to an exploitative abuse within the meaning of Article 102(a) TFEU. Furthermore, consumers tend to “pay” for the use of a free digital service, some more consciously than others, by transferring personal data to the platform. This data has economic value for the platform, as it allows it to develop new services tailored to consumer demand. The platform can also capitalise on such data by selling it on to other

¹⁸ CMA, decision of 7 December 2016 (Case CE/9742-13 - Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK).

¹⁹ CMA, Press release of 16 December 2016, “Pharmaceutical company accused of overcharging NHS”.

²⁰ Autorità Garante della Concorrenza e del Mercato, decision of 29 September 2016 (Case A480 – Incremento prezzi farmaci Aspen).

²¹ European Commission, “Commission opens formal investigation into Aspen Pharma's pricing practices for cancer medicines”, Press Release of 14 May 2017.

²² Konkurrencerådet, decision of 31 January 2018 (Case 14/08469, CD pharma's pricing of syntocinon).

companies, or using it to sell targeted advertising. This raises the question whether excessive data collection on the part of a dominant digital platform could and should be considered a form of exploitative abuse. As discussed in Part III, the German FCO answered this question in the affirmative.

II. The position of US antitrust law

The position could not be more different in the United States, where Facebook was founded by 5 Harvard College students in 2004 and is now incorporated. Despite growing concerns about the ability of dominant platforms to harm consumers in a myriad of ways, including the invasion of their users' privacy,²³ US antitrust law, as currently interpreted, does not prohibit an undertaking from exploiting a lawfully obtained position of dominance to the detriment of consumers. In *Trinko*, the US Supreme Court famously held that the mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful under sec. 2 Sherman Act, but an important element of the free-market system. According to the Court, it is the opportunity to charge monopoly prices - at least for a period of time - that attracts business acumen in the first place and induces risk-taking that produces innovation and economic growth. Hence, in order to safeguard the incentive to innovate, the mere possession of monopoly power will not be considered unlawful under US antitrust law unless it is accompanied by a restriction of competition.²⁴ This ruling makes clear that, contrary to the position of EU competition law, excessive pricing in itself is not prohibited by US antitrust law. Although the ruling explicitly only refers to monopoly prices, the underlying rationale also translates to other forms of consumer exploitation.

The US Supreme Court reiterated the same principle in *Pacific Bell v Linkline* as a key argument as to why margin squeezes should not be deemed anticompetitive within the meaning sec. 2 Sherman Act. In addition to considering such a prohibition incompatible with the very essence of a free market economy, it held that outlawing margin squeezes would require courts to identify the proper price, quantity, and other

²³ See e.g. Roger McNamee, 'A Brief History of How Your Privacy Was Stolen', The New York Times (3 June 2019).

²⁴ Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

contractual conditions, thereby taking on the day-to-day controls characteristic of a regulatory agency, and that this was a role for which courts were ill-suited.²⁵ One could expect courts to invoke similar concerns if asked to decide what amount of personal data collection would be acceptable on the part of a powerful platform.

The FTC might, in theory, be legally entitled to address this type of conduct under sec. 5 FTC Act, which allows it to intervene against “unfair or deceptive acts or practices” in addition to “unfair methods of competition”. In *Sperry & Hutchinson*, for example, the US Supreme Court ruled that sec. 5 charged the FTC with protecting consumers as well as competitors, and that, when measuring conduct against the elusive, but congressionally mandated standard of fairness, the FTC was not overstepping its power when, like a court of equity, it considered public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.²⁶ The exact scope of what should constitute unfair conduct, beyond purely anticompetitive behaviour, however, is highly contested.²⁷ Even though the FTC has, in the past, used this provision to intervene against business conduct that threatened consumers’ privacy,²⁸ there does not currently

²⁵ *Pacific Bell Telephone v. Linkline Communications*, 129 S.Ct. 1109, 1122 (2009); see also: *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

²⁶ *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972). Reiterated in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986).

²⁷ In favour of a narrow interpretation of unfair methods of competition, that is essentially limited to cases of substantial harm to competition: Maureen K. Ohlhausen, “Section 5 of the FTC Act: principles of navigation”, (2014) 2(1) *Journal of Antitrust Enforcement* 1. In favour of a broader and more flexible reading: Statement of Commissioners Rohit Chopra and Rebecca Kelly Slaughter, Federal Trade Commission Report on the Use of Section 5 to Address Off-Patent Pharmaceutical Price Spikes of 24 June 2019, www.ftc.gov/system/files/documents/public_statements/section-5-ftc-act-principles-navigation/131018section5.pdf; likewise: Concurring Opinion of (former) Commissioner Jon Leibowitz in *The Matter of Rambus, Inc.*, Docket No. 9302, www.ftc.gov/sites/default/files/documents/cases/2006/08/060802rambusconcurringopinionofcommissionerleibowitz.pdf.

²⁸ E.g. *FTC*, In the Matter of Infotrax Systems, L.C., and Mark Rawlins, FTC Matter/File Number: 162 3130; *FTC v. LifeLock et al*, Civil Action Number: 2:10-cv-00530-MHM; In the Matter of LightYear Dealer Technologies, FTC Matter/File Number: 172 3051; DOCKET NUMBER: C-4687; *FTC*, In the Matter of Retina-X Studios, FTC Matter/File Number: 172 3118; *FTC and State of New York v. Google and YouTube*, FTC MATTER/FILE NUMBER: 172 3083, CIVIL ACTION NUMBER: 1:19-cv-02642; *FTC v. Musical.ly*, FTC MATTER/FILE NUMBER: 172 3004; *FTC v. Unixiz et al*, FTC MATTER/FILE NUMBER: 172 3002, amongst many others.

seem to be any political appetite for using sec. 5 FTC to intervene against excessive data collection by dominant platforms.

The theoretical possibility of sec. 5 FTC Act notwithstanding, it remains that an antitrust action alleging mere consumer exploitation by a dominant undertaking, be it in the form of excessive pricing or excessive data collection, is currently doomed to fail under the US Sherman Act in the absence of exclusionary conduct or collusion.

III. The German Facebook case

Before this background, it is not surprising that the German Federal Cartel Office²⁹ (FCO) made international headlines in February 2019,³⁰ when it issued an infringement decision against Facebook for exploiting consumers through excessive data collection under German competition law.³¹ The decision contained several Firsts. It was the first European case in which a digital platform was found guilty of having committed an exploitative rather than an exclusionary abuse. Even more importantly, it was the first time that an undertaking was accused of exploiting consumers through excessive data-collection. Finally, it was also the first time that the FCO had had the occasion to apply the recently amended provisions of German competition law for assessing digital platforms and networks. The decision employed a highly innovative theory of harm, as the FCO essentially inferred the abuse from the fact that Facebook had violated the European Union's General Data Protection Regulation (GDPR).³² Unsurprisingly,

²⁹ Bundeskartellamt.

³⁰ E.g. Sam Schechner and Sara Germano, "Facebook Told to Stop Tracking German Users' Online Life Without Consent", *The Wall Street Journal* (7 February 2019); Olaf Storbeck, Madhumita Murgia and Rochelle Toplensky, "Germany blocks Facebook from pooling user data without consent", *Financial Times* (7 February 2019); Natasha Singer, "Germany Restricts Facebook's Data Gathering" *The New York Times* (7 February 2019); Cécile Boutelet, "L'Allemagne dénonce la position dominante de Facebook sur la collecte de données personnelles", *Le Monde* (7 February 2019); Elisa Braun, "L'Allemagne porte un coup d'arrêt au monopole de Facebook", *Le Figaro* (7 February 2019).

³¹ Bundeskartellamt, decision no B6-22/16 of 6 February 2019. An English translation is available at: www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=4.

³² Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ L119/1.

competition law experts and competition agencies from other jurisdictions followed the proceedings with great interest.³³

A. Facts and procedural background

Facebook is the provider of a worldwide digital social network service, which has been available in Germany since 2008. By 2018, Facebook's user base in Germany had grown to 23 million daily and 32 million monthly users.³⁴ The network was primarily financed through online advertising, and was free of charge for private users. However, Facebook required users to register with the network and set up a user profile. Both registration and use of the network were subject to numerous terms and conditions. Most importantly, Facebook required users to authorise it to process their personal data as specified in its data and cookie policies. In essence, private users who agreed to these terms, allowed Facebook to collect, combine and analyse user-generated data from a number of different online sources, namely data generated on (1) Facebook.com itself, (2) any other Facebook-owned service, and (3) any third-party websites that used "Facebook Business Tools". Users of the social network were, in theory, able to establish which services Facebook owned by clicking on a link contained in Facebook's terms of service.³⁵ By contrast, it was more difficult for them to ascertain which third-party websites used Facebook Business Tools - tools and products that Facebook made available free of charge to third-party website operators, developers, advertisers and other businesses for integration into their own websites, apps and online offers. They included social plugins ("Like" or "Share" buttons), Facebook login and other analytics services (Facebook Analytics). According to the FCO, "millions" of businesses used Facebook Business Tools at the time of the investigation.³⁶ They were – unsurprisingly - not individually listed in

³³ Digital Competition Expert Panel, *Unlocking Digital Competition* (Furman Report), March 2019, p. 43; Australian Competition and Consumer Commission (ACCC), *Digital Platforms Inquiry, Final Report*, June 2019, p. 78; Stigler Committee on Digital Platforms, *Final Report*, 2019, p. 54.

³⁴ Bundeskartellamt, decision no B6-22/16 of 6 February 2019, para 17. The total population of Germany in 2019 was around 83 million inhabitants (Statistisches Bundesamt, www.destatis.de/DE/Themen/Gesellschaft-Umwelt/Bevoelkerung/Bevoelkerungsstand/_inhalt.html).

³⁵ The most popular Facebook-owned services at the time of the decision were WhatsApp, Instagram, Masquerade and Oculus.

³⁶ Bundeskartellamt, decision no B6-22/16 of 6 February 2019, para 905.

Facebook's terms and conditions, and users could not know whether a website had embedded them before they accessed it for the first time. Some Facebook Business Tools remained invisible to users even after they accessed the website.

This practice allowed Facebook to track individuals' movements (both geographically and online), and collect detailed data about the users of its social media network, as well as individuals who were not registered with Facebook but visited third-party websites that integrated Facebook business tools. It thus established a vast database of highly-detailed user profiles, including information such as names, age, gender, photos, friends, locations, shopping behaviour, interests, political views, and sexual orientation, amongst many others.³⁷ This information allowed Facebook to sell highly-targeted online advertising services to businesses by matching the ad to individual profiles. In 2018, Facebook generated 98% of its world-wide \$55 billion profit from advertising.³⁸

The FCO formally initiated proceedings against Facebook on 1 March 2016. On 6 February 2019, almost three years after opening proceedings, it issued a decision finding that Facebook had abused a dominant position by collecting, combining and analysing user data from the above-mentioned three sources, and required Facebook to make far-reaching changes to its data collection policy.

B. The FCO's infringement decision

1. EU or German competition law?

The first legal issue the FCO had to address was whether to assess Facebook's conduct under German or EU competition law. This question is governed by Regulation (EC) No 1/2003. Where a national competition authority decides to apply national competition law to conduct that is also prohibited by Articles 101 and 102 TFEU, the Regulation requires the agency to apply Articles 101 or 102 TFEU in addition to national

³⁷ Brian X. Chen, 'I Downloaded the Information That Facebook Has on Me. Yikes.', *New York Times* (11 April 2018).

³⁸ Bundeskartellamt, decision no B6-22/16 of 6 February 2019, para 13.

competition laws.³⁹ However, an agency is not precluded from applying, on its own territory, national competition rules outlawing unilateral conduct that are stricter than Article 102 TFEU.⁴⁰

The FCO considered that Article 102(2)(a) TFEU could theoretically provide a basis for prohibiting consumer exploitation through excessive data collection. However, it also found that, contrary to German competition law, there was no case law or decisional practice on Article 102 TFEU yet that had explicitly recognised that a dominant undertaking could commit an exploitative abuse by violating an individual constitutional or statutory right. As the FCO intended to base its theory of harm on an infringement of the GDPR, it therefore did not deem Article 102 TFEU an appropriate basis for its decision, and instead decided to rely exclusively on the German prohibition against abusive conduct, i.e. sec. 19 GWB.⁴¹

2. The relevant market

The FCO defined the relevant market in a detailed 60-page assessment as the German social network market for private users.⁴² It considered that this was an intermediary product that had the characteristics both of a multisided market and of a network within the meaning of sec. 18(3)(a) GWB. According to this provision, which the German legislator introduced in 2016 to address novel issues arising in the digital economy, the FCO is required to take into account the following additional factors when defining multisided and network markets: (1) direct and indirect network effects; (2) multi-homing and switching costs; (3) economies of scale resulting from network effects; (4) the dominant undertaking's access to competition-relevant data; and (5) innovation-driven competitive pressure.

³⁹ 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 L1/1, Article 3(1).

⁴⁰ *Supra*, Article 3(2). However, the national competition rules outlawing agreements, decisions by associations of undertakings or concerted practices must not be stricter than Article 101 TFEU.

⁴¹ Gesetz gegen Wettbewerbsbeschränkungen (GWB), version of 26 June 2013 (BGBl. I S. 1750, 3245), last amended on 12 July 2018 (BGBl. I S. 1151).

⁴² Bundeskartellamt, decision no B6-22/16 of 6 February 2019, paras 166-373)

The FCO used the classic demand-side substitutability test as the basis for its product market definition. Given the multi-sided nature of the market, however, one particular question it grappled with was which consumers' views to consider in the assessment. It identified two key user groups of the Facebook platform: private users who used the social network free of charge to connect with other users, and businesses, who purchased data-based advertising services from Facebook in order to target the private users.⁴³ It also briefly considered a number of other user categories, i.e. publishers, website operators, developers, advertisers and businesses that integrated Facebook business tools into their own websites, apps and online offers.

The FCO acknowledged that there were situations in which it was appropriate to consider the demand-side substitutability of all users of a multisided platform, in particular if these users had similar needs and views. However, it concluded that this was not called for in the case at hand, as the interests of the private users significantly differed from those of advertisers, developers and third-party businesses: while the value of the platform increased for advertisers the more private users were active on the social network side, the same was not true for the private users, who were indifferent at best about the number of advertisers using the platform. At worst, users found too much advertising irritating. In view of these asymmetrical indirect network effects, the FCO concluded that each of the services that Facebook offered to the different user groups constituted separate markets, and that the relevant user group for assessing which other services were substitutes for Facebook's social network were the private users of the network only. This stands in contrast to the US Supreme Court's approach in *Ohio v American Express*, in which the majority decided that significant indirect network effects required the court to define the multi-sided platform market for credit card transactions as including all users.⁴⁴ Facebook itself had argued that the relevant market was that "for attention".

⁴³ *Supra*, paras 223-229.

⁴⁴ *Ohio v American Express* 138 S.Ct. 2274 (2018); the majority opinion relied heavily on the writings of Evans and Schmalensee, who had submitted an amici curiae observation on behalf of American Express. Evans was also Facebook's economic advisor in the proceedings before the FCO.

The FCO then briefly addressed whether Facebook's social network was subject to the competition rules at all, given that it was available to private users free of charge. Until very recently, according to the case law of the Düsseldorf Higher Regional Court – the same court that later was to review the FCO's Facebook decision - free services, including free internet services, had indeed not been considered markets for the purposes of German competition law.⁴⁵ In 2016, however, the German legislator amended the GWB to correct this position, which now explicitly stipulates that the free nature of a service does not preclude it from being an economic service.⁴⁶ Given that the free social network service was cross-subsidised through advertising revenue on the other side of the market, the FCO concluded that Facebook's provision of the social network to private users was an economic service and hence subject to the competition rules.⁴⁷

The FCO deemed the traditional SNIPP test unworkable for free services, and therefore assessed the substitutability of other social media services with Facebook on the basis of a lengthy qualitative comparison of over 30 different services.⁴⁸ It concluded that the market for social networks was distinct from other social media services in terms of purpose, functions and user experience. In particular, it excluded messaging services such as WhatsApp, professional networks such as LinkedIn or Xing, as well as YouTube and Twitter. Ultimately, it only included (the now defunct) Google+ and a few smaller German providers of social networks⁴⁹ in the relevant market for social networks, which it deemed national in scope.⁵⁰

⁴⁵ OLG Düsseldorf, Order of 9 January 2015, Az. VI Kart 1/14 (V), para 43 – (HRS) juris.

⁴⁶ Gesetz gegen Wettbewerbsbeschränkungen (GWB), version of 26 June 2013 (BGBl. I S. 1750, 3245), last amended on 12 July 2018 (BGBl. I S. 1151), sec. 18(2)(a).

⁴⁷ This is in line with the European Commission's views on the nature free digital services in cases such as Facebook/WhatsApp and Microsoft/Skype: decision of 3 October 2014 (Case No COMP/M.7217 – Facebook/Whatsapp), recital 47; and decision of 7 October 2011 (Case No COMP/M.6281 - Microsoft/Skype), recital 75.

⁴⁸ By comparison, in the *Google Android* case, the European Commission had adapted the SSNIP test for free digital services to ask whether a small but significant, non-transitory degradation in quality would induce consumers to switch. However, the Commission did so in addition to assessing other types of evidence, and did not rely on the modified SSNIP test exclusively (European Commission, decision of 18 July 2017 (CASE AT.40099 - Google Android), recital 267).

⁴⁹ Stayfriends, StudiVZ, Jappy and Wize.Life.

⁵⁰ Bundeskartellamt, decision no B6-22/16 of 6 February 2019, paras 334 – 351.

3. The position of dominance

The FCO established that Facebook was dominant in this market within the meaning of sec. 18(1), (3) and (3)(a) GWB. It defined the concept in line with the European Court of Justice's understanding of dominance under Article 102 TFEU as a position of economic strength that allows the undertaking to behave to a significant degree independently of its competitors, customers and ultimately consumers.⁵¹ The FCO additionally cited its own merger guidelines, according to which dominance refers to the ability of an undertaking to take commercial decisions that are not sufficiently constrained by the reactions of competitors, customers and suppliers, including, in particular, decisions on price, output, quality, or other market relevant parameters such as investment in new technologies or research and development.⁵² Given that pricing was only one of several relevant parameters, the FCO considered it immaterial that Facebook's service was free of charge and that Facebook was unlikely to start charging consumers in the foreseeable future. It briefly suggested that the scope of data collection could be considered a parameter of service quality, but did not pursue the point.⁵³ Instead, it held that dominance also referred to the ability to force other unfavourable contractual conditions upon consumers who, in view of the undertaking's position of economic strength, had no bargaining power. This included the ability to force users to agree to excessive data collection.⁵⁴

Facebook argued that market power did not significantly increase an undertaking's ability to collect and process consumer data. The FCO acknowledged that consumers were generally more sensitive to price increases than increases in data collection. It suggested that this phenomenon could be partially explained by the fact that many consumers had difficulties grasping the extent of data collection to which they agreed. In its view, this factor also explained the well-known "privacy paradox", according to which

⁵¹ Bundeskartellamt, decision no B6-22/16 of 6 February 2019, para 376, citing the jurisprudence of the German Federal Court of Justice (BGH, judgment of 12 December 1978, Case KVR 6/77, *Erdgas Schwabe*, BGHZ 73, 65) and the European Court of Justice (Case 27/76 United Brands, ECLI:EU:C:1978:22, para 65).

⁵² Bundeskartellamt, Leitfaden zur Marktbeherrschung in der Fusionskontrolle of 29 March 2012, para 9, available at www.bundeskartellamt.de/SharedDocs/Publikation/DE/Leitfaden/Leitfaden%20-%20Marktbeherrschung%20in%20der%20Fusionskontrolle.pdf?__blob=publicationFile&v=12.

⁵³ *Supra*, para 379, 379.

⁵⁴ Bundeskartellamt, decision no B6-22/16 of 6 February 2019, para 378.

consumers generally claimed to be highly concerned about data protection, but nonetheless acted in ways that resulted in their data being widely accessible online.⁵⁵ The FCO also held, however, that dominance or market power could significantly increase the ability of an undertaking to compel individuals to agree to extensive data collection against their will where they had no alternative but to agree if they wanted to use the service. In such a situation, the average consumer did not even bother to read the terms and conditions, because he or she had no choice.

On this basis, the FCO carried out a 40-page qualitative assessment of whether Facebook's ability to set the terms for data collection was sufficiently constrained on the German market for social networks. It first considered Facebook's market share and the position of existing competitors. One of the difficulties the FCO had to contend with was how to calculate Facebook's market share given the free nature of the service. It considered several potentially relevant parameters, and concluded that the number of daily active users was the most accurate reflection of market share. It thus established that Facebook had had a continually growing share of at least 90% in the German market for social networks since 2012. The FCO then engaged with the additional factors that sec. 18(3)(a) GWB requires for assessing dominance in multisided and network markets. It found that the market for social network services was subject to strong direct and indirect network effects, which had resulted in increasing market concentration, until the market had tipped in Facebook's favour in 2011, three years after it entered the market.⁵⁶ These network effects were a significant barrier to entry for potential competitors, and a barrier to growth for existing competitors, and hence conferred a strong, albeit not unassailable, market position upon Facebook. The FCO also found that German consumers tended not to multi-home in this market, and that switching costs were high, as average Facebook users would only be willing to leave Facebook for a competing network if most of their friends made the same move. Also, as Facebook user profiles and timelines were not transferrable to other social networks, leaving Facebook would

⁵⁵ Bundeskartellamt, decision no B6-22/16 of 6 February 2019, para 384.

⁵⁶ Bundeskartellamt, decision no B6-22/16 of 6 February 2019, paras 423-451.

automatically entail losing one's social media profile and record of past activities.⁵⁷ For users who had been using Facebook to document their daily lives in a diary-like style for a significant period of time this was a high price to pay. The FCO hence concluded that many consumers were locked into Facebook's social network. It further found that Facebook benefitted from significant economies of scale,⁵⁸ and that Facebook had unparalleled access to competition-relevant data from Facebook.com, Facebook-owned services, and millions of third-party websites using Facebook Business tools. The FCO deemed this factor highly relevant for assessing dominance in markets for social network services that were financed through advertising, because the quality and value of advertising depended on highly detailed information about the target. Finally, it established that Facebook was not sufficiently constrained by innovation-driven competitive pressure. While recognising that digital markets were highly dynamic, and that even dominant undertakings needed to invest in innovation to protect themselves against competitors, it held that this fact could not translate into a generic defence against market power in digital markets. It concluded that there was currently no concrete evidence of innovation-driven competitive pressure capable of keeping Facebook's market power in check.⁵⁹

In sum, the FCO found that the combination of Facebook's market share in excess of 90%, strong direct and indirect network effects, high switching cost, economies of scale, and absence of meaningful innovation-driven competitive pressure gave Facebook a dominant position in the German market for social networks, so that it was not sufficiently constrained in its power to dictate detrimental contractual terms on data collection to consumers.

⁵⁷ The FCO acknowledged that users wishing to leave Facebook were able to download their information beforehand, which Facebook would email the user in a browser-compatible format. However, this function was only available for activities that the user had published, and excluded both the reactions of third-parties (e.g. likes or comments) to these user-generated activities, and the user's own reactions to the activities of third parties. The FCO did not consider this export option exhaustive enough to cancel out users' switching cost.

⁵⁸ Bundeskartellamt, decision no B6-22/16 of 6 February 2019, paras 477-480.

⁵⁹ Bundeskartellamt, decision no B6-22/16 of 6 February 2019, paras 501-521.

4. The abuse

At the heart of the FCO's decision lay the 120-page assessment of whether Facebook's conduct should be considered abusive.

a. The theory of harm

The FCO started the analysis by spelling out its theory of harm. For a number of reasons, it decided against considering Facebook's conduct a form of excessive pricing, even though excessive pricing is expressly prohibited by sec. 19(2) no 1 GWB. For one, it took the view that data could not be likened to money,⁶⁰ because it was non-rivalrous, meaning that consumers could share the same data over and over again and were less compelled to budget this resource than money. Second, it deemed the welfare implications of passing on data difficult to quantify, and consumers themselves could appreciate the consequences of passing on data less fully than the implications of spending money. Third, the FCO interpreted the newly introduced sec. 18(2)(a) GWB, according to which the provision of a good or service free of charge does not preclude the application of competition law, as expressing the legislator's intent that the transfer of data should not be equated with monetary payments, as otherwise, there would have been no need to introduce this provision.⁶¹

In fact, the FCO decided not to rely on any of the examples of abusive conduct listed in sec. 19(2) GWB. Instead, it chose to base its assessment on an concept of exploitation developed by the German Federal Court of Justice,⁶² according to which the general clause of sec. 19(1) GWB had to be interpreted as also prohibiting the use of dominance to impose contractual terms on consumers that were incompatible with statutory or fundamental rights.⁶³ The FCO relied on three specific judgements by the German

⁶⁰ *Supra*, paras 569-572.

⁶¹ Sec. 18(2)(a) GWB was inserted into sec. 18's rules on market definition in 2016, and states.

⁶² Bundesgerichtshof (BGH). This is Germany's highest court of civil and criminal jurisdiction.

⁶³ In German constitutional law, the term fundamental right ("Grundrecht") refers to an individual right guaranteed by the German constitution ("Grundgesetz"), and which the individual can enforce against the State. The term entered the jurisprudence of the European Court of Justice in the late 1960s, when German plaintiffs started invoking "fundamental rights" against the former Community institutions (eg Case 29/69 *Stauder v City of Ulm*, ECLI:EU:C:1969:57).

Federal Court of Justice, in which this court had held that the use of unlawful standardised terms and conditions could be exploitative within the meaning of sec. 19(1) GWB where the use of these terms was a ‘manifestation of market power or significantly superior power’.⁶⁴ In *VBL-Gegenwert I* and *II*, the court thus found that standardised contractual clauses, which imposed unduly burdensome conditions on the dominant undertaking’s contract partner and which were therefore void pursuant to sec. 307(1) BGB,⁶⁵ fell within this category. In *Pechstein*, it reiterated this principle, and added that the fundamental rights of all parties had to be considered when interpreting the scope of sec. 19(1) GWB.⁶⁶

The FCO considered that Facebook’s conduct might be incompatible with the right to informational self-determination and privacy guaranteed by German constitutional law⁶⁷ and Article 8(2) of the EU Charter of Fundamental Rights. In its view, these constitutional rights had been concretised in the GDPR,⁶⁸ which aimed to address the power asymmetries between organisations and individuals, and therefore made fall within the realm of commercial law.⁶⁹

b. The relationship between competition law and data protection law

Before embarking on the actual substantive analysis, the FCO assessed its competence to apply the GDPR.⁷⁰ It concluded that it was acting within its powers by enforcing sec. 19 GWB against undertakings that used their market power to impose contractual terms in violation of the GDPR, even though it was not a data protection

⁶⁴ BGH, judgment of 7 June 2016, Case KZR 6/15, *Pechstein/International Skating Union*, BGHZ 210, 292, para 48; judgment of 6 November 2013, Case KZR 58/11, *VBL Gegenwert I*, BGHZ 199, 1, para 65; judgment of 24 January 2017, Case KZR 47/14, *VBL Gegenwert II*, WM 2017, 1479, para 35.

⁶⁵ According to sec. 307(1) of the German Civil Code (BGB), provisions in standard business terms are void if, contrary to the requirement of good faith, they unreasonably disadvantage the other contract party. An unreasonable disadvantage may also arise from the provision being unclear and incomprehensible.

⁶⁶ BGH *Pechstein/International Skating Union*, BGHZ 210, 292, para 57.

⁶⁷ While the German Constitution does not contain an explicit constitutional right to data protection, the German Federal Constitutional Court recognised the unwritten constitutional right to “informational self-determination” in a landmark ruling from 1983 (BVerfG, judgment of 15 December 1983, Case BvR 209, 269, 362, 420, 440, 484/83, *Volkszählungsurteil*).

⁶⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ L119/1.

⁶⁹ Bundeskartellamt, decision no B6-22/16 of 6 February 2019, para 530.

⁷⁰ Bundeskartellamt, decision no B6-22/16 of 6 February 2019, paras 535-558.

agency within the meaning of Articles 55, 56 GDPR. It also denied that enforcing sec. 19 GWB in this manner would undermine the GDPR's "consistency mechanism",⁷¹ which sets up detailed procedural rules for situations in which several national data protection agencies disagree on how to apply the GDPR to cases with cross-border context. According to the FCO, the creation of this dispute settlement mechanism should not be interpreted as conferring a monopoly on national data protection agencies for interpreting open-worded provisions of national law in line with the GDPR. It also disputed that enforcing sec. 19 GWB against conduct that breached the GDPR would undermine the uniform interpretation of the GDPR, as, on appeal, the competent national court could make a request for a preliminary ruling to the European Court of Justice.⁷²

Finally, the FCO held that the GDPR did not supersede the competition rules. First, the GDPR did not contain any provisions that would suggest such a preclusion. Second, multiple data protection agencies strongly supported the application of the competition rules for the purposes of data protection. Third, the 2016 amendment of the GWB made clear that the German legislator considered access to data an important factor in competition law assessments.⁷³ Finally, to minimise the danger of conflicting interpretations, the FCO had consulted with the competent German authorities throughout the proceedings.⁷⁴ Sec. 55(c) GWB, also introduced in 2016 in order to facilitate competition law enforcement in the digital age, explicitly authorised the FCO and the German data protection agencies to exchange information for enforcement purposes.

c. Compatibility with the values of the GDPR

On this basis, the FCO therefore assessed whether Facebook's data collection policy was compatible with the values of the GDPR.⁷⁵ The premise of examining the

⁷¹ GDPR, Articles 63-69.

⁷² Any court may make such as reference (Article 267(2) TFEU). A last-instance Court that has questions on the correct interpretation of a provision of EU law is required to make a reference (Article 267(3) TFEU).

⁷³ Bundeskartellamt, decision no B6-22/16 of 6 February 2019, paras 544-548.

⁷⁴ Supra, paras 555, 556.

⁷⁵ Supra, paras 573-913.

conduct's compatibility with the GDPR's 'values' rather than its legal provisions, reiterated repeatedly at key stages of the decision,⁷⁶ could have been interpreted as auguring a light-touch legal assessment. In reality, the FCO carried out a highly technical and detailed 85-page long legal analysis pursuant to Articles 6 and 9 GDPR. It established, without any difficulty, that Facebook was processing and profiling personal data within the meaning of Article 4 GDPR, including special categories of data within the meaning of Article 9(1) GDPR.⁷⁷ The lion's share of the assessment consisted in proving that Facebook's behaviour was not justified pursuant to Articles 6 and 9(2) GDPR. Facebook invoked all six justifications available under the GDPR: user consent, necessity for the performance of the service, and four different types of overriding interest recognised by the Regulation. The FCO concluded that none of these justifications applied.

(1) User consent

One of the most challenging defences was Facebook's submission that users had consented to Facebook processing and profiling their data by agreeing to Facebook's terms and conditions, and that its conduct was thus justified pursuant to Article 6(1)(a) GDPR.⁷⁸ The FCO concluded that users had not effectively consented to Facebook's data processing policy, because their consent was not 'freely given' within the meaning of Article 4(11) GDPR.⁷⁹ It primarily based this view on recitals (42) and (43) of the GDPR, which it interpreted as meaning that consent could not be considered freely given if there was a clear imbalance of power between the data subject and the organisation, and if the data subject had no genuine choice or was unable to refuse consent without detriment. According to the FCO, there was a clear imbalance between Facebook and individual users, because Facebook's market share of over 90%, the absence of a serious competitor,

⁷⁶ Supra, paras 523, 525, 531, 889 amongst many others.

⁷⁷ Data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation (Article 9(1) GDPR).

⁷⁸ Bundeskartellamt, decision no B6-22/16 of 6 February 2019, paras 639-665.

⁷⁹ Article 4(11) GDPR defines 'consent' as any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.

and the barriers to entry and growth resulting from strong network effects meant that individuals had no choice but to agree to Facebook's terms if they wanted to use a social network. Furthermore, the FCO held that users had not, as required by Article 9(2)(a) GDPR, 'explicitly' consented to the processing of special categories of sensitive personal data that Facebook collected from Facebook-owned services and third-party businesses. Finally, it found that the opt-out options that Facebook made available to users⁸⁰ and the information it provided on how to block cookies or ad IDs on mobile devices were insufficient to counteract these shortcomings.

(2) Necessity for the performance of the contract

The FCO also disagreed with Facebook's second defence that its data processing policy was necessary for the performance of a contract to which the data subject was a party (Article 6(1)(b) GDPR). In particular, it held that "necessity" within the meaning of this provision had to be narrowly construed, and interpreted as not applying where a dominant company dictated the contractual terms.⁸¹ It based this reading on the guidelines issued by the former 'Article 29 Data Protection Working Party'.⁸² Also, Facebook had not demonstrated that it was necessary to combine the data obtained on Facebook.com with data from Facebook-owned services and third-party businesses in order to provide the core social network service for Facebook users.⁸³

(3) Overriding interests

Finally, the FCO rejected all four of Facebook's defences as to why its conduct was necessary to protect specific overriding interests. It concluded quickly that there was no evidence for Facebook's claims that (1) it was legally required to collect, combine and process the data,⁸⁴ (2) that it was doing so to protect vital interests of the data subject or

⁸⁰ Users were given the choice to opt out of 'targeted' advertising in favour of more generic advertising, but could not opt out of the process of data collection itself.

⁸¹ Bundeskartellamt, decision no B6-22/16 of 6 February 2019, paras 668-677.

⁸² Art. 29 Data Protection Working Party, "Guidelines in relation to consent under Regulation 2016/679, https://iapp.org/media/pdf/resource_center/20180416_Article29WPGuidelinesonConsent_publishpdf.pdf.

⁸³ Bundeskartellamt, decision no B6-22/16 of 6 February 2019, paras 688-713.

⁸⁴ Article 6(1)(c) GDPR.

another natural person,⁸⁵ or (3) that this was necessary for the performance of a task carried out in the public interest.⁸⁶ It gave significantly more attention to the fourth and final of these defences.⁸⁷ According to Article 6(1)(f) GDPR, processing of personal data is lawful where it is “necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.” The FCO interpreted this provision as requiring careful balancing of all competing interests. Facebook invoked several interests, such as Facebook.com’s personalisation, targeted advertising, measurement and analytics purposes, user and network security, research purposes and responses to legal requests. The FCO recognised that all of these aims could, in principle, be considered legitimate within the meaning of Article 6(1)(f) GDPR. However, it once more took the view that Facebook had not proved that the combination of data from the different company-internal and external sources was necessary to achieve these aims. It further balanced these interests against the interests of Facebook’s users in protecting their right to privacy, while considering the sensitive nature of the data, its scope and scale, its use for profiling individuals, and the reasonable expectations of users. Once more, the FCO stressed that users could not be expected to grasp how much data from their entire Internet usage was being assigned to their Facebook accounts and used for personalisation and other purposes. While Facebook formally disclosed the practice in its Data Policy, users regularly only took fleeting notice of the latter. Further, in order to establish which services were owned by Facebook, they would have had to click a hyperlink which took them to another page listing the companies belonging to the Facebook group. In order to understand these companies’ data collection practices, users would have to read the terms of use of each individual service. When visiting third-party websites, it was often not possible for users to know at all whether these businesses used Facebook Business Tools and transmitted user data to Facebook to be assigned to the user’s profile. Even if specific Facebook business tools were visible on third-party

⁸⁵ Article 6(1)(d) GDPR.

⁸⁶ *Supra*, paras 716-726.

⁸⁷ *Supra*, paras 726-869.

websites, by the time the user had opened the page and recognised these tools, their personal data had already been transmitted to Facebook. The FCO also considered that the majority of individuals using Facebook-owned services such as Instagram, WhatsApp and Masquerade were teenagers, who frequently had unlimited faith in the safety of online services. Finally, the FCO considered that Facebook's monopoly-like position in the market for social networks gave it such bargaining power that it could assert its interests unilaterally. On that basis, the FCO concluded that Facebook's interests could not outweigh the interests of the data subjects.

d. Causality

As a last formal step in the substantive assessment, the FCO engaged with the issue of causality between Facebook's position of dominance and the infringement. It took the view that the case law of the German Federal Court of Justice on abusive exploitation by means of unlawful contractual conditions did not require strict causality between market power and conduct, but that "normative causality" sufficed.⁸⁸

According to the FCO, there was normative causality between Facebook's position of dominance and the reduction in privacy because the infringement of the GDPR and Facebook's dominant position were closely connected. It was because of the very position of dominance that users' consent could not be considered freely given.⁸⁹ The position of dominance also weighed heavily in the balancing of interests under Article 6(1)(b) and (f) GDPR.⁹⁰ The FCO further considered that there was in fact strict causality between Facebook's dominant position and its conduct, as an undertaking without market power would not have been able to impose such unfavourable conditions upon consumers.⁹¹ However, it offered little empirical evidence for this claim.

⁸⁸ Bundeskartellamt, decision no B6-22/16 of 6 February 2019, paras 872-875, citing BGH, judgment of 6 November 2013, Case KZR 58/11, *VBL Gegenwert I*, BGHZ 199, 1, para 65; judgment of 24 January 2017, Case KZR 47/14, *VBL Gegenwert II*, WM 2017, 1479, para 35.

⁸⁹ Recitals 42 and 43 GDPR

⁹⁰ *Supra*, para 877.

⁹¹ *Supra*, para 880.

In this context, the FCO also briefly engaged with the opinion of Facebook's economic consultant, who had argued that restricting Facebook's use of "off Facebook" data in line with the requirements of the GDPR would impair Facebook's ability to compete effectively, and would result in less innovative and lower quality services. The FCO acknowledged that the GDPR's data protection standard might appear questionable from a purely economic point of view. This, however, did not change the fact that it was the legally binding standard for defining the constitutional right to informational self-determination. In its view, the European legislator had accepted that data protection would result in certain economic disadvantages when enacting the GDPR.⁹²

Finally, the FCO argued, in all brevity and in a highly theoretical manner, that Facebook's conduct was also causing certain exclusionary effects. Facebook's unlawful data processing allowed it to gather unparalleled information about individual users. This put it in a position to offer third-party businesses particularly valuable because highly targeted advertising services, thereby enhancing the risk that Facebook could extend its dominant position in the market for social media to the market for online advertising. The FCO also expressed concern that processing data collected from Facebook-owned services, in particular WhatsApp and Instagram, might allow Facebook to extend its dominance to these markets as well. Finally, it claimed that Facebook's unlawful data collection and ensuing knowledge of user behaviour strengthened the already considerable barriers to entry in the market for social networks.⁹³

e. Balancing of interests

The FCO carried out one last overall balancing exercise between the many competing interests.⁹⁴ It explicitly did so in a prophylactic manner, as it did not think the Federal Court's case law actually required such a step. Just in case, however, the FCO once more considered the imbalance of power between Facebook and individual users, and the lack of a realistic alternative for users wishing to use a sizable social network, which allowed Facebook to dictate its terms and conditions. It briefly considered

⁹² *Supra*, paras 881, 882.

⁹³ *Supra*, paras 885-888.

⁹⁴ *Supra*, paras 890-913.

Facebook's efficiency defence at this point, but concluded in one sentence that Facebook had not demonstrated why it was necessary to combine the data from Facebook-internal and external sources to achieve such efficiencies. On the last two pages, the FCO also engaged with the expert economic opinion commissioned by Facebook, which purported to quantify both the consumer benefits and disadvantages resulting from Facebook's conduct, and to demonstrate that the overall result for consumer welfare was positive.⁹⁵ The FCO rejected the findings of this opinion for a number of reasons. First, it found the quantification insufficiently precise, because it did not distinguish between the welfare effects of data collected on Facebook, Facebook-owned services and third-party websites. Second, the FCO disputed the very premise that the consumer harm at issue in this case could be reliably quantified in economic terms. In its view, the opinion failed to recognise that Facebook's conduct could result in different types of consumer harm, such as self-imposed changes in user behaviour, unauthorised passing on of personal data to third parties, identity theft, blackmail, fraud, and disclosing personal information which the user considered worthy of protection (e.g. on income, location, diseases, political views or sexual orientation). Not all of these types of harm could be quantified in an accurate manner, which was the very reason why the GDPR not only prohibited actual but also potential consumer harm. The FCO also found the opinion incompatible with economic research showing that modern-day data collection by AI was characterised by negative externalities to the detriment of users, which resulted from the fact that consumers bore the bulk of the associated cost, creating false incentives for companies to collect too much personal data from a welfare point of view.⁹⁶ In sum, the FCO concluded that, even if sec. 19(1) GWB were to require it to balance the interests of the dominant undertaking against those of its customers, the latter would prevail.

⁹⁵ *Supra*, paras 906-913.

⁹⁶ Bundeskartellamt, decision no B6-22/16 of 6 February 2019, para 911, citing Ginger Zhe Jin, "Artificial Intelligence and Consumer Privacy" in: Agrawal, Gans and Goldfarb (eds), *The Economics of Artificial Intelligence: An Agenda* (University of Chicago Press, 2018).

5. The remedy

The FCO decided not to fine Facebook for the infringement. Instead, it issued a complex prohibition that spanned the better part of 5 pages.⁹⁷ In essence, the FCO prohibited Facebook from combining personal data obtained from Facebook.com/Facebook.de, Facebook-owned services and third-party companies using Facebook Business tools under the current terms of service for Facebook users resident in Germany. Facebook would only be allowed to combine data from these sources and assign it to a Facebook user profile if users “voluntarily” consented to this. The FCO defined voluntary as meaning that the use of Facebook’s services could not be made dependent on users’ consent.

Additionally, the FCO issued two relatively open-ended behavioural remedies. First, it required Facebook to adapt its terms of data processing in line with the prohibition. Second, if Facebook intended to continue collecting data from outside the social network and combining it in user accounts without the voluntary consent of the profiled user, it would have to restrict the processing of this data substantially. The FCO suggested different ways in which Facebook could achieve this (e.g. restrictions on the amount of data, purpose of use, type of data processing, additional control options for users, anonymization, processing only upon instruction by third-party providers, limitations on data storage periods). It set Facebook a deadline of 12 months to develop specific proposals and submit them to the FCO for approval.

C. The appeal

The FCO’s decision triggered a wide range of reactions. Some commentators were sceptical or even outright critical. Recurring views amongst this group were that, from an economic point of view, all parties were better off as a consequence of Facebook’s business model, that the ability to collect data was unrelated to market power, and that empirical evidence suggested that many users willingly shared their data to obtain better services.⁹⁸

⁹⁷ Bundeskartellamt, decision no B6-22/16 of 6 February 2019, pp. 2-6.

⁹⁸ Justus Haucap, “Data Protection and Antitrust: New Types of Abuse Cases? An Economist’s View in Light of The German Facebook Decision”, *CPI Antitrust Chronicle*, February 2019, 1 (this author also advised Facebook in the proceedings before the FCO). Equally sceptical: Giuseppe Colangelo and Mariateresa

Others applauded the FCO's decision as a brave and necessary attempt to tackle a genuine problem.⁹⁹

In any event, the FCO's victory was initially short-lived. Facebook appealed the decision to the Düsseldorf Higher Regional Court¹⁰⁰ and applied for interim relief, asking the court to order suspensive effect of the appeal.¹⁰¹ The court granted this request because of serious legal doubts.¹⁰² It detailed its concerns in a 37-page, forcefully-worded opinion that, at times, read more like a final judgement than a summary review, and stated in no uncertain terms that even a summary examination of the factual and legal arguments showed that the FCO's decision would have to be annulled in the main proceedings.

The court considered three possible types of abuse, and found that the FCO had not proved any of these to the required legal standard: (1) excessive pricing or other unfair contractual conditions; (2) exploitation by dictating unlawful contractual conditions, and (3) an exclusionary abuse.

1. No excessive pricing and no exclusionary abuse

The FCO had in fact not based its decision on the first or the third theories of harm, but had relied exclusively on the second concept of abuse examined by the court. The court nonetheless briefly explained why there was insufficient evidence for either of these alternatives. In relation to the possibility of excessive pricing or unfair conditions, it found that the FCO had not established the counterfactual required for proving this type

Maggiolino, "Data Protection in Attention Markets: Protecting Privacy through Competition?", (2017) 8(6) *Journal of European Competition Law & Practice* 363.

⁹⁹ Rupperecht Podszun, "After Facebook: What to Expect from Germany" (2019) 10(2) *Journal of European Competition Law & Practice* 69; Giulia Schneider, "Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's investigation against Facebook" (2018) 9(4) *Journal of European Competition Law & Practice* 213–225.

¹⁰⁰ Oberlandesgericht (OLG) Düsseldorf.

¹⁰¹ According to sec. 65(3) GWB, the appellate court may, upon application, entirely or partly restore the suspensive effect of the appeal, if there are serious doubts as to the legality of the appealed decision, or if enforcement would result in unreasonable hardship for the applicant and was not required by overriding public interests.

¹⁰² OLG Düsseldorf, Order of 26 August 2019, Case VI-Kart 1/19 (V), available at www.olg-duesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20190826_PM_Facebook/20190826-Beschluss-VI-Kart-1-19-V_.pdf.

of abuse. In other words, the FCO had not shown that prices were higher or contractual terms less advantageous than would have been the case in a competitive market.¹⁰³ Regarding the potential exclusionary abuse, it engaged with the FCO's very rudimentary and highly theoretical statements relating to the effects of Facebook's conduct on competition that the agency had made in passing when assessing the causality of Facebook's position of dominance for its exploitative conduct.¹⁰⁴ Not surprisingly, it found that the FCO's evidence was not even remotely sufficient to support the assumption that Facebook's data collection foreclosed competition on the market for social networks, or that there was a danger of Facebook transferring its market power to the market for online advertising or any of the other markets on which Facebook-owned services were active.¹⁰⁵ Interestingly, the court also did not deem the capacity to foreclose or a likely foreclosure effect sufficient for such an abuse, but held that sec. 19 (2) no. 1 GWB required an actual foreclosure effect. It argued that this requirement was widely recognised in the case law and academia, but only cited its own case law in support of this view.¹⁰⁶ This is a different standard than that applied by the European Court of Justice to exclusionary abuses, which does not require an actual foreclosure effect, but considers a likely foreclosure effect or the capacity to foreclose sufficient under Article 102 TFEU.¹⁰⁷

2. No exploitative abuse by means of unlawful data collection

The focus of the court's review was the FCO's claim that Facebook had abused its dominant position by forcing illegal contractual conditions upon its users.¹⁰⁸ It did not object to the FCO's definition of the relevant market. Nor did it fault the finding that Facebook was dominant in this market.¹⁰⁹ However, it strongly disagreed with the FCO's assessment of Facebook's conduct. At the outset, the court acknowledged that one could "not entirely exclude" the possibility that an infringement of consumer protection law could amount to abusive behaviour within the meaning of sec. 19(1) GWB. This followed

¹⁰³ *Supra*, pp. 7, 8, point B.1.a).

¹⁰⁴ *Supra*, paras 885-888.

¹⁰⁵ OLG Düsseldorf, Order of 26 August 2019, Case VI-Kart 1/19 (V), pp. 32-36, point B.2.

¹⁰⁶ OLG Düsseldorf, Order of 26 August 2019, Case VI-Kart 1/19 (V), p. 33.

¹⁰⁷ See e.g. Case C-413/14 P Intel v Commission, ECLI:EU:C:2017:632, paras 142, 143; Case C-23/14 Post Danmark v Konkurrenserådet, ECLI:EU:C:2015:651, paras 68, 69.

¹⁰⁸ OLG Düsseldorf, Order of 26 August 2019, Case VI-Kart 1/19 (V), pp. 8-32, point B.1.b).

¹⁰⁹ OLG Düsseldorf, Order of 26 August 2019, Case VI-Kart 1/19 (V), p. 7, point B.1.a).

both from the case law of the German Federal Court of Justice¹¹⁰ and that of the European Court of Justice on Article 102 TFEU.¹¹¹ It also conceded that the wording of sec. 19 GWB and of Article 102 TFEU both explicitly recognised the concept of exploitative abuse.

That being said, the Düsseldorf court unequivocally rejected the FCO's findings that Facebook had committed such an abuse because, in its view, the FCO had not established that Facebook had engaged in "anticompetitive conduct", i.e. conduct that resulted in "anticompetitive effects".¹¹² Facebook users had not suffered any economic loss from the transfer of data, as personal data was duplicable and could be shared by users with an infinite number of other undertakings.¹¹³ The FCO had also not proved that users had been required to share an "excessive" amount of personal data of a commercial value.¹¹⁴ Finally, contrary to the FCO's findings, consumers had not "lost control of their data",¹¹⁵ because they had knowingly and willingly agreed to the transfer of this data. Facebook had not coerced or pressured users into agreeing to the terms and conditions, nor had it pried on the weak-minded or engaged in any other unconscionable conduct. Users had simply weighed the pros and cons of sharing their personal data, and had done so freely, in line with their own preferences. This was proved by the fact that 32 million German citizens used Facebook, whereas around 50 million had chosen not to because they had reached a different conclusion in this cost-benefit analysis. The court also strongly disagreed with the FCO's assessment that users did not understand the extent to which Facebook collected and used their data, as, in its view, Facebook's terms and conditions were perfectly clear on this point. If users chose not to read these, this was due to indifference or laziness, but not compulsion.

The court further dismissed the FCO's argument that individuals could suffer relevant harm through identity theft, fraud or blackmail. The FCO had neither provided evidence for this claim, nor was this the type of harm that competition law sought to

¹¹⁰ BGH, judgment of 7 December 2010, Case KZR 5/10, *Entega II*, WuW/E DE-R 3145, para 55.

¹¹¹ Case 85/76 *Hoffmann-La Roche v Commission*, ECLI:EU:C:1979:36, para 125.

¹¹² OLG Düsseldorf, Order of 26 August 2019, Case VI-Kart 1/19 (V), point B.1.b).bb), p. 8.

¹¹³ *Supra*, point B.1.b).bb)(1), p. 8.

¹¹⁴ *Supra*, point B.1.b).bb)(2), p. 9.

¹¹⁵ *Supra*, point B.1.b).bb)(3), pp. 9-11.

prevent. Rather, this was a matter for data protection law. Also, the FCO had failed to explain why Facebook’s practice of combining data from different sources was more likely to result in this type of harm than merely collecting sensitive data from the core social network.

Lastly, the court considered whether an anticompetitive effect could be inferred from the fact that Facebook had allegedly breached the GDPR.¹¹⁶ It left open whether Facebook had actually infringed the GDPR, because it considered this point irrelevant. The court reiterated that exploitative conduct could only be abusive within the meaning of sec. 19(1) GWB if the undertaking engaged in conduct that harmed competition.¹¹⁷ This followed from the wording of the provision, which outlawed the “abuse of a dominant position”, and its legal objective, which was to protect the “freedom of competition”.¹¹⁸ The requirement of anticompetitive conduct was also the reason why the test for excessive pricing required the FCO to establish a counterfactual. The same requirement had to apply to any other type of exploitative abuse within the meaning of sec. 19(1) GWB. Hence, a mere breach of statutory law by a dominant undertaking could not possibly constitute a sufficient basis for considering its conduct abusive. Such an approach would also be unfair towards individuals whose data protection rights had been breached by a non-dominant undertaking.

The court left open, whether a breach of the GDPR could be deemed anticompetitive if the position of dominance had been causal for the statutory breach, as, in its view, the FCO had failed to establish causality to the required standard. According to the court, any exploitative abuse required strict, and not merely ‘normative’, causality between the position of dominance and the conduct. In its view, this was implied in the case law of the European Court of Justice, in particular the principle established in *Hoffmann-La Roche* that dominance was problematic because it enabled the dominant undertaking to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors,

¹¹⁶ *Supra*, point B.1.b).bb)(4), pp. 12-32.

¹¹⁷ “Wettbewerbsschädliches Verhalten”.

¹¹⁸ OLG Düsseldorf, Order of 26 August 2019, Case VI-Kart 1/19 (V), point B.1.b).bb).(4.2)(a)(aa), p. 12.

its customers and ultimately of the consumers.¹¹⁹ Likewise, the case law of the German Federal Court had to be interpreted as prescribing a standard of strict causality for exploitative abuses.¹²⁰ The only relevant question therefore was whether the average user's consent at the time of registration was influenced by Facebook's position of dominance to such an extent that it could no longer be considered an autonomous decision.¹²¹ According to the court, the FCO had not proved that this was the case. Consumers were not in a position of dependency vis-a-vis Facebook. They had freely decided to make their personal data available in exchange for a free, advertising-financed service. Further, the social network service was not indispensable for users' everyday life, but merely allowed them to communicate with friends, family or other third parties. The fact that 50 million German citizens did not use Facebook proved that there were alternative ways of communication.

The court concluded its review with a few choice words of scepticism about the 'privacy paradox' cited by the FCO. In its view, the fact that 75% of Facebook users questioned in the FCO's survey had expressed the opinion that they cared how a social network work handled their data, but had nonetheless agreed to Facebook's terms, was not evidence of market power. Moreover, the fact that over 80% of users¹²² had stated that they had not read Facebook's data policy before agreeing to it, was also not evidence of Facebook's market power, but more likely explained by a lack of time, interest or sheer laziness. None of these possible explanations could affect the validity of their consent.¹²³

D. Further Appeal

The FCO appealed against the Düsseldorf Higher Regional Court's interim order to the Federal Court of Justice,¹²⁴ the highest court in the German ordinary jurisdiction.

¹¹⁹ Case 85/76 Hoffmann-La Roche v Commission, ECLI:EU:C:1979:36, para 38

¹²⁰ OLG Düsseldorf, Order of 26 August 2019, Case VI-Kart 1/19 (V), point B.1.b).bb).(4.2)(c)(bb)(3), p. 23, citing: BGH, judgment of 24 January 2017, Case KZR 47/14, *VBL Gegenwert II*, WM 2017, 1479, para 35; and judgment of 23 January 2018, Case KVR 3/17, *Hochzeitsrabatte*, NZKart 2018, 136, paras 83-86.

¹²¹ OLG Düsseldorf, Order of 26 August 2019, Case VI-Kart 1/19 (V), point B.1.b).bb).(4.2)(c)(cc)(3), p. 28.

¹²² *Supra*, point B.1.b).bb).(4.2)(c)(cc)(3)(3.3), p. 30. This number was not included in the public version of the FCO's decision (see Bundeskartellamt, decision no B6-22/16 of 6 February 2019, para 385, FN 382).

¹²³ *Supra*, point B.1.b).bb).(4.2)(c)(cc)(3)(3.3), p. 31.

¹²⁴ Bundesgerichtshof.

On 23 June 2020, in a ruling that took the German competition community rather by surprise,¹²⁵ the Federal Court of Justice annulled the Higher Regional Court's interim order.¹²⁶ The 5-judge panel, which was formally only ruling on whether the Higher Regional Court had been right to order suspensive effect of the appeal, made clear that it had no doubt at all that Facebook was abusing its dominant position. It also explained its take on key substantive issues in this interim ruling, which is highly unusual. While not explicitly rejecting the FCO's privacy-based concept of harm, it suggested a slightly approach. In its view, the relevant issue was "not so much" the infringement of the GDPR, but users' lack of choice between (1) a more personalised experience on Facebook, that might indeed require extensive data collection from all three sources, and (2) a less personalised experience, based on the data that consumers choose to disclose on Facebook.com. This lack of choice, the Federal Court ruled, "not only" affected users' autonomy and right to privacy, but it was also exploitative because Facebook was denying consumers a service for which there was demand, and which a competitive market would likely have provided, i.e. a less personalised and less invasive social network service. The Federal Court further specified that Facebook's data collection policy, in its view, was entirely capable of affecting competition. It saw a likely restrictive effect (1) on the market for social networks, because Facebook's data collection further increasing the lock-in of users, and the data collection allowed Facebook to provide attractive advertising services, which financed the social network, and (2) on market for online advertising. It explicitly criticised the Higher Regional Court for erroneously assuming that the restrictive effect had to occur in the market in which the undertaking was dominant. The ruling, incidentally, did not address the issue of causality, which had played such a key role in the Higher Regional Court's reasons for granting Facebook interim relief.

¹²⁵ Most commentators had predicted that the FCO's chances of success were more than slim. See e.g. Rupperecht Podszun, Facebook vs. Bundeskartellamt, <https://www.d-kart.de/blog/2019/08/30/en-facebook-vs-bundeskartellamt/>.

¹²⁶Bundesgerichtshof, Order of 23 June 2020 in Case KVR 69/19 (not yet published), and Press Release of 23 June 2020; <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288&Seite=2&anz=621&pos=71&nr=107146&linked=pm&Blank=1>.

To be clear, the Federal Court’s order of 23 June merely annulled the Düsseldorf Higher Regional Court’s decision to order suspensive effect of the appeal. The main proceeding now continues in the Düsseldorf court, which would be well advised to take on board the interpretative suggestions of the Federal Court of Justice. Whichever party loses can then appeal against this judgement to the Federal Court of Justice again. The proceedings are likely to continue for several years. In the meantime, Facebook has to comply with the prohibition, meaning that it may no longer operate its current data collection policy in Germany.

E. Legislative aftermath

In a further plot twist, the German government has meanwhile also joined the fray. On 10 October 2019, just over a month after the Higher Regional Court’s order condemning the FCO’s decision, the federal government published a new legislative proposal to amend the German Competition Act, which is currently being considered by the legislator.¹²⁷ The proposal promises to deliver a “focused, proactive and digital competition law 4.0”, and proposes far-reaching changes to the law. This proposal was not specifically triggered by the Higher Regional Court’s order. The ministry had reportedly been working on the amendment since 2018 in response to an expert report recommending a number of legislative changes to facilitate the enforcement of German competition law against dominant platforms.¹²⁸ However, the proposal explicitly engages with the FCO’s decision and the Düsseldorf court’s order. Far from criticising the FCO’s approach, the document relies on the FCO’s findings and views as a basis for many of the proposed amendments.¹²⁹ Even more importantly, the proposal firmly takes the FCO’s

¹²⁷ Bundesministerium für Wirtschaft und Energie, Entwurf eines Zehnten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 (GWB-Digitalisierungsgesetz), available at <https://www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.pdf>.

¹²⁸ Heike Schweitzer, Justus Haucap, Wolfgang Kerber and Robert Welker, Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen, Projekt im Auftrag des Bundesministeriums für Wirtschaft und Energie (BMWi) Projekt Nr. 66/17 (29 August 2018). An executive summary of the report is available in English at: https://www.bmwi.de/Redaktion/DE/Downloads/Studien/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen-zusammenfassung-englisch.pdf?__blob=publicationFile&v=3.

¹²⁹ Bundesministerium für Wirtschaft und Energie, (GWB-Digitalisierungsgesetz), *supra*, pp. 76, 82.

side in several of the contentious legal issues underlying the Facebook case and aims to correct the course set by the Düsseldorf court. Most significantly, the bill proposes to codify the standard of normative causality used by the FCO and rejected by the court for all types of exploitative abuse, including those resulting from unlawful contractual conditions imposed by a dominant undertaking. According to the ministry, the standard of normative causality follows clearly from the Federal Court of Justice's case law and from the GWB's legal objective, which is to protect autonomous decision-making in the market.¹³⁰ The proposal also stresses that exploitative abuses could occur in situations where the harm inflicted upon users was not measurable in monetary terms, but took the form of an unjustified transfer of personal data. In the context of digital platforms characterised by increasing market concentration, information asymmetries and the "rational apathy" of users, the FCO had to be in a position to prohibit an exploitation even though it was typically not possible to develop a sensible counterfactual. The fact that even non-dominant undertakings could act in a comparable manner did not make users less worthy of protection, especially as the dominant undertakings in these settings discouraged switching and encouraged competitors to copy their behaviour. The legislative proposal cites the Düsseldorf Higher Regional Court's order in the Facebook case as evidence of "legal uncertainty" on this point, which urgently requires legislative clarification.¹³¹

IV. Critical analysis

In the current climate of collective antitrust soul-searching¹³² and uncertainty about how to treat powerful digital platforms under the existing competition rules, it cannot come as a complete surprise that the key players of German competition law are so deeply divided on many of core legal issues. The following takes a critical at the key points of contention.

¹³⁰ Supra, p 70.

¹³¹ Supra, pp. 70, 71.

¹³² Anne Witt, "Technocrats, Populists, Hipsters, and Romantics – Who Else is Lurking in The Corners of The Bar?", CPI Antitrust Chronicle (Nov. 2019).

A. Anticompetitive conduct in the absence of foreclosure or collusion?

The first question that arises is whether a dominant undertaking's conduct can really be considered anticompetitive if the undertaking did not engage in conduct that restricted competition, be it in the form of foreclosure or collusion. In the United States, the answer currently is a clear no.¹³³ However, as explained in Part I, EU and German competition law take a different position.¹³⁴ The very wording of Article 102(a), (b) TFEU and sec. 19(2) no 2 GWB make clear that it is abusive for a dominant undertaking to impose unfair prices, other unfair trading conditions, or to limit output or innovation to the prejudice of consumers. Neither of these provisions requires that the detrimental effects for consumers be the consequence of foreclosure or collusion. Nor does the case law in either jurisdiction require this.

While the Düsseldorf court almost grudgingly recognised this in its opening statements, it was clearly uncomfortable with the very notion of sanctioning pure consumer exploitation under the competition rules, stressing again and again that the only purpose of competition law was to protect the freedom of competition,¹³⁵ and that sec. 19(1) GWB therefore only prohibited “anticompetitive conduct”.¹³⁶ This is somewhat reminiscent of the wording used by the US Supreme Court in *Trinko*.¹³⁷ However, it remains that both the authors of the European Treaties and the German legislator decided that it is a matter of competition law to ensure that a dominant undertaking does not use the absence of competition to extract excessive or unfair conditions from consumers.

B. Invasion of privacy as consumer harm

The next issue on which the FCO and Düsseldorf court could not agree was whether Facebook's conduct caused relevant consumer harm. Is privacy a parameter of consumer welfare within the meaning of competition law? And if so, did Facebook's conduct result

¹³³ See above, Part II.

¹³⁴ See above, Part I.

¹³⁵ OLG Düsseldorf, Order of 26 August 2019, Case VI-Kart 1/19 (V), point B.1.b).bb).(4.2)(a)(aa), pp. 12, 13, 17.

¹³⁶ “Wettbewerbsschädliches Verhalten”: e.g. OLG Düsseldorf, order of 26 August 2019, Case VI-Kart 1/19 (V), point B.1.b).bb).(4.2)(a)(aa), p. 12.

¹³⁷ *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

in a reduction of such welfare? Neither the FCO nor the Düsseldorf court explicitly defined the concept of harm, nor was the theory underlying either side's arguments particularly clear. The only conclusion one can draw with certainty is that the two institutions strongly disagreed on whether Facebook's conduct had resulted in relevant harm.

For the FCO, Facebook had harmed users by infringing their right to informational self-determination or privacy - legal rights guaranteed by the German constitution, and the European Union's GDPR and Charter of Fundamental Rights respectively. The FCO inferred the violation of these rights from the fact that Facebook had infringed the GDPR. It did not rely on an economic concept of consumer welfare - it might have been possible to argue that privacy was an element of service quality - and outright rejected Facebook's attempts to translate the implications of this infringement into quantifiable economic terms. One may conclude that it considered the infringement of a constitutionally guaranteed freedom in itself a relevant form of harm within the meaning of German competition law.

The Düsseldorf court disagreed. In its view, consumers had not suffered any relevant harm. They had not suffered any economic loss. They had also not lost control of their data, because they had knowingly and willingly agreed to Facebook's terms and conditions after balancing the benefits and drawbacks of paying for Facebook's free social network service with their data. The fact that some users were too lazy, busy or indifferent to read these terms and conditions did not change the fact that they had agreed without coercion to the transfer of data. As it was clear to the court that users had willingly shared their data, it did in fact not engage with the fundamental question of whether an infringement of a constitutional right is a relevant form of consumer harm, or whether competition law is limited to preventing instances of economic consumer harm.

The Federal Court of Justice, while not rejecting the FCO's proposition that personal autonomy and privacy are protected by sec. 19 GWB, indicated that it was more inclined to focus on another type of harm: consumer choice and the prevention of a service for which there was demand. In its view, the key problem was that Facebook had denied consumers the choice between a more personalised but invasive network service, and a

less personalised but less invasive service. Thereby, Facebook denied certain consumers a service which they wanted, and which a competitive market would likely have provided.

C. Causality

Another key point of contention between the FCO and the Düsseldorf court was the issue of causality. Even if one recognises that both German and EU competition law outlaw exploitative abusive behaviour in principle, under what conditions exactly does the welfare-reducing conduct of a dominant behaviour become abusive and hence unlawful under the competition rules? In particular, must the absence of competition be causal for the welfare-reducing behaviour? And if so, how does one prove this?

In fact, neither institution disputed that there had to be some form of causality between the position of dominance and the conduct. This is a sensible position, as otherwise any act on the part of a dominant undertaking that negatively affects consumer welfare would amount to abusive conduct. It is hard to make the case that harmful conduct, which is entirely unrelated to the absence of competition, should fall within the scope of competition law. The link with the objectives of competition law would become tenuous, in fact almost inexistent, in this kind of scenario, and competition law would become an all-purpose tool for punishing any harmful conduct by a dominant undertaking, just because it operates in a market in which competition is compromised. This would be neither reasonable, nor would it be compatible with the general concept of exploitative abuses. In the words of *United Brands*, it is necessary to “ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition”.¹³⁸ In other words, the absence of competition must have been causal for the harmful conduct.

However, while the FCO took the view that normative causality was sufficient, the Düsseldorf court required strict causality between the position of dominance and the conduct. In other words, the court took the view that the FCO should have established a

¹³⁸ Case 27/76 *United Brands v Commission* ECLI:EU:C:1978:22, para 249.

counterfactual, and proved that Facebook would not have been able to engage in the relevant conduct in a competitive market. In its view, non-pricing exploitative abuses had to be subject to the same rules as excessive pricing, and excessive pricing required establishing a counterfactual to prove that the dominant undertaking would not have been able to impose these prices in a competitive environment. Hence, it concluded that the FCO should have established that Facebook would not have been able to collect as much personal data if it had been subject to competitive pressure.

Could the FCO possibly have established a convincing counterfactual that would have proved on the basis of sound empirical evidence that a non-dominant provider of social network services could not have inflicted the same harm on consumers? Evidence, in fact, suggests that the few non-dominant competing providers of social network services were acting in a similar way.¹³⁹ According to the FCO, however, this did not sever the causal link between the position of dominance and the unlawful data collection, as, in its view, the smaller competitors were acting under the umbrella of Facebook's illegal conduct – similarly to non-participating fringe competitors being able to charge supra-competitive prices under the umbrella of a price-fixing cartel.¹⁴⁰ This is an interesting argument. However, the FCO did not provide any further evidence for this claim. Alternatively, rather than rely on the conduct of non-dominant competitors in the market for social network services, the FCO might also have tried to show that undertakings in comparable competitive data-driven markets, which were not dominated by one undertaking with significant market power, collected data in a way that did not violate the GDPR. It did not do so. One might indeed wonder whether competitive markets for free, advertizing-financed online services even exist, given the propensity of such markets towards tipping.¹⁴¹ In sum, the FCO did not provide any empirical evidence for the assumption that competition would have prevented undertakings from acting in a way that was incompatible with the EU data protection rules.

¹³⁹ Bundeskartellamt, decision no B6-22/16 of 6 February 2019, para 884.

¹⁴⁰ On the concept of umbrella pricing under EU competition law, see Case C-557/12 *Kone v ÖBB-Infrastruktur* ECLI:EU:C:2014:1317.

¹⁴¹ Stigler Committee on Digital Platforms, Final Report (2019), pp. 34 et seq.

Instead, the FCO relied on the concept of normative causality. It did not define or explain this concept that was so central to its theory of harm. However, according to German scholarship, the concept of normative causality in the context of exploitation by means of unlawful contractual conditions refers to a situation in which the undertaking violates a legal provision that condemns the conduct precisely because the undertaking has a position of dominance.¹⁴² One could therefore take the view that the FCO inferred the causal link from the fact that Facebook violated a piece of legislation that is itself based on the assumption that a position of dominance is likely to cause, or at least significantly contribute to causing, the relevant type of harm. Is this approach compatible with the German case law? There is currently no clear answer to this question. The FCO appeared to read the 3 judgements by the German Federal Court as inferring causality from the infringed legal provision. The Düsseldorf court interpreted the same judgements as clearly requiring a counterfactual. In fact, none of the cases explicitly mentioned or discussed the concept of causality. This is a question the German Federal Court would have to answer on appeal. Interestingly, it did not pronounce itself on the matter of causality at all when annulling the Düsseldorf Higher Regional Court's order on 23 June 2020, even though it gave unusually detailed indications on the appropriate theory of harm in this interim procedure. However, the matter may soon be moot for the purposes of German competition law at least, if the German government's proposal for the amendment of the GWB is enacted by the German Parliament, and the revised GWB explicitly prescribed normative causality as the appropriate standard for all types of exploitative abuse.

That being said, one may also wonder, whether the position of market dominance is really so central to the GDPR's assessment criteria as to allow the conclusion that the GDPR presumes causality between market power and excessive data collection. In support of its view, the FCO first relied on (the legally non-binding) recitals 42 and 43 of the Regulation, which do not actually mention the terms dominance or market power, but

¹⁴² Nela Grothe, *Datenmacht in Der Kartellrechtlichen Missbrauchskontrolle* (Nomos 2019), p. 226; Jörg Nothdurft in Langen and Bunte (eds), *Kartellrecht*, 13th ed. (Beck 2018), para 211.

do state that consent should not be deemed freely given if there is a clear imbalance between the data subject and the data controller, in particular where the controller is a public authority. Facebook is not a public body and does not have the powers and authority of an organ of the State. However, there is a clear economic imbalance between Facebook and the average user. The FCO therefore additionally relied on the guidelines issued by the former 'Article 29 Data Protection Working Party',¹⁴³ according to which an imbalance of power within the meaning of recital 43 is not limited to interactions with public authorities. The FCO's second argument relates to the balancing of interests to be carried out under Article 6(1)(b) and (f) GDPR. Again, neither of these provisions explicitly mentions dominance or market power. Article 6(1) does specify, by contrast, that a public authority may not rely on the justification of Article 6(1)(f) GDPR at all. Instead, the FCO relied on an opinion of the former 'Article 29 Data Protection Working Party' from 2014 on the equivalent provisions of the GDPR's predecessor,¹⁴⁴ according to which an imbalance of power needs to be considered in the balancing exercise. While it is thus possible to make the case, with the aid of legally non-binding soft law instruments, that the GDPR considers an imbalance of power an important criterion for the purposes of assessing the validity of consent and other justifications, it would be a stretch to say that the GDPR explicitly and clearly presumes causality between a position of market power and excessive data collection. On the face of it, it expresses a stronger connection between public power and excessive data collection. Whether this is a sensible position in the time of data-driven mega platforms is another matter.

D. The privacy paradox

One last point on which the FCO and the Düsseldorf court did not see eye to eye is the existence and relevance of the privacy paradox. The FCO, being convinced that the privacy-paradox was a genuine problem, used it as an additional argument to prove that

¹⁴³ Art. 29 Data Protection Working Party, which has an advisory status and whose views are not legally binding: "Guidelines on consent under Regulation 2016/679, https://iapp.org/media/pdf/resource_center/20180416_Article29WPGuidelinesonConsent_publishpdf.pdf.

¹⁴⁴ Article 29 Data Protection Working Party', Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC of 9 April 2014; https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp217_en.pdf.

Facebook had a position of dominance in the market for social networks, i.e. the power to impose contractual data procession conditions that users did not want and would not have agreed to but for the unavoidability of Facebook as a trading partner. It therefore chose to step in and protect consumers against the consequences of their own actions. The Düsseldorf court, on the other hand, held that the privacy paradox, even if existed, was not evidence of Facebook's dominance. In the absence of coercion and deceit, users had had the opportunity to make a fully informed decision and to weigh the benefits derived from using the social network against the cost of allowing Facebook to carry out extensive data collection and personal profiling. Around 50 million German citizens had chosen not use Facebook, which proved that individuals reached different conclusion in this balancing exercise. In the court's view, mere laziness or lack of interest on the part of the users, which led them not to read the terms and conditions, did not change the fact that they had freely consented. In other words, unlike the FCO, the court did not find this type of behaviour worthy of protection, and considered consumers fully responsible for their actions.

The privacy paradox has been studied from many different angles since the late 1990s, drawing in particular on social theory, psychology, behavioural economics. A number of studies show a clear dichotomy between people's beliefs on what is desirable and their actual behaviour when it comes to the disclosure of personal data online.¹⁴⁵ Other studies challenge the existence of a privacy paradox, and claim that consumers' beliefs and behaviours are more or less aligned.¹⁴⁶ It would go beyond the scope of this

¹⁴⁵ Alessandro Acquisti and Jens Grossklags, "Privacy and rationality in individual decision making", (2005) 3(1) IEEE Security & Privacy 24; Bettina Berendt, Oliver Günther and Sarah Spiekermann, "Privacy in e-commerce: stated preferences vs. actual behaviour", (2005) 48(4) Communications of the ACM 101; Patricia A. Norberg, Daniel R. Horne and David A. Horne, "The Privacy Paradox: Personal Information Disclosure Intentions versus Behaviors", (2007) 41(1) Journal of Consumer Affairs 100, amongst many others.

¹⁴⁶ E.g. Emily Christofides, Amy Muise and Serge Desmarais, "Information Disclosure and Control on Facebook: Are They Two Sides of the Same Coin or Two Different Processes?" (2009) 12(3) CyberPsychology & Behavior 342; Giles D'Souza and Joseph E Phelps, "The privacy paradox: the case of secondary disclosure", (2009) 7(1) Review of Marketing Science 1546; Caroline Lancelot Miltgen and Dominique Peyrat-Guillard, "Cultural and generational influences on privacy concerns: a qualitative study in seven European countries", (2014) 23(2) European Journal of Information Systems 103.

article to explore the vast literature on the privacy paradox in detail. Suffice it to say that even amongst those scholars who agree that the phenomenon exists, there is no one universally accepted explanation for what exactly is causing it.¹⁴⁷ Behavioural economists, for example, argue that people may not be able to act as economically rational agents when it comes to personal privacy, as privacy-related decisions are affected by incomplete information, bounded rationality (self-control problems and the need for immediate gratification) and other psychological biases.¹⁴⁸ Others have primarily drawn on social theory to conclude that social networks have become such an important part of their users' social lives that they feel compelled to disclose their personal information despite privacy concerns in order to maintain their social lives.¹⁴⁹ These are just two amongst many different explanations. In sum, the privacy paradox appears to be a complex, user- and context-dependent phenomenon that requires further research.¹⁵⁰

This uncertainty notwithstanding, the Düsseldorf Court's assumption that Facebook's pre-formulated contractual terms and business model were clear enough to allow the average Facebook user to make an informed and timely decision about the exact implications of their conduct, and easily balance the advantages and against its disadvantages, seems a little unworldly. After all, in February 2018, following a formal investigation, the EU Consumer Protection Cooperation Network found Facebook's terms and condition to be insufficiently clear, and required it to explain more clearly to consumers that they were not charged for using the platform because they paid for this service with their data, that Facebook used that data to create detailed profiles of its users, and that commercial firms paid Facebook to show targeted advertisements to users on

¹⁴⁷ For a good overview of the literature, see Spyros Kokolakis, Privacy attitudes and privacy behaviour: A review of current research on the privacy paradox phenomenon, (2017) 64(1) *Computers and Security* 122-134.

¹⁴⁸ Acquisti, Alessandro, "Privacy in Electronic Commerce and the Economics of Immediate Gratification", Proceedings of the 5th ACM Conference on Electronic Commerce, 2004, New York.

¹⁴⁹ Grant Blank, Gillian Bolsover and Elizabeth Dubois, "A New Privacy Paradox: Young people and privacy on social network sites", Global Cyber Security Capacity Centre, Draft Working Paper, University of Oxford (2014).

¹⁵⁰ For an economist's point of view, see Wolfgang Kerber, "Digital Markets, Data and Privacy: Competition Law, Consumer Law and Data Protection" (2016) 65(7) *Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil* 639.

the basis of that data.¹⁵¹ Likewise, in November 2018, the Italian Antitrust Authority found that Facebook’s slogan “sign up, it’s free, and always will be” breached several provisions of the Italian Consumer Protection Code and fined Facebook EUR 10 million for engaging, amongst others, in a “misleading practice” by failing to provide adequate information to consumers on how Facebook commercially exploited users’ data collected from the social network.¹⁵²

V. Should the FCO also have applied Article 102 TFEU?

One question remains: should the FCO also have applied EU competition law in addition to sec. 19 GWB? The answer to this question depends on whether Article 102 TFEU prohibits this type of conduct. If it did, the FCO would have been legally required to apply Article 102 TFEU according to Article 3(1) of Regulation 1/2003, and would in fact be in breach of EU law for only enforcing the German provision.¹⁵³

Whether Article 102 TFEU prohibits excessive data collection by dominant platforms is far from clear – for the simple fact that this issue has never been litigated before the European Court of Justice. And while the European Commissioner for Competition Policy, when asked to comment on the Facebook case, said that the FCO’s decisions could “probably not” serve as a blueprint for future Commission cases, as it was based on German competition law and sat “in the zone between competition law and privacy law”,¹⁵⁴ the president of the 4th chamber of the European Court of Justice

¹⁵¹ European Commission, ‘Facebook changes its terms and clarify its use of data for consumers following discussions with the European Commission and consumer authorities’, Press Release of 8 April 2019.

¹⁵² Autorità Garante della Concorrenza e del Mercato, decision of 29 November 2018. The decision was recently upheld on appeal (Tribunale Amministrativo Regionale Lazio, judgement no. 261/2020 of 10 January 2020).

¹⁵³ Wouter Wils, ‘The obligation for the competition authorities of the EU Member States to apply EU antitrust law and the *Facebook* decision of the Bundeskartellamt’, September 2019, *Concurrences Review* No 3-2019, 58.

¹⁵⁴ Aoife White and Lenka Ponikelska, ‘Germany’s Facebook Order Will Be Studied by EU, Vestager Says’, Bloomberg (8 February 2019), [bloomberg.com/news/articles/2019-02-08/germany-s-facebook-order-will-be-studied-by-eu-vestager-says](https://www.bloomberg.com/news/articles/2019-02-08/germany-s-facebook-order-will-be-studied-by-eu-vestager-says). Equally sceptical: Justus Haucap, ‘Data Protection and Antitrust: New Types of Abuse Cases? An Economist’s View in Light of The German Facebook Decision’, *CPI Antitrust Chronicle*, February 2019, 1 (this author also advised Facebook in the proceedings before the FCO); and Giuseppe Colangelo and Mariateresa Maggiolino, ‘Data Protection in Attention Markets: Protecting Privacy through Competition?’, (2017) 8(6) *Journal of European Competition Law & Practice* 363.

reportedly expressed the view that the type of conduct at issue in the Facebook case actually fell nicely within the scope of EU competition law.¹⁵⁵

In order to succeed, a theory of harm similar to that used by the FCO would have to clear two major hurdles: (1) the invasion of privacy would have to be a relevant form of consumer harm under Article 102 TFEU, and (2) Article 102 TFEU would have to allow the enforcing agency to infer the causality of the platform's position of dominance for this type of harm from the infringement of the GDPR.

1. The right to privacy as a parameter of consumer welfare under EU competition law

The European Commission's current interpretation of the EU competition rules suggests that it is unlikely to consider an infringement of the right to privacy a relevant form of consumer harm. Since the late 1990s, it has interpreted the EU competition rules as protecting consumer welfare in the economic sense of the term,¹⁵⁶ which it primarily defines in terms of price, output, quality and innovation.¹⁵⁷ Constitutional freedoms, such as the right to privacy, do not fall within in this objective. Moreover, the European Commission's decisional practice since the advent of the digital economy does not suggest that it considers privacy a parameter of consumer welfare in the form of service quality. In the *Facebook/WhatsApp* acquisition from 2014, for example, the Commission explicitly stated that any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the transaction would

¹⁵⁵ Statement by Thomas von Danwitz at the 19th International Conference on Competition in Berlin (IKK) on 15 March 2019, reported by Rupprecht Podszun at: www.d-kart.de/blog/2019/03/15/conference-debriefing-7-international-competition-conference-berlin/, and Wouters Wils, "The obligation for the competition authorities of the EU Member States to apply EU antitrust law and the Facebook decision of the Bundeskartellamt", 2019(3) *Concurrences* 58, FN 28 and 29. Von Danwitz has long taken the view that EU competition law has to be interpreted in line with fundamental rights: von Danwitz, "La protection des droits fondamentaux lors de la mise en œuvre décentralisée du droit communautaire de la concurrence", 2008(4) *Concurrences* 31. In similar vein, Maximilian Volmar and Katharina Helmdach, "Protecting consumers and their data through competition law? Rethinking abuse of dominance in light of the Federal Cartel Office's Facebook investigation", (2018)14(2-3) *European Competition Journal* 195; Marco Botta and Klaus Wiedemann, "EU Competition Law Enforcement vis-à-vis Exploitative Conducts in the Data Economy Exploring the Terra Incognita", (2018) *Max Planck Institute for Innovation and Competition Research Paper* No. 18-08, pp. 25-28.

¹⁵⁶ It used to have a broader understanding of the aims of competition law: Anne Witt, *The More Economic Approach to EU Antitrust Law* (Hart 2016), Chapter 4.

¹⁵⁷ Eg European Commission, Guidelines on the application of Article 81(3), OJ [2004] C101/97, recital 24.

not fall within the scope of EU competition law but that of the EU data protection rules.¹⁵⁸ Likewise, in the 2016 decision clearing Microsoft's acquisition of LinkedIn, it merely assessed the potential competition concerns arising from the combination of personal data, i.e. whether the transaction would give the merged entity a competitive advantage in the market for online advertising. It did not engage with the potential impact on consumers' privacy, and only touched on the GDPR in its capacity to restrict the parties' data processing practices and hence as an additional argument against market power.¹⁵⁹ The US antitrust authorities currently take a similar stance.¹⁶⁰

However, it is the European Court of Justice that has the final word in matters of interpretation. The Court has ruled on the relevance of privacy in competition law assessments only once to date. In *Asnef-Equifax*, a judgement from 2006, it was asked to give guidance on whether Article 101 TFEU prohibited financial institutions from setting up a credit information system, that would allow them to exchange solvency and credit information on individual customers through the computerised processing of data. The Court ruled that this type of agreement neither had the object of restricting competition, nor was it likely to have such an effect. Rather as an afterthought, it added that any possible issues relating to the sensitivity of personal data were not, as such, a matter for competition law, as they could be resolved on the basis of the relevant

¹⁵⁸ European Commission, decision of 03 October 2014 (Case COMP/M.7217 – Facebook/WhatsApp), recital 164.

¹⁵⁹ Commission decision of 6 December 2016 (Case M.8124 – Microsoft/LinkedIn), recitals 176-181.

¹⁶⁰ In its investigation of the *Google/DoubleClick* acquisition in 2007, for example, the FTC made clear that it considered the exploitation of user data in a way that threatened privacy a matter for consumer protection and not antitrust law. While recognising that consumer privacy could be considered a non-price attribute of competition, it took the view that regulating the privacy requirements of just one company by means of the antitrust rules could itself pose a serious detriment to competition (FTC, 'Statement of the Federal Trade Commission Concerning Google/DoubleClick' of 20 December 2007, F.T.C. File No. 071-0170. The FTC nonetheless investigated the possibility that the transaction could adversely affect consumer privacy, but found that the evidence did not support such an assumption). Likewise, FTC Commissioner Noah Joshua Phillips, "Should We Block This Merger? Some Thoughts on Converging Antitrust and Privacy", Speech at The Center for Internet and Society Stanford Law School (30 January 2020). However, see also: Dissenting Statement of Commissioner Pamela Jones Harbour Concerning Google/DoubleClick of 20 December 2007, and Makan Delrahim, 'Challenges to Antitrust in a Changing Economy', Speech at the Harvard Law School & Competition Policy International Conference, Cambridge, MA (8 November 2019); and "...And Justice for All": Antitrust Enforcement and Digital Gatekeepers', Speech at the Antitrust New Frontiers Conference, Tel Aviv (11 June 2019).

provisions governing data protection.¹⁶¹ In sum, like the Commission, which may have taken its clue from this ruling, the Court took the view that privacy is not “as such” a competition issue.

That being said, *Asnef-Equifax* concerned a potentially anticompetitive agreement, which, according to Article 101 TFEU, requires a restriction of competition. And unquestionably, a restriction of privacy does not amount to a restriction of competition. However, the Facebook case concerns an exploitative abuse, which does not outlaw conduct for restricting competition, but for using a position of dominance to inflict harm on consumers in the form of unfair prices or other unfair trading conditions. The ruling in *Asnef-Equifax* did not pronounce itself on whether compelling an individual to agree to excessive data collection in violation of the GDPR could, or could not, be considered an unfair trading condition. Also, the judgment in *Asnef-Equifax* dates from 2006, when e-commerce was still in its infancy. As the Internet of Things has grown in importance, so have the understanding and concerns about the commercial use of personal data as a business model.

It may therefore well be that, in a future case, in which invasive data collection is the key investigated type of harm, the Court may clarify or revise this position. After all, it has never explicitly embraced all tenets of the European Commission’s more economic approach which reinterpreted the EU competition rules in light of the consumer welfare aim and resulted in the Commission employing a relatively narrow, price-centric understanding of competitive harm in practice.¹⁶² In particular, the Court has not never defined consumer welfare as referring to purely economic welfare to date. In fact, the Court has yet to formally endorse the exclusive consumer welfare aim. Instead, it has regularly adopted broader formulas, according to which the objective of the EU competition rules is to “prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union”,¹⁶³ or to protect “not only the interests of competitors or of

¹⁶¹ C-238/05 *Asnef-Equifax*, EU:C:2006:734, para. 63.

¹⁶² See Anne Witt, *The More Economic Approach to EU Antitrust Law* (Hart 2016), Chapter 10.

¹⁶³ See e.g. Cases C-52/09 *Konkurrensverket v TeliaSonera Sverige* [2011] ECR I-527, para 22; C-94/00 *Roquette Frères* ECLI:EU:C:2002:603, para 42.

consumers” but also the “structure of the market and, in so doing, competition as such”.¹⁶⁴ Likewise, the Court has not yet explicitly agreed with the Commission’s ‘more economic’ reading that restrictions of competition are only problematic if they are bound to result in demonstrable consumer harm, or that only economic efficiency effects can outweigh anticompetitive effects. On the contrary, it has repeatedly ruled that direct consumer harm is not an essential requirement of anticompetitive exclusionary conduct or export restrictions,¹⁶⁵ and it has consistently defined the first condition of Article 101(3) as ‘appreciable objective advantages of such a kind as to compensate for the resulting disadvantages for competition’.¹⁶⁶ The latter are therefore not explicitly limited to efficiency effects, or, in fact, even economic benefits. In sum, while the Court has never explicitly recognised privacy as a parameter of consumer welfare, there is nothing in the case law either that would explicitly rule out such an interpretation in the context of exploitative abuses.

Further, according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures.¹⁶⁷ It thus regularly interprets other areas of commercial law, such as the free movement rules, in light of EU fundamental rights. For example, it has held that fundamental rights, such as the freedom of expression, assembly or the principle of human dignity, can act as limitations on the free movement of goods or services even if these aims are not explicitly listed in the relevant Treaty exemption.¹⁶⁸ The case could therefore be made that the right to privacy should be considered when deciding whether data collection in violation of the

¹⁶⁴ Joined cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline v Commission* ECLI:EU:C:2009:610, para 63.

¹⁶⁵ E.g. Case C-501/06 P *GlaxoSmithKline v Commission* ECLI:EU:C:2009:610, paras 62-64 for Article 101 TFEU; or . Cases C-95/04 P *British Airways* ECLI:EU:C:2007:166, para 106; C-202/07 P *France Télécom v Commission* ECLI:EU:C:2009:214, para 105; T-321/05 *AstraZeneca v Commission* ECLI:EU:T:2010:266, para 353; C-52/09 *TeliaSonera Sverige* ECLI:EU:C:2011:83, para 24 for Article 102 TFEU.

¹⁶⁶ Joined cases 56 and 58/64 *Consten and Grundig v Commission* ECLI:EU:C:1966:41, pt 13; C-279/95 P *Langnese-Iglo v Commission* ECLI:EU:C:1998:447, para 180; T-17/93 *Matra Hachette v Commission* ECLI:EU:T:1994:89, para 135; T-65/98 *Van den Bergh Foods v Commission* ECLI:EU:T:2003:281, para 139.

¹⁶⁷ E.g. Case C-260/89 *ERT* ECLI:EU:C:1991:254, para 44.

¹⁶⁸ See eg C-36/02 *Omega* ECLI:EU:C:2004:614, para 35; C-112/00 *Schmidberger* ECLI:EU:C:2003:333, para 74; Case C-260/89 *ERT* ECLI:EU:C:1991:254, para 45.

GDPR amounts to an “unfair trading practice” within the meaning of Article 102(a) TFEU. That being said, such an assessment should then also consider Facebook’s commercial freedom, and balance this against the individual user’s right to privacy. According to the German FCO, the Union legislator carried out such a balancing exercise and stipulated the outcome in a legally binding manner in the GDPR.

That being said, the theory of harm favoured by the Federal Court of Justice, which focuses on the fact that Facebook was denying its users a choice between two types of service and was thus preventing the emergence of a new kind of service for which there was demand, appears more easily reconcilable with the case law of the European Court of Justice. Article 102(b) TFEU explicitly prohibits a dominant undertaking from limiting production, markets or technical development to the prejudice of consumers, and the Court of Justice has repeatedly deemed that “preventing the appearance of a new product for which there is potential consumers demand” is a relevant factor for determining whether the conduct of a dominant undertaking is abusive.¹⁶⁹

2. The issue of causality

The issue of causality is even less clear and a possible future ruling by the Court of Justice even more difficult to predict. If one looks at the European case law on excessive pricing, one sees that the Court, while requiring causality between the absence of competition and the high price,¹⁷⁰ does not necessarily require a state-of-the-art counterfactual to prove causality. Instead, it has repeatedly held that there are different acceptable ways of proving such a link.¹⁷¹ For example, it deems evidence that the price is excessive in relation to the economic value of the product sufficient. For this purpose, it accepts evidence that the difference between the cost actually incurred and the price actually charged is excessive, and that the price is either unfair in itself or when compared with competing products.¹⁷² This is hardly a precise scientific formula. Neither does it

¹⁶⁹ E.g. Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission (Magill)* ECLI:EU:C:1995:98, paras 43, 54; Case C-418/01 *IMS Health* ECLI:EU:C:2004:257, para 38; T-201/04 *Microsoft v Commission* ECLI:EU:T:2007:289, paras 331, 332.

¹⁷⁰ Case 27/76 *United Brands v Commission*, EU:C:1978:22, para 249.

¹⁷¹ Cases 27/76 *United Brands v Commission*, EU:C:1978:22, para 253; C-177/16 *AKKA* ECLI:EU:C:2017:689, para 37.

¹⁷² Case 27/76 *United Brands v Commission*, EU:C:1978:22, para 252.

require the enforcement bodies to quantify what price that undertaking could have charged in a competitive market. Given that the Court has indicated that it is open to alternatives, it cannot be entirely excluded that the Court would accept a legal presumption of causality based on the fact that the dominant undertaking infringed an EU Regulation that itself contains a presumption of causality between the position of dominance and the detrimental effect. After all, the Court has not been averse to employing legal presumptions to infer certain effects on competition¹⁷³ or the position of dominance itself¹⁷⁴ in the past, even though the trend lately seems to have shifted in favour of more detailed individual assessments.¹⁷⁵ However, one should not generalise. In the absence of precedent, it is impossible to predict with certainty whether the court would be willing to infer causality from the infringement of a regulation that condemns the conduct because the undertaking is dominant, or whether it would require empirical evidence that the undertaking could not have dictated these detrimental conditions had the market been competitive.

In view of this uncertainty, and given the legal obligation to apply Article 102 TFEU in addition to national competition law if the conduct is also caught by Article 102 TFEU, the Düsseldorf court, or, at the very least, the German Federal Court on appeal, should make a reference for a preliminary ruling to clarify these questions of interpretation under Article 267 TFEU.

Conclusion

The German FCO's decision to prohibit a social media platform's infringement of a constitutional right as anticompetitive and to infer both harm and causality from the company's infraction of the European data protection rules is currently an outlier in the Western world. US antitrust law does not consider mere exploitation of a lawfully

¹⁷³ E.g. Case 85/76 *Hoffmann-La Roche v Commission* ECLI:EU:C:1979:36, para 89.

¹⁷⁴ E.g. Case 85/76 *Hoffmann-La Roche v Commission* ECLI:EU:C:1979:36, para 41; C-62/86 *AKZO Chemie v Commission* ECLI:EU:C:1991:286, para 60.

¹⁷⁵ See A Witt, "The European Court of Justice and the More Economic Approach to EU Competition Law - Is the Tide Turning?" (2019) 64(2) *Antitrust Bulletin* 172-213.

obtained position of market power anticompetitive at all. And while Article 102 TFEU does recognise the concept of exploitative abuse, neither the European Commission nor the European Court of Justice has ever applied it to excessive data collection to date, let alone inferred the abuse from the infringement of the GDPR. Even within Germany, the decision triggered a remarkable inter-institutional dispute over the concept of relevant harm, the need to establish a counterfactual and the relevance of the privacy paradox. The Düsseldorf Higher Regional Court condemned many of the FCO's key propositions in the strongest terms, only to be overruled a few months later by the Federal Court of Justice, which, while not explicitly rejecting the FCO's privacy-based approach, favoured a third theory of harm that focused on consumer choice and preventing the emergence of a new service. The Düsseldorf court's views were shared by the German Monopolies position, while the German government came down on the side of the FCO, and is currently proposing to codify the FCO's approach by means of a legislative proposal to amend the German competition code. As a result, all three branches of government are now involved in this ideological tug of war.

This contribution concludes that the FCO's decision, while raising at least as many questions as it answers, is not as unreasonable as the Düsseldorf court suggests. It neither appears incompatible with the German case law on which the FCO based its decision, nor is it clear that the case law of the European Court of Justice would currently prevent a competition agency from considering fundamental rights in the interpretation of Article 102 TFEU. That being said, the German Federal Court's approach, with its focus on consumer choice and the emergence of a new service, is probably more easily reconcilable with the existing case law of the European Court of Justice. Given the importance of these questions and the uncertainty whether this type of conduct could also be considered exploitative within the meaning of Article 102 TFEU, in which case the FCO should have applied Article 102 TFEU, the Düsseldorf Higher Regional Court, or at the very latest the German Federal Court of Justice on appeal, should make a reference for a preliminary ruling to the European Court of Justice on whether, and if so, under what conditions Article 102 TFEU prohibits this type of conduct.

While the FCO's decision to prohibit a dominant platform's conduct as abusive for imposing unlawful contractual conditions is unique so far, there may be more cases of

exploitative contractual abuse to come. In November 2019, three major French press associations (AGIP, SEPM and AFP) complained to the French Competition Authority,¹⁷⁶ alleging that Google had abused its dominant position in the search market by not adequately remunerating publishers in line with the new French law implementing the EU Copyright Directive.¹⁷⁷ In April 2020, the French Competition Agency issued an interim decision, finding, amongst others, that Google was likely to have imposed “unfair trading conditions” within the meaning of Article 102(a) TFEU on the publishers by simply de-listing the complainants’ content and avoiding any form of negotiation and remuneration for the use of content protected under the relevant French law.¹⁷⁸

At a time, where the conduct of digital platforms is not yet subject to comprehensive and enforceable regulation, it is very tempting for competition agencies to step in and use their significant enforcement powers to combat new forms of harm. The Facebook case should therefore be seen as a welcome and necessary opportunity for policy-makers to (re)consider and clarify the concept of competitive harm, and whether a price-centric consumer welfare standard is really appropriate in the age of Big Tech platforms.

¹⁷⁶ Yvonne Gangloff, ‘Droit voisin: des éditeurs de presse français portent plainte’, 22 November 2019, available at: www.clubic.com/pro/entreprises/google/actualite-877001-droit-voisin-editeurs-presse-francais-portent-plainte.html. See also Alexandre Piquard, ‘Droit voisin: la presse française riposte à Google et scrute Facebook’, *Le Monde* (24 October 2019).

¹⁷⁷ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market [2019] OJ L130/92.

¹⁷⁸ Autorité de la concurrence, Décision 20-MC-01 of 9 April 2020 relative à des demandes de mesures conservatoires présentées par le Syndicat des éditeurs de la presse magazine, l’Alliance de la presse d’information générale e.a. et l’Agence France-Presse.