Testing Art. 102 TFEU in the Digital Marketplace: Insights from the *Bundeskartellamt*'s investigation against Facebook

Giulia Schneider*

Key Points

- On 2 March 2016, the German Bundeskartellamt (BKA) launched an investigation against Facebook under art. 102 TFEU.
- On 19 December 2017, in its preliminary assessment, the Authority declared that Facebook is abusing its dominant position through the imposition of 'misleading' privacy policies regarding data collected from third-party websites.
- This contribution reviews the legal background to the investigation by the BKA and the justifiability of its approach to competition enforcement in digital markets.
- Far from bending competition law to the heteronomous task of protecting users' personal data, the BKA's investigation is a welcome attempt to identify and remedy novel forms of anti-competitive behaviour in digital markets.

I. Introduction

On 20th March 2016, the German Competition Authority launched a proceeding against Facebook for abuse of its dominant position in the market for social networks, based on its misleading terms and conditions for user data.[1] In the view of the German antitrust authority,[2] Facebook has a dominant position in the German market for social networks because it collects a vast amount of data from various sources and it uses this data for the creation of profiles enabling its advertisement customers to better target their advertisement activities.[3] The BKA suspects that such market dominance enables Facebook to impose unclear and misleading terms and conditions on its users. The BKA[4] believes such conduct to infringe EU competition law and more specifically art. 102 TFEU, which inter alia prohibits the imposition of 'unfair trading conditions' by dominant firms.[5]

Specifically, the BKA's theory of harm is that Facebook is abusing its dominant position by conditioning the access to its social networking service on users' consent to a limitless collection of their personal data.[6] Facebook is said to collect its users' data not only from services that the company directly owns, such as Whatsapp or Instagram, but also from secondary websites and applications of other operators with embedded Facebook APIs.[7] The current proceeding thus focuses on the terms and conditions regarding the collection of users' data from third-party sources.

Framed in such terms, the BKA's investigation causally links antitrust violations with data protection law infringements. The BKA is deciding the case in the context of an on-going heated debate among scholars and practitioners regarding the interaction between data protection and competition law in digital markets.[8]

* Universita Bocconi, Legal Studies, via Roentgen 1, Milano, Italy, 20136; Scuola Superiore Sant'Anna, Lider Lab Institute, Pisa 20136, Italy, giulia.schneider@phd.unibocconi.it

1 Bundeskartellamt, 'Bundeskartellamt initiates proceeding against Facebook on suspicion of having abused its market power by infringing data protection rules', accessed 2 March 2016 <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html?nn=3599398>. On the issue see Anna Blume Huttenlauch, 'How many likes for the German Facebook Antitrust Probe?, in Competition Policy International', August 2016 <http://www.blomstein.com/perch/resources/cpi-facebook-investigation-15.8.2016.pdf.>

2 Bundeskartellamt (n 1).

3 Bundeskartellamt (n 1).

4 Bundeskartellamt, 'Preliminary Assessment in Facebook Proceeding: Facebook's collection and use of data from third-party sources is abusive', accessed 19 December 2017, <http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2017/19_12_2017_Facebook.pdf?__blob=publicationFile&v=3>, 1.

5 Bundeskartellamt (n 1). The proceeding was conducted under the German competition law provision of para 19(1) GWB. Bundeskartellamt, 'Background Information on the Facebook proceeding', 19 December 2017, <http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2017/Hintergrundpapier_Facebook.pdf?__blob=publicationFile&v=4>, 5.

6 Bundeskartellamt (n 4).

7 Bundeskartellamt (n 4).

8 Lisa Kimmel and Janis Kestenbaum, 'What's up with Whatsapp? A Transatlantic view on Privacy and Merger Enforcement in Digital Markets' (2014) 29(1) Antitrust 48; Geoffrey A. Manne and Joshua D.Wright, 'Google and the Limits of Antitrust: The Case Against the Case Against Google' (2010) 34 Harv. J.L. & Pub. Policy 171, 212; Daniel Sokol and Roisin Comerford, 'Does Antitrust have a role to play in Regulating Big Data?', in Roger D. Blair and Daniel Sokol, *The Cambridge Handbook of Antitrust, Intellectual Property and High Tech* (Cambridge University Press, 2017) 271, 277; Damien Geradin and Monika Kuschewsky, 'Data protection in the context of competition law investigations: An overview of the challenges' (2014) 37 World Competition 69; Francisco Costa-Cabral and Orla Lynskey,

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Thus, it is significant that the investigation launched by the BKA based on the anti-competitive implications of Facebook's terms and conditions on personal data use is, thus far, an isolated stance among enforcers. While the EU Commission issued a clearing decision of the merger between Facebook and WhatsApp in 2014, subsequently the effects of the merger appeared more insidious. In particular, the subsequent change of WhatsApp's privacy policies triggered the attention of both the Commission[9] and the Italian antitrust authority.[10] Although dealing with privacy policies, the newly opened investigations have however not considered the data protection concerns under the competition law framework.

By contrast to the literature that rejects the possibility that privacy or data protection concerns can be analysed and remedied under competition law,[11] this contribution argues in favour of the interaction of these areas of market regulation and thus of the BKA's approach against Facebook.[12] It indeed shows that, far from bending competition law to the heteronomous task of protecting users' personal data,[13] the BKA's Facebook case should be regarded as a welcome attempt to identify and remedy novel forms of anti-competitive behaviour in a data-driven economy.

The paper first aims to show how the BKA's enquiry challenges two traditional assumptions of competition law, respectively related to the structural components of market power and the goals attributable to competition law. In part II, the paper delves further into the investigation, positing a test for abuse drawn from the existing European case law on the imposition of unfair trading conditions under art. 102 TFEU in other analogous settings. The analysis of the relevant case law under art. 102 TFEU suggests that the imposition of a misleading privacy policy by Facebook could amount to an abuse of market dominance under certain conditions.

II. From the Commission to the *Bundeskartellamt*: a change in perspective

The German antitrust authority's in Facebook appears to take a different approach from that adopted so far by the EU Commission and other antitrust enforcers in the assessment of anti-competitive conducts in digital markets for at least two reasons.

First, the *Bundeskartellamt* focuses its analysis on the zero-price side of the market of social networking services, which the EU Commission did not do in prior investigations against digital platform owners.[14] For example, in the *Google/Double Click* decision,[15] the Commission—consistent with mainstream antitrust analysis—principally focused its analysis of digital two-sided markets on the paying advertising side.[16] In its clearance decision of the Facebook/Whatsapp merger, the Commission sought to assess also the user side, so as to exclude any anti-competitive effects on both sides of the merged entity's operations.[17] However, the Commission denied the existence of network effects and of economies of scale that would have strengthened the company's dominant position on both sides.[18] Following such decisions—and before the BKA's Facebook investigation—on 9 June 2017, Germany introduced substantial amendments to the German act on restraints of competition (GWB—*Gesetz*

'Family ties: the intersection between data protection and competition EU Law' (2017) 54 Common Market Law Review, 11, 17; Joaquin Alumnia, 'Competition and privacy in markets of data', Speech at Privacy Platform event: Competition and Privacy in Markets of Data, Brussels, 26 November 2012<http://europa.eu/rapid/press- releaseSPEECH-1 2-860_en.htm> accessed 28 September 2017; David S. Evans and Richard Schmalensee, 'The Antitrust Analysis of Multi-Sided Platform Businesses', in R. Blair and D. Sokol (ed.), *Oxford Handbook on International Antitrust Economics* (Vol. 1, Oxford University Press, 2015) 404.

9 The Statement of Objection of the Commission against Facebook and WhatsApp focuses merely on procedural infringements stemming from the incorrect information given by the parties to the authority regarding the technical feasibility of the combination of both firms' user data. See European Commission, 'Press Release - Commission alleges Facebook provided misleading information about WhatsApptakeover', accessed 20 December 2016 <http://europa.eu/rapid/press-release_IP-16-4473_en.htm>.

10 The two investigations launched by the Italian antitrust authority emphasised the unfair nature of Whatsapp's contract clauses under consumer law, rather than due to antitrust concerns. See Autorità Garante della Concorrenza e del Mercato, 'Press Release - Exchange of personal data with Facebook and oppressive clauses, double Antitrust investigation on WhatsApp', accessed 28 October 2016 <http://www.agcm.it/en/newsroom/press-releases/2358-exchange-of-personaldata-with-facebook-and-oppressive-clauses,-double-antitrust-investigation-on-whatsapp.html>

11 Geoffrey A. Manne and Joshua D. Wright (n.8) 250, 258; Wolfang Kerber, 'Digital Markets, Data, and Privacy: Competition Law, Consumer Law, and Data Protection' (2016) 11 Journal of Intellectual Property Law & Practice, 856.

12 Anna Blume Huttenlauch (n. 1).

13 Ariel Ezrachi and Maurce Stucke, 'The Curious Case of Competition and Quality' The curious case of competition and quality' Oxford Legal Studies Research Paper 64/2014 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2494656>, 5-7; Giuseppe Colangelo and Mariateresa Maggiolino, 'Data Protection in Attention Markets: Protecting Privacy through competition?', (2017) Journal of European Competition Law and Practice, 1-7 <https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2945085>.

14 Bundeskartellamt (n 1).

15 European Commission, *Google Double Click*, 11 March 2008, Case N. Comp./M. 4731 <http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf> para 242.

16 Jean-Charles Rochet and Jean Tirole, 'Platform Competition in Two-Sided Markets' (2003) 1 J. Eur. Econ. Ass'n 990. DS. Evans and R. Schmalensee (n.8) 45.

17 European Commission, *Facebook/Whatsapp*, 3 October 2014, Case N. Comp./M. 7217 <http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf> para 164.

18 European Commission (n 17) para 257. For the literature see Lisa Kimmel and Janis Kestenbaum (n.8) 48.

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gegen Wettbewebbeschränkunge)[19] that, among other substantial novelties, introduces a new definition of 'market' aiming to be more suitable to digital environments where a service is mostly provided for free.[20] Among the factors included as relevant for the definition of a market in which a company may be dominant, the law includes (i) companies' access to competitively relevant data; (ii) direct and indirect network effects; (iii) companies' economies of scale and (iv) innovation-driven competitive pressure.[21] By reference to such parameters the conclusions to be reached by the *Bundeskartellamt* with regard to Facebook's dominant position in the zero-price side would be sensitively different to the ones reached by the Commission in its prior decisional practice.[22]

Second, while the Commission in both the Google/Double Click and the Facebook/Whatsapp investigations focused on traditional exclusionary conduct as the basis of the violation, the German antitrust authority apparently centres its investigation on the existence of an exploitative conduct under art. 102 TFEU.

In doing so, the *Bundeskartellamt* would be taking a relatively unexplored path of competition law. There have been indeed only very few cases dealing with unfair trading conditions as the basis of an art. 102 TFEU violation. However, the fact that art. 102 TFEU in its reference to 'unfair trading conditions' is a rather rarely used provision does not mean that this is a dead part of EU antitrust law. To the contrary, by linking the general clause of 'unfair trading conditions' to data protection law breaches, the German antitrust authority would envisage a novel type of anti-competitive conduct in the digital environment, where the collection of personal data is not only the source of market power but also, if unlawful, the means of distorting or – better yet – abusing it.

III. Theoretical background of the *Bundeskartellamt*'s investigation

Bridging data protection and competition law is certainly not an easy task. It presents analytical challenges and it threatens competition law's autonomy and self-sufficiency. These are the principal reasons for which both practitioners, enforcers and the scholarly literature[23] have opposed the pursuit of privacy or data protection concerns via competition law enforcement.

In clearing the merger between Facebook and Whatsapp, the European Commission expressly rejected the relevance – under competition law—of data protection concerns stemming from the increased concentration of personal data in the hands of a dominant company.[24] More recently, Commissioner Verstager in a speech given in January 2016 affirmed that 'privacy and competition concerns should be considered separately'.[25] Finally, in the *Microsoft/Linkedin* merger clearance decision, the Commission again insisted on the separation of the two regulatory terrains, stressing that the integration between the parties' datasets was to be governed only by applicable data protection rules.[26]

Does this mean that to the extent that it links data protection into the antitrust analytical framework, the BKA has gone out on a limb and its approach lacks authoritative support? In the remainder of this section, I show that a closer look at both data protection law and the relevant EU

19 BGB IS 1416, 1 June 2017, modifying *Gesetz gegen Wettbewebbeschränkunge* <https://www.gesetze-im-internet.de/gwb/BJNR252110998.html>

20 See para 18.2 *GWB* 2017, where it is stated that 'the assumption of a market is not precluded by the fact that a service is provided free of charge'. S. Heinz, 'Germany adopts Competition Law Reform', (2017) Kluwer Competition Law Blog <http://kluwercompetitionlawblog.com/2017/04/04/germany-adopts-competition-law-reform/>, 4.

21 See para 18 of the new German antitrust law *GWB* 2017. The Reform appear thus to have perfectly taken up the suggestions made by Bundeskartellamt, 'Working Paper- Market Power of Platforms and Networks- Executive Summary', June 2016 <http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Zusammenfassung.html>.

22 Although the *Bundeskartellamt* cannot formally base its decision on the newly reformed German Competition law, which has been enacted after the launch of the investigation, it can nonetheless interpretatively refer to these parameters, which were already widely acknowledged in the authority's working papers. Bundeskartellamt (n. 21).

23 Giuseppe Colangelo and Mariateresa Maggiolino (n.13), 4; Wolfgang Kerber (n.11) 858.

24 European Commission, *Facebook/Whatsapp*, 3 October 2014, Case N. Comp./M. 7217 <http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf> para 164 stating that 'any privacy-related concerns flowing from the increased concentration of data (…) do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules'. Similar statements were made in European Commission, *Google Double Click*, 11 March 2008, Case N. Comp./M. 4731 <http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf>. On the issue see also the statements made by the CJEU stating that 'any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection'. European Court of Justice, *Asnef-Equifax*, Case C-238/05, (2006) ECR I-11125, para 63.

25 European Commission, *Competition in a big data world*, accessed 17 January 2016 https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-big-data-world_en.

26 European Commission, *Microsoft/LinkedIn*, Case COMP/M.8124, accessed 6 December 2016 <http://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf> para 177. Although the Commission observed how the GDPR 'may further limit Microsoft's ability to have access and to process its users' personal data in the future since the new rules will strengthen the existing rights and empowering individuals with more control over their personal data', it ultimately deemed that the data combination was allowed under the applicable data protection framework. See para 178-179.

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case law shows that the BKA's more integrated approach to enforcing EU competition law is consistent with an emergent trend observed by various European authorities and ultimately endorsed also by the European legislator.

The BKA's approach would appear consistent with the European Data Protection Supervisor's suggestion about the need to adopt a 'holistic approach'[27] in the enforcement of data protection law through a stronger cooperation between data protection, consumer protection and antitrust authorities.[28] As the Supervisor acknowledged, the protection of personal data should be considered a central factor in the assessment of companies' economic conduct and of their 'impact on competitiveness, market efficiency and consumer welfare'.[29] According to this line of reasoning, the growing economic significance of personal data[30] requires the adoption of a new concept of consumer harm triggering an evolutionary interpretation of competition law's doctrines and especially the one of abuse of market dominance.[31]

Similarly, a joint position paper issued in May 2016 by the French and German antitrust authorities has specifically argued in favour of the assessment of privacy policies from the perspective of competition law 'whenever these policies are liable to affect competition, notably when they are implemented by a dominant undertaking for which data serves as a main input of its products or services'.[32] In the view of the two authorities, although privacy and competition law serve different regulatory objectives, data protection matters cannot be *per se* banned from consideration under competition law. As the joint paper points out, when data collection processes depend from the processing company's dominant position and impair the competition process on the relevant markets, then the consideration of privacy policies under competition law is not only desirable from a policy standpoint, but also fully justified under art. 102 TFEU.[33]

Finally, the General Data Protection Regulation itself calls for a multi-sided protection of users' personal data. It stresses the need to adopt a 'strong and more coherent framework of data protection in the Union, backed by strong enforcement, given the importance of creating the trust that will allow the digital economy to develop across the internal market'.[34]

Against this backdrop, another strand of the scholarly literature has also suggested to look at antitrust law as an additional tool to protect consumers from the privacy risks that may be associated with digital market mergers.[35] More precisely, some scholars[36] have contended that in some cases data protection law could be capable of orienting substantive competition law assessments, shaping competition law's own concepts of abuse, violation and remedy.[37]

Given such statements, in its investigation, the *Bundeskartellamt* considers the use of terms and conditions adequately informing the users about the type and scope of collected data[38] to create an obligation for dominant companies not only under data protection law but also under competition law and, more precisely, under art. 102 TFEU, requiring the imposition of 'fair' trading conditions. Thus, by enquiring into the anticompetitive nature of trading conditions related to data, the *Bundeskartellamt* is suggesting to align data protection and competition law only to the extent the latter allows it. This means that only to the extent the notion of 'unfair trading conditions' under art. 102 TFEU[39] needs for its proper concretisation to rely on heteronomous concepts.[40] Indeed, for the proper assessment of the presence of 'unfair trading conditions', the same general clause of fairness under art. 102 TFEU requires

27 Monopolkommission, 'Competition policy: The challenge of digital markets', Special Report, 2015, <http://www.monopolkommission.de/index.php/en/home/84-pressemitteilungen/285-competition-policy-the-challenge-of-digital-markets>. For the literature see W. Kerber (n. 8) 860. In the same sense also European Data Protection Supervisor, *Privacy and competitiveness in the age of big data, The interplay between data protection, competition law and consumer protection in the digital economy*, Press release of 26 March 2014 https://edps.europa.eu/sites/edp/files/publication/14-03-26_competitition_law_big_data_en.pdf.

28 European Data Protection Supervisor (n. 27) 10.

29 European Data Protection Supervisor (n. 27) 26.

30 Damien Geradin and Monika Kuschewsky (n. 8) 73. Stressing this point also Inge Graef, 'Market Definition and Market Power in Data: The Case of Online Platforms' (2015) 38 World Competition: Law and Economics Review 473.

31 European Data Protection Supervisor (n. 27) 32, stating that 'the scope for abuse of market dominance and harm to the consumer through refusal of access to personal information and opaque or misleading privacy policies may justify a new concept of consumer harm for competition enforcement in the digital economy'.

32 Autoritè de la Concurrence and Bundeskartellamt, *Competition Law and Data*, Joint Position Paper, 10 May 2016, online available at < http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf> 23-24. The position paper echoes to a great extent the statements made by the European Data Protection Supervisor (n. 27) 15.

33 Autoritè de la Concurrence and Bundeskartellamt (n.32) 42.

34 So Recital 6 General Data Protection Regulation, 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 (onwards GDPR).

35 Lisa Kimmel and Janis Kestenbaum (n. 8) 49.

36 Damien Geradin and Monika Kuschewsky (n. 8) 74.

37 Francis Costa-Cabral and Orla Lynskey (n. 8) 27 stating that 'when data protection can point to obstacles to market integration, or help identifying consumer mistreatment or coercion, competition law might listen'.

38 Bundeskartellamt (n. 1).

39 For a broader assessment on the concept of fairness in European data protection and European competition law, Harri Kalimo and Klaudia Majcher, 'The concept of fairness: linking EU competition and data protection law in the digital marketplace' (2017) 2 European Law Review 210, 212.

40 Francis Costa-Cabral and Orla Lynskey (n. 8) 27.

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reference to other branches of law. From this perspective, it is thus clear that in considering the fairness of the privacy policy (qualified as 'trading conditions' under art. 102 TFEU), the *Bundeskartellamt* will have to rely in its decision on data protection concepts.

Against this backdrop, the investigation against Facebook does not intend to unduly include data protection rationales into competition law assessments.[41] To the contrary, the BKA intends to substantiate competition law assessments through the support of a different branch of law, as competition law itself under art. 102 TFEU requires.

IV. Revising traditional competition law principles in digital markets?

The incorporation of data protection rationales into substantive competition law analysis triggers a possible reconsideration of traditional antitrust concepts as applied to digital markets.[42]

Thus, the *Bundeskartellamt*'s investigation apparently relies on at least three theoretical assumptions, all of which challenge traditional and formalistic competition law approaches and create the opportunity to incorporate data protection rationales into competition law assessments. These assumptions include the acknowledgement of (i) the link between personal data (and of data protection infringements) and market power; (ii) the broader scope of competition law's goals in respect to mere price parameters; and (iii) the new relevance of exploitative abuses in digital markets.

A. Personal data as a source of market dominance

By grounding the investigated abuse in the imposition of unlawful privacy policies, the *Bundeskartellamt* recognises the strategic significance of personal data as a driver for digital markets' concentration.[43] It is quite undisputed that personal data is an essential input for the provision of both communication services on the user side and of advertisement services on the paying-side of a digital platform.[44] However, it is the subject of much debate whether personal data should be considered as a source of competitive advantage. Both the Commission and a strand of the relevant literature have indeed rejected this circumstance by leveraging on the ubiquitous and non-rival nature of personally-inflected data.[45] This very feature of digital data is said to prevent any exclusive control over data and thus avoids any foreclosure effect in respect to (actual or potential) competitors.[46]

The *Bundeskartellamt*'s investigation, by contrast, implies a different conception of the structure of digital markets: by considering the unlawful collection of personal data by Facebook as the origin of the suspected abuse, it considers the collected personal data as the source of Facebook's market power.[47]

As mentioned above, such an approach has subsequently found direct validation under paragraph 18 of the newly enacted German competition law (*GWB*), which expressly requires that the market power of an undertaking on multi-sided markets be assessed on the basis of the access it has to competitively sensitive data and of the network effects and the economies of scale directly stemming from its exploitation of collected data through (mostly) automated analytical processing.

Network effects and economies of scale are two structural features of digital multi-sided markets.[48]

Network effects relate to the increase of value generated by an increase of connected users on a platform. In two-sided markets, network effects are of twofold nature. There are direct network effects referring to the users' zero-price side and indirect network effects that are reflected on the paying advertisement side. Direct

41 This much seems clear from the first disclosure by the German antitrust authority in the Facebook case. Bundeskartellamt (n 1).

42 Stressing this point also Autoritè de la Concurrence and Bundeskartellamt (n. 32) 23, where it is underlined how 'decisions taken by an undertaking regarding the collection and use of personal data can have, in parallel, implications on economic and competition dimensions'.

43 David Evans, 'Attention Rivalry among Online Platforms', (2013) 9 Journal of Competition Law and Economics 31, 36.

44 Stressing this point Inge Graef (n. 30) 513.

45 Allen P. Grunes and Maurice E. Stucke, 'No Mistake About It: The Important Role of Antitrust in the Era of Big Data' (2015) 14 Antitrust Source 1, 5. On the issue also Darren S. Tucker and Hill B. Wellford, 'Big Mistakes regarding Big Data' (2014) The Antitrust Source, American Bar Association https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2549044 1-12.

46 Robert H. Bork and J. Gregory Sidak, 'The misuse of profit margins to infer Market Power' (2013) 9 Journal of Competition Law and Economics 511, 688-691. The widespread collection of consumer data is particularly stressed by Andres V. Lerner, 'The role of Big Data in Online Platform Competition' (2014) Concurrences- Revue de droits de la Concurrence <http://awards.concurrences.com/IMG/pdf/big.pdf> 6, who does not acknowledge any link between data and the 'entrenchment of dominant online platforms'. Also in Facebook/Whatsapp the Commission has affirmed that also in the case the two merging parties datasets would have been combined there would have 'continued to be a large amount of internet user data that are valuable for advertising purposes and that are not within Facebook's exclusive control'. In this sense, European Commission (n.17) para 184.

47 'In the digital economy, the collection and processing of data is an entrepreneurial activity that has great relevance for the competitive performance of a company'. Bundeskartellamt, (n 5) 1-2. For the literature see Matthew Newman, 'Facebook's German antitrust probe hinges on market power of network effects', 8 January 2017, Mlex Market Insights, stressing how the Bundeskartellamt will have to clarify 'what it means by 'network effects' and how they prove market dominance'.

48 Michael L. Katz and Carl Shapiro, 'Network externalities, Competition and Compatibility' (1985) 75(3) The American Economic Review 424, 436–438.

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network effects refer to a peculiar chain reaction activated by the massive collection and processing of data by online service providers: indeed, the more users a certain zero-price service has, the more data the provider collects and the more precisely the provider itself can tailor its zero-price service, thus rendering it more attractive to users. In such a scenario, the paying advertisement side of the platform indirectly also benefits from the collection of personal data taking place on the zero-price side. Indeed, by virtue of the collected data, the platform can offer also more tailored advertisement spots, thus attracting more advertisers and in turn increasing the platforms' overall revenues.[49] Network effects also trigger economies of scale given the fact that the more data is collected, the easier and less costly it becomes for online service providers to produce new data. Indeed, subsequent and generative algorithmic processing techniques enable the extraction from existing databases of always new, readily usable data.[50]

As the German law reform suggests, the two abovementioned mechanisms can give rise to substantial barriers to entry for newcomers, significantly enhancing a company's market power. Indeed, despite the non-rival and ubiquitous nature of data, the interaction of these two mechanisms impede competitors to deliver a service that is on both sides of the market as attractive for users and advertisers as the one delivered by the dominant undertaking.[51]

On account of such networks effects, the *Bundeskartellamt* considers users to be locked in Facebook's social networking service with no possibility to (readily) switch to one of Facebook's competitors.[52] As a result, the *Bundeskartellamt*'s underlying intuition is that the resulting market power has the effect of decreasing the dominant company's incentives to maintain legally sound data protection standards. The lowering of data protection standards enables the collection of more data,[53] fuelling network effects and the related economies of scale ultimately consolidating an ever-growing market dominance.[54] Such market dominance is easily abused. As Commissioner Vestager has remarked in a statement released on the 27 June 2017, market dominance entails special responsibilities, including the control of price rises, the guarantee of the provided services' quality and ultimately the preservation of users' freedom of choice.[55]

B. Broadening competition law's goals: from price to quality

By focusing its investigation on Facebook's misleading privacy policies, the *Bundeskartellamt* appears to take distance from traditional price parameters as the only source of antitrust harm. Indeed, the suggested abuse of market dominance does not, at least directly, impair the social networking service's price but rather the quality of it. More precisely, as the German antitrust authority has declared, the harm suffered by Facebook users allegedly lies in the loss of control over their personal data, which ultimately leads to the impairment of the same users' right to informational self-determinacy.[56]

It follows that the Facebook investigation of the German antitrust authority is to be contextualised in the scholarly debate regarding the opportunity to reconsider consumer welfare narrowly defined[57] as the general objective of competition law in zero-price markets.[58] Specifically, some authors have questioned whether conduct, such as the imposition of unlawful contractual terms, which does not affect services' prices or quantity, could nonetheless be deemed anti-competitive according to other parameters

49 On the issue see Autoritè de la Concurrence and Bundeskartellamt (n. 32) 27. Maurice E. Stucke and Allen Grunes, 'Debunking the myths over Big Data and Antitrust', CPI Antitrust Chronicle, May 2015 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612562> 6.

50 Inge Graef (n. 30) 514.

51 Joseph Farrel and Paul Klemperer, 'Coordination and Lock-in: competition with switching costs and network effects', in M. Armstrong and R. Porter, *Handbook of industrial organization* (Elsevier, 2007) 2018.

52 Bundeskartellamt (n 5), 3.

53 Stressing this point, Adam D. Thierer, 'The Pursuit of Privacy in a World Where Information Control is Failing' (2013) 36 Harvard Journal of Law and Public Policy 432.

54 Pamela Jones Harbour and Tamara Isa Koslov, 'Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets' (2010) 76 Antitrust LJ, 769, 794, observing that 'if achieving a dominant market position might change the firm's incentives to compete on privacy dimensions, this is a consequence that antitrust enforcers might wish to explore further'.

55 Commissioner Vestager, 'Statement on Commission decision to fine Google euro 2.42 billions for abusing dominance as search engine by giving illegal advantage to own comparison shopping service', 27 June 2017 <http://europa.eu/rapid/press-release_STATEMENT-17-1806_en.htm>. Similarly, the Bundeskartellamt states that 'where access to the personal data of users is essential for the market position of a company, the question of how that company handles the personal data of its users is no longer only relevant for data protection authorities. It becomes a relevant question for the competition authorities, too'. Bundeskartellamt (n 5), 1-2.

56 Bundeskartellamt (n 5), 4.

57 Stressing the vagueness of the notion of consumer welfare, Barak Orbach, 'The Antitrust Consumer Welfare paradox' (2011) 7 Journal of Competition Law & Economics 133 and Kati Cseres, The Controversies of the Consumer Welfare Standard (2007) 3 Competition Law Review 121, 125.

58 Neelie Kroes, 'European Competition Policy- Delivering Better Markets and better choices, European Consumer and Competition Day', London, 15 september 2005 <https://uk.practicallaw.thomsonreuters.com/1-201-2864?__lrTS=20170615152404500&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1>; Christian Ahlborn and A. Jorge Padilla, 'From Fairness to Welfare: Implications for the Assessment of Unilateral Conduct under EC Competition Law', in Claus-Dieter Ehlermann and Mel Marquis (eds.), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing, 2008), 61.

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different from price.[59] Despite the lack of any normatively established hierarchy of parameters, the price criterion has been used frequently by virtue of the so-called phenomenon of 'mathematization' of competition law.[60] However, increasing attention is being given to the notions of quality and consumer choice, as complementary parameters of price.[61] Accordingly, an emerging theory suggests that consumer welfare is determined by prices and quantities in the short run but it is given by quality, variety and innovation in the medium and long run.[62] This has been already acknowledged by several EU decisions that have supported the importance of quality as a competitive parameter.[63]

As early as *Alsatel v. Novasam*,[64] the Court of Justice of the EU observed that a sudden decrease in the quality of the marketed product could have the same exploitative effects as a sudden and unjustified increase of price.[65] More recently, in the *Microsoft* case,[66] the Commission affirmed that consumer choice is the foundation of competition policy as well as the essential precondition for proper market functioning.[67] Along these lines, also the *Wanadoo* case[68] provides an interesting example of how non-price related concerns can be a more effective medium capable of detecting anti-competitive practices where mere price assessments appear to be short-sighted. In *Wanadoo*, the Commission affirmed that the goal of competition law is not only that of maintaining low prices, but also that of assuring that consumers are given the possibility to choose among a sufficient array of possibilities.[69]

The quality discourse is likely to gain new grounds in the digital market.[70] As the European Data Protection Supervisor has underlined, in markets where access to services is gained through the disclosure of personal data 'privacy could become a competitive advantage' in the sense that consumers may be oriented to choose one service or another on the basis of the undertaking's data use policy.[71]

Significant attention to the parameters of quality and choice has been ultimately given by the Commission in the *Google Search* investigation concluded on the 27 June 2017, which found Google to be abusing its dominant position as a search engine by giving an unfair advantage to Google's products, thus depriving 'European consumers of the benefits of competition on the merits, namely genuine choice and innovation'.[72]

59 Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law', CLES Working Paper Series 3/2013 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235875> 11; C. Ahlborn and A.J. Padilla (n 52), 62. Ariel Ezrachi and Maurce Stucke (n. 13) 8 stressing the practical difficulty of assessing decreases in quality of a provided service.

60 Ioannis Kokkori and Ioannis Lianos, *The reform of EC Competition law: new challenges* (Kluwer Law International, 2009), 57. The attention given by the competition law discourse to price is strictly connected to the efficiency interpretation of competition law as influenced by the orientation of the Chicago School. For a deeper assessment see Neil Averitt, Robert H. Lande and Paul Nihoul, '"Consumer choice" is where we are all going- so let's go together' (2011) 2 Concurrences-Revue des droits de la concurrence 1, 3.

61 The Commission itself has recalled that the notion of consumer welfare is to be defined through the parameters of 'lower prices, better quality and a wider choice of new or improved goods and services'. European Commission, *Guidance on its Enforcement Priorities in Applying Article 102 TFEU to Abusive Exclusionary Conduct by dominant undertakings*, 2009, OJ C, 45, 7 http://ec.europa.eu/competition/antitrust/art82/. See also Ariel Ezrachi and Maurce Stucke (n. 13), 12-16. Highlighting the importance of applying 'a consumer choice approach' to antitrust law, Neil W. Averitt and Robert Lande, 'Using the Consumer Choice Approach to Antitrust Law' (2007) 74 Antitrust Law Journal 175.

62 Kati Cseres (n. 57) 162-265; Francisco Costa-Cabral and Orla Lynskey (n. 8) 30. See also Robert Pitofsky, 'Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy' (2001) 16 Berkeley Technology Law Journal 535, 540, considering innovation as the main goal of modern competition policy.

63 Similarly, also in the United States numerous cases in which businesses' practices that were not directly related to a price increase, were nonetheless considered anti-competitive for their restrictive effects on consumer choice under section. 5 FTC Act, prohibiting 'unfair or deceptive acts or practices in or affecting commerce'. In this perspective US Sixth Court of Appeals, *Realcomp II*, Ltd. V. FTC, 2011 WL 1261180, April 6, 2011, online available at http://www.opn.ca6.uscourts.gov/opinions.pdf/11a0084p-06.pdf, where the Sixth Circuit Court of Appeals examined the conduct of a real-estate service that tended to exclude low-price brokerage from the market. The court found however that the company did not set commission rates or prices. Despite this, the court found a violation of antitrust law given that the conduct ended up reducing the competitive brokerage options available to home sellers.

64 European Court of Justice, *Alsatel v. Novasam*, C-247/86 <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=94972&doclang=EN>.

65 European Court of Justice (n. 64) para 10.

66 European Commission, *Microsoft*, accessed 24 March 2004 <http://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf>.

67 *Microsoft* affirmed that by concealing essential information and by tying its media software to its platform, the company was impeding customers from making real choices on the basis of their non-price related preferences. European Commission (n. 60) para 782: 'Microsoft's refusal to supply has the consequence of stifling innovation in the impacted market and of diminishing consumers' choices by locking them into a homogeneous Microsoft solution. As such, it is in particular inconsistent with the provisions of Article 82 (b) of the Treaty'.

68 European Commission, *Wanadoo Interactive*, accessed 16 July 2003 <http://ec.europa.eu/competition/antitrust/cases/dec_docs/38233/38233_87_1.pdf>.

69 The fact that the behaviour of France Telecom, although having lowered prices, resulted in the reduction of the alternatives among which consumers could satisfy their preferences, was considered sufficient for abusive behaviour. *Ibid.*, para 360. See also the final judgment by the European Court of justice, *France Télécom v. Commission*, C-202/07 <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-202/07>, especially para 112.

70 Ariel Ezrachi and Maurce Stucke (n. 13), 26. More recently, Francisco Costa-Cabral and Orla Lynskey (n. 8) 32.

71 European Data Protection Supervisor (n. 27) 32. It must be however stressed that the relationship between data protection and the provided service's quality is not mono-directional: as some scholars have observed, the lowering of data protection standards and the resulting increase in the amount of processed personal data are very likely to increase the quality of the service—and thus its attractiveness for users—in terms of more accurate search results or more targeted suggested social network stories. Stressing this point also Daniel Sokol and Roisin Comerford (n. 8) 275, state that 'as an input, online firms use data to improve and refine products and services in a number of ways, and to develop brand new innovative product offerings'.

72 European commission, Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service – Factsheet, accessed 27 June 2017 <http://europa.eu/rapid/press-release_MEMO-17-1785_en.htm>. For the

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C. The relevance of exploitative abuses in digital markets

The *Bundeskartellamt*, thus, is of the view that Facebook abuses its market dominance through the imposition of unlawful privacy policies, unduly shrinking users' sphere of choice and with that overall reducing the quality of the provided social networking service. On this view, such a conduct is likely to amount to an exploitative abuse that could be addressed under art. 102 TFEU.[73] Exploitative abuses are an underdeveloped area of competition law, to which the Commission has given little attention compared to exclusionary conducts.[74] The Commission itself has stated in 2009 that the prosecution of exploitative abuses is not a priority in applying art. 82 EC.[75] However, given the fact that personal data is increasingly central to competition interactions in digital markets, such a statement may be out-dated. This view is suggested by some recent declarations by Commissioner Vestager, who has shed new light on art 102 TFEU by declaring that the task of competition authorities is to protect consumers not only from exclusionary conducts consisting in the imposition of high prices, but also from exploitative abuses consisting the imposition of unfair trading conditions, equally affecting consumer welfare.[76]

By enquiring into the relevance of misleading privacy policies as unfair trading conditions under art. 102 TFEU, the *Bundeskartellamt*'s investigation appears to anticipate such recent leanings: it proposes to employ the more flexible scheme of exploitative abuses for the assessment of the evolving configuration of anti-competitive practices by big data companies in zero-price digital markets.

V. A test for exploitative abuses in digital markets

It is true that exploitative abuses have been less prominent in the jurisprudence compared to exclusionary abuses and there are rather few cases directly dealing with the imposition of 'unfair trading conditions' under art. 102 TFEU. Thus, in assessing the abuse of market dominance resulting from the imposition of privacy policies deemed unfair, the *Budeskartellamt* needs to rely a new theory of competitive harm in zero-price digital markets. Such an approach must touch upon deeper systemic issues, respectively relating (i) to the 'external' limits of competition law, (ii) to the 'internal' limits of the conduct of abuse under art. 102 TFEU and, ultimately, and (iii) to the interdependency between competition law and data protection infringements. More precisely, in order to sanction Facebook for abuse of dominant position, the *Bundeskartellamt* has to clarify some important theoretical points, which can be summarised in a test for abuse in zero-price digital markets:

(i) can privacy policies be considered as 'trading conditions' within the meaning of art. 102 TFEU?

(ii) can the violation of another branch of law be relevant for competition law purposes?

(iii) which are the parameters for assessing the abusive nature of trading conditions identified as unfair?

(iv) is there the risk that the relevance of data protection infringements for identifying exploitative abuses under art. 102 TFEU will create an automatism unduly extending the scope of competition law?

The following section aims to try to provide some answers to these questions, mainly referring to the European case law regarding exploitative abuses under art. 102 TFEU. As will be shown, such precedents do not only constitute an important jurisprudential base for the *Bundeskartellamt*'s investigation, but also provide useful practical insights for the solution of the investigated case.

A. Can privacy policies be considered 'trading conditions' under art. 102 TFEU?

It is by now widely recognised that big data companies such as Facebook or Google provide their services in exchange for users' personal data.[77] Far from being freely

literature assessing the issue of the quality decrease in this specific case, Maurce Stucke and Ariel Ezrachi, 'When competition fails to optimise quality: a look at search engines' (2016) 18 Yale Journal of Law & Technology 70.

73 Under art. 102 TFEU, the conduct of abuse of dominant position can stem, among others, from the imposition of 'unfair purchase or selling prices' or 'unfair trading conditions', both leading to exploitative abuses to be distinguished from exclusionary abuses. Traditionally, exclusionary abuses are predatory pricing conducts and refusals to deal that harm consumers by excluding rivals. See Luc Peeperkorn and Katja Vietiö, 'Implementing an effects-based approach to Article 82' (2009) 1 Competition Policy Newsletter 17.

74 Stressing the issue Jonathan Faull and Ali Nickpay, *The EU Law of Competition* (Oxford University Press, 2014) 332.

75 European Commission, *Guidance on the Commission's Enforcement Priorities in Applying Art. 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2009, OJ C, 45, 7, http://ec.europa.eu/competition/antitrust/art82/.

76 Commissioner Vestager, *Protecting Consumers from Exploitation*, Brussels Chillin' Compeiltition Conference, accessed 21 November 2016 <https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/protecting-consumers-exploitation_en>.

77 Alessandro Acquisti, 'The Economics and Behavioural Economics of Privacy', in Lane et al., *Privacy, big data and the Public Good* (Cambridge University Press, 2014) 80. This is what has been stressed also by Commissioner Vestager, *Competition in a big data world*, speech held in Munich on the 17 January 2016 <https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-big-

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provided, these services are paid by users with their own personal information.[78] The resulting privacy policies thus set the conditions through which online services are provided in return of users' personal information. Moreover, privacy policies rely on users' consent. Through the granting of consent, a transaction is made. In this light, privacy policies can reasonably be considered as an outright information trade[79] and thus relevant as trading conditions under art. 102 (a) TFEU. The consideration of privacy policies as trading conditions is preliminary to the assessment over the relevance of 'misleading' privacy policies as unfair trading conditions prosecutable under art. 102 TFEU.

B. Can the violation of another branch of law be relevant for competition law purposes?

By grounding the suspected abuse in the imposition of 'misleading' privacy policies, the German antitrust authority appears to qualify as anti-competitive conduct violations that have occurred outside the scope of competition law. But this is not necessarily new. The significance of infringements of other branches of law for competition law assessments has already been positively acknowledged by the CJEU on multiple occasions.

In *Allianz Hungária*,[80] for example, it was expressly affirmed that the impairment of objectives pursued by another set of rules could be taken into consideration for the purposes of competition assessments.[81] Moreover, with respect to exploitative conducts under art. 102 TFEU, the European Court of Justice took into consideration breaches of – or better said the distortive use of rights provided by – intellectual property law, in both the *DSD* case[82] and in the well-known *Astrazeneca* case.[83] As commentators observed with respect to the latter case, the relevance of intellectual property for competition law assessments reflects the fact that competition law itself does not have sufficient tools for the assessment of the unfairness of an allegedly abusive conduct.[84] In some cases, thus, external parameters may be borrowed from other legal regimes.[85]

Given these premises, further appropriate precedents to the Facebook case are provided by the case law regarding collecting societies' imposition of unfair trading conditions on original copyright-holders.[86] In the 1974 *Belgische Radio en Televisie vs. SABAM* case,[87] the European Court of Justice considered the 'unfair' violation of the original right-holder's copyright by the collecting society as the basis of an abuse of dominant market position. More recently, in the *Daft Punk* decision,[88] the Commission regarded as abusively exploitative, and thus enforceable under art. 102 TFEU, the rejection by the collecting society SACEM of the application for membership referring only to some and not to the entirety of the author's rights.[89] More specifically, the Commission held that where collecting societies' statutes entail a mandatory requirement according to which all of the author's rights must be assigned, without distinction, to the organisation, then the same collecting society is likely to abuse its dominant position through the imposition of such unfair trading conditions.[90]

data-world_en>: 'we as consumers have a new currency that we can use to pay for them (the online services)—our data'.

78 Dirk Auer and Nicholas Petit, 'Two-sided markets and the challenge of turning Economic Theory into Antitrust policy', (2015) Working Paper Liege Competition and Innovation Institute, <http://journals.sagepub.com/doi/abs/10.1177/0003603×15607155> 6. See also Aleksandra Gebicka and Andrea Heinemann, 'Social Media & Competition Law' (2014) 37 World Competition 149, 165. OECD Report, 'Exploring the Economics of Personal Data', 2 April 2013 <http://www.oecd-ilibrary.org/science-and-technology/exploring-the-economics-of-personal-data_5k486qtxldmq-en > 20 and more recently OECD Competition Division, 'Background note by the Secretariat, Big Data: Bridging Competition Policy to the digital era', 29-30 November 2016 <http://www.oecd.org/competition/big-data-bringing-competition-policy-to-the-digital-era.htm> 18-20; Thomas Hoppner, 'Defining Markets in Multi-Sided Platforms: the Case of Search Engines' (2015) 38(3) World Competition, 349, 366.

79 This was acknowledged also in earlier times by Daniel Solove, 'Privacy and Power: computer databases and methaphors for information privacy' (2001) 53 Stanford Law Review, 1393, 1448.

80 European Court of Justice, *Allianz Hungaria et al. vs. Gazdasági Versenyhivatal*, C-32/11 <http://curia.europa.eu/juris/liste.jsf?language=it&num=C-32/11>

81 European Court of Justice (n. 80) para 164.

82 European Court of Justice, *Duales System Deutschland v. Commission*, C-385/07 <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-385/07>, where the Court found an exploitative abuse when the license fees were charged, but the service protected by the trademark was not used.

83 European Court of Justice, *Astrazeneca vs. Commission*, C-457/10 <http://curia.europa.eu/juris/liste.jsf?num=C-457/10>, where the Court found the company to have acted abusively as a consequence of the misrepresentations made to the patent offices and the courts of several member states in order to obtain a supplementary protection certificate to which it was not entitled to.

84 On the issue Joseph Drexl, *Research Handbook on intellectual property and competition law*, (Edward Elgar, 2008) 64-68.

85 Sharing this perspective Francisco Costa-Cabral and Orla Lynskey (n. 8) 12-14.

86 Exploitative abuses under art. 102 TFEU have been the object of very early investigations conducted by the Commission in respect to the unfair trading conditions imposed by collecting societies on their members. For a comment see Joseph Faull and Ali Nickpay (n. 74) 678.

87 European Court of Justice, *Belgische Radio en Televisie vs. SABAM*, C-127/73 <http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d0f130d5f8e15c9828f84fde9040ea5220804f87.e34KaxiLc3eQc40LaxqMbN4PaxuMe0?text=&docid=88585&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=266548>.

88 European Commission, *Banghalter & Homem Christo vs. SACEM*, accessed 12 August 2008 <http://ec.europa.eu/competition/antitrust/cases/dec_docs/37219/37219_11_3.pdf>.

89 See also Comisión Nacional de la Competencia, *Resolución Expediente S/0466/13 SGAE Autores*, accessed 9 July 2015 <https://www.cnmc.es/sites/default/files/647040_0.pdf>, where the Spanish Antitrust authority fined for abuse of dominant position the IP rights collecting society for the unfair terms and conditions posed onto its members.

90 Commenting the point, Daniel J. Gervais, *Collective Management of Copyright and Related Rights*, (Wolters Kluwer, 2010) 141.

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This case law appears of interest not only for having considered copyright infringements under the umbrella of abuse of dominant position, but also for a factual similarity with the German antitrust investigation against Facebook. Indeed, IP collecting societies have been found liable under art. 102 TFEU for the imposition of unfair terms and conditions regulating the management of members' copyrights. At a closer look, the *Bundeskartellamt's* is a very similar case, where a big data company collecting users' personal data is suspected of exploiting original right-holders through the imposition of unfair trading conditions misleadingly regulating the treatment of the collected data.

It follows, therefore, that both the European Court of Justice and the Commission have already positively answered the question raised by the German antitrust authority regarding the existence of an exploitative abuse stemming from an unconstrained 'collection' of members' rights.[91]

C. Which are the parameters for assessing the unfairness of trading conditions under art. 102 TFEU?

Having affirmed the potential relevance for competition law of infringements occurring in other branches of law, a deeper enquiry is needed over when such infringements specifically fall within the conduct of abuse of market dominance. For these purposes, the notion of unfair trading conditions is of key significance.

As the *Bundeskartellamt* suggests, the mere unlawfulness of a certain trading condition is not sufficient for it to be considered unfair under art. 102 TFEU. An 'unfair' trading condition is thus something different than a merely 'unlawful' trading condition. From this perspective, the German antitrust authority will have to define when a privacy policy that is infringing data protection law is also unfair for art. 102 purposes, thus constitutive of the anti-competitive conduct of abuse of market dominance. Also in this respect, the case law regarding collecting societies' exploitative abuses under art. 102 TFEU proves to be particularly relevant, as it sets some specific indicators for the assessment of trading conditions' unfairness within the meaning of art. 102 TFEU.

In the *GEMA I* and *GEMA II* decisions,[92] the Commission deemed trading conditions to be unfair, because the onerous effect for the party bearing these conditions was not outweighed by gains in efficiency in respect to the service provided by the collecting companies.[93] Along these lines, the above-cited decision by the European Court of Justice *Belgische Radio en Televisie vs. SABAM*[94] clarified how the unfairness of terms and conditions imposed by a collecting society onto the original right-holders originated from the fact that obligations borne by its members were 'not *necessary* for the attainment of its objects'.[95] Such terms were found to 'unfairly' impair a member's freedom to exercise his copyright and were thus deemed by the Court to constitute an abuse of the dominant position held by the company.[96] Thus, as acknowledged also by the literature, at the core of the judgment of exploitative abuses lies the assessment of the necessity and the proportionality of the limitation determined by the trading condition and suffered by the users' right in exchange of a given service.[97]

In the same vein, another useful parameter of unfairness of trading conditions is to be drawn from the already cited *Astrazeneca* case,[98] where the European Court of Justice found the company's conduct consisting in 'deliberate' and 'consistent' 'misleading representations' and 'misleading information' to be an abuse of dominant position.[99] Thus, in the court's view, the 'objectively wrong representation'[100] made by the dominant company, causing the violation of regulatory procedures, constituted an abuse of dominant position.

Against this backdrop, both the European Commission and the European Court of Justice have assessed exploitative abuses using the principles of necessity and proportionality as well as the principle of transparency as relevant benchmarks.[101] Accordingly, to be considered unfair under art. 102 TFEU, the set trading conditions

91 The suggested parallelism between intellectual property rights and the rights over personal data is not new: the idea of establishing a property right over personal data allegedly strengthening data subjects' control over personal information that is 'licensed' online is not new and has gained renewed attention recently. See Lawrence Lessig, 'The Architecture of Privacy' (1999) 1 Vand. J. Ent. L. & Prac. 56; Robert S. Murphy, 'Property Rights in Personal Information: An Economic Defense of Privacy' (1996) 84 Georgetown L.J. 2381; Pamela Samuelson, 'Privacy as Intellectual Property?' (1999) 52 Stanford Law Review 1125 and P. Schwartz, Property, Privacy and personal data (2004) 7 Harvard Law Review 117, 2057. In some of its new provisions, such as the right to be forgotten and the right to data portability, the General Data Protection Regulation appears to have acknowledged, to a certain extent, a proprietary paradigm rendering this parallelism even more realistic. Stressing this point, Jacob M. Victor, 'The EU General Data Protection Regulation: Toward a Property Regime for Protecting Data Privacy' (2013) 123(2) *Yale Law Journal* 266, 279-281.

92 European Commission, *Gema I*, 2 June 1971, in *Official Journal*, 134, 20 June 1971; European Commission, *Gema II*, 6 July 1972, in *Official Journal*, 166, 24 July 1972. Similarly also European Court of Justice, *Tetra Pak International vs. Commission*, 14 November 1996, C-333/94 <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61994CJ0333&from=IT>.

93 On the issue see Damien Gervais, *Collective Management of Copyright and Related Rights* (Kluwer Law International, 2010) 141.

94 European Court of Justice (n. 87).

95 European Court of Justice (n. 87) para 15.

96 European Court of Justice (n. 87) para 15.

97 On the issue J. Faull and A. Nickpay (n. 74) 678.

98 European Court of Justice (n. 83).

99 European Court of Justice (n. 83) para 62-63-65-93.

100 European Court of Justice (n. 83) para 72.

101 Joseph Faull and Ali Nickpay (n. 74) 677.

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need to be (i) disproportionate, (ii) not necessary for the objectives the undertaking is meant to pursue, and (iii) misleading in terms of information rendered to the contracting parties.

These benchmarks appear to be particularly relevant for the assessment of the unfair nature under art. 102 TFEU of privacy policies. They suggest indeed that in the case a big data company, as Facebook, which deliberately and consistently misleads users through insufficiently informative terms and conditions regarding the data processing practices it carries out, the same company is likely to abuse its market power by virtue of the resulting unnecessary, disproportionate and obscure collection of users' personal data.

The reference to the principles of proportionality, necessity and transparency for the assessment of the unfair nature of a business's conduct triggers however some deeper considerations where the alleged abuse is suspected to stem, as in the BKA's case, from unlawful privacy policies. Indeed, it cannot be neglected that the mentioned principles are (also) core principles of data protection law, the violation of which causes the trading condition to be unlawful under data protection law, well before being found unfair under competition law.[102] Misleading terms and conditions pave the way for a disproportionate and unnecessary processing of personal data and thus impair users' right to data protection under the General Data Protection Regulation, which also emphasises the mentioned principles.[103]

From such a perspective, the assessment of unlawfulness—under data protection law—and of unfairness—under competition law—of a certain privacy policy appear to be governed by the same principles. This means that the assessment regarding the violation of the principles of necessity, proportionality and transparency required for the evaluation of the unfairness of a suspected exploitative conduct is already carried out at the previous stage of the assessment of the unlawfulness under data protection law. As a result, if the examined terms and conditions are found to infringe the outlined principles under data protection law, the same terms and conditions are likely to be deemed unfair also within the meaning of art. 102 TFEU according to the precedents discussed.

The circumstance of the overlay between the assessment of the unlawfulness under data protection law and of the unfairness under competition law of a certain privacy policy, as such anchors and concretises a suspected abuse of market dominance in an infringement of another branch of law, that is data protection law.

This does not, however, mean that any infringement of the above-mentioned data protection law principles is necessarily unfair, and thus abusive, under art. 102 TFEU. Indeed, it must be observed that the fact that the assessment regarding the unfairness of a certain privacy policy under art. 102 TFEU is guided by the same principles governing its unlawfulness under data protection law, does not establish an automatic link between the unlawfulness of such a policy and its abusiveness under art. 102 TFEU. As the next section will show, also in this regard, an analysis of the European case law regarding exploitative abuses of dominant positions suggests that in order to be deemed abusive it is not sufficient for a certain trading condition to be unfair in the above described terms: an additional parameter is needed in order to assure the distinction between a merely unfair privacy policy and an abusive one.

D. Does using data protection infringements under art. 102 TFEU risk unduly extending the scope of competition law?

The risk of an automatic link between data protection infringements and the existence of an exploitative abuse may be addressed, again, by reference to the European case law regarding exploitative abuses of dominant position. For this purpose, one approach may be drawn from the German Federal Court of Justice. In a 2013 decision, it observed that 'contract terms which are incompatible with the laws regulating general conditions and terms of trade might be an abuse of a dominant position if the use of the terms is based on the company's market dominance'.[104] Such a statement appears of utmost interest

102 Stressing this point Harri Kalimo and Klaudia Majcher (n 39) 213.

103 Indeed, as far as the principle of transparency is concerned, the GDPR has reinforced the transparency obligations of data processors: recital 39 requires any data processing to be transparent, meaning that data processors should inform the data subjects 'on the identity of the controller and the purposes of the processing' as well of the risks, rules, safeguards and rights in relation to the processing of personal data" and 'how to exercise their rights in relation to such processing'. More specifically, under art. 12 GDPR, the 'controller shall take appropriate measures to provide any information' needed in order to satisfy the right to explanation under art. 13-15 GDPR, 'in a concise, transparent, intelligible and easily accessible form, using clear and plain language'. Likewise, also the principles of proportionality and necessity are reaffirmed under the General Data Protection Regulation at art. 5 para 1.c and art. 6 para 1.c. respectively stating that '(personal data shall be) adequate, relevant and limited to what is necessary to the purpose for which they are processed' and that the 'processing shall be lawful only if and to the extent that) processing is necessary for compliance to a legal obligation to which the controller is subject'. Ultimately art. 35 GDPR requires companies to base the data protection impact assessment they are bound to carry out on the 'assessment of the necessity and proportionality of the processing operations in relation to the purposes'. See also Art. 29 Working Party, 'Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is 'likely to result in a high risk' for the purposes of Regulation 2016/679', 4 April 2017 <http://ec.europa.eu/justice/data-protection/index_en.htm> 14.

104 German Federal Court of Justice (*Bundesgerichtshof*), *VBL vs. Gegenwert*, KZR 61/11, accessed 16 November 2013 <http://juris.bundesgerichtshof.

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since it clarifies that the abusive nature of an unfair trading condition derives from the fact that it is established by a dominant undertaking. This means that the trading condition would not have been imposed or accepted under competitive market conditions.[105]

Accordingly, to be considered abusive under art. 102 TFEU the privacy policy infringing data protection law will have to depend on the dominant position of the company setting it. Hence, no automatism is to be found: the impugned conduct is not anti-competitive on grounds of the mere infringement of data protection law but because the same infringement is rooted in a dominant market position that provides the conditions for the data protection infringement. In this perspective, the detection of a causal link between the company's market dominance and the data protection infringement should work as a filter preventing an undue overlap between data protection and competition law's scope of application. More specifically, it should avoid the risk of excessively broadening the scope of the unfairness clause under art. 102 TFEU, which would otherwise become, as it has been said, an 'open-ended' clause, attracting into the sphere of competition law conducts that are unlawful under other legal regimes.[106]

Against this backdrop, it is a widely acknowledged fact that the high concentration of online services in the hands of a few key players, such as Facebook, creates a users' lock-in that obliges users to accept the conditions offered so as to not lose the opportunities of the provided service, even if these conditions are not sufficiently clear or widely subject to change.[107] Moreover, in respect of exploitative abuses occurring in the zero-price side of a two-sided platform, such as Facebook, the automatism between data protection law infringements and the violation of art. 102 TFEU could be prevented by taking into account the strict interdependency existing between the user side and the paying side. Such an interdependency between the two sides is given by indirect networks effects.[108]

Indeed, zero-price markets are only one half of a two-sided coin. Although the free side has its own autonomy and has gained over time increasing attention by antitrust scholars as a self-standing dimension,[109] it is structurally entangled with the other, paying side of the platform. This is because not only the social networking site, but also the paying advertisement site is data-driven: the more personal data the company gets to flow into the paying site, the stronger its market power on this side grows.[110] Indeed, the more personal data the company collects and inserts in the loops of its algorithmic processing machines, the better the system can identify which pieces of information is most relevant for a specific user.[111] Such data are thus employed also on the advertisement side where more advertisers will be attracted by the possibility to target more users and to target them more precisely.[112]

It follows that the misleading privacy policies through which a company massively and unconstrainedly collects personal data are not without impact on the paying side. On the contrary, the vast availability of personal data unlawfully collected on the free-side captures the attention of a greater number of advertisers, which are more willing to pay the more precise the advertisement spots become. The increase of demand on the advertisement side strengthens the market dominance of the platform also on this side. As a result, the dominant company could be encouraged to unfairly increase the price of its advertisement spots, this leading to a second abuse under art. 102 TFEU.[113]

The acknowledgement of this intimate interdependency between the two sides of a digital platform shows how exploitative abuses occurring on the zero-price side through the setting of 'unfair trading conditions' are very likely to subsequently result in an exploitative abuse on the paying side in the form of an unfair price increase of ads spaces.[114]

de/cgibin/rechtsprechung/list.py?Gericht=bgh&Art==en&Datum=Aktuell&Sort=12288, para 68.

105 In the same sense also European Commission (n 92): in the *Gema I* and *Gema II* decisions, the abusiveness of the unfair terms and conditions set by the German collecting society Gema was derived from the dominant position of the same collecting society.

106 Robert O' Donoghue, 'The Death of the Theory of Everything under Article 102', Global Competition Law Centre Conference, Brussels, February 2016 <https://www.coleurope.eu/sites/default/files/uploads/page/slides_robert_odonoghue.pdf>.

107 Bundeskartellamt (n 5), 4. This point is particularly stressed by Alessandro Mantelero, 'Competitive value of personal data protection' (2013) International Data Privacy Journal 229, 232.

108 David S. Evans, 'The Antitrust Economics of Multi-Sided Platform Markets' (2003) 20 Yale J. Regulation 325, 331-33 and Lapo Filistrucchi and Damien Geradin and Eric Van Damme, 'Identifying Two-Sided Markets' (2013) World Competition 33, 37-39. Maurice E. Stucke and Allen Grunes (n. 49) 6-7.

109 John M. Newman, 'Antitrust in Zero-Price Markets: Foundations' (2015) 164 University of Pennsylvania Law Review, 149, 158 and Michal Gal and Daniel L. Rubinfeld, 'The Hidden Costs of Free Goods: Implications for antitrust Enforcement' (2016) 82 Antitrust Law Journal 522.

110 Damien Geradin and Monika Kuschewsky (n. 8) 4.

111 This is expressly confirmed by Facebook's own disclosures, 'How News Feed Works' https://en-gb.facebook.com/help/32713101403 6297.

112 Daniel L. Rubinfeld and Michal S. Gal, 'Access barriers to big data', accessed 26 August 2016, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2830586>, 17.

113 David Evans and Michael Noel, 'Defining Markets that involve Multi-Sided Platform Businesses: an empirical framework with an application to Google's Purchase of DoubleClick', accessed 6 November 2007, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1027933>, 6; Michael L. Katz and Carl Shapiro (n. 48) 430.

114 'Facebook is becoming more and more indispensable for advertising customers. This is also reflected in the rapidly increasing turnover Facebook has been able to generate in the past years. There is also potential for competitive harm on the side of the advertising customers

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This means that the more traditional price parameter put aside in the assessment of the exploitative abuse occurred on the users' side is likely to gain relevance at a later stage, where the effects of the first detected abuse reflect themselves on the prices charged on the paying side. The imposition of unfair prices would thus provide the grounds for a second abuse impairing not 'competition on the merits' but, more traditionally, price competition.[115] Thus, the structural features and the mechanisms governing two-sided platforms make it very likely that a chain reaction of (different types of) abuses occurs as a consequence of the infringement of data protection law.

This last consideration shows how far from establishing an automatism between data protection law infringements and anti-competitive conduct, rooting exploitative abuses in data protection infringements captures not only the very nature of market distortions in data-driven platforms, but also the complexity of the resulting anti-competitive conduct.[116]

VI. Conclusions

In the digital environment, personal data have acquired an economic value[117] and is sensitively changing the dynamics of competition interactions. The consideration of the economic significance of personal data suggests that the inclusion of data protection concerns into competition law assessments is triggered by something more than just the newly felt need to strengthen data protection enforcement through other means.[118] Indeed, the dynamics of digital markets are triggering a reconsideration of fundamental assumptions of competition law and suggesting the need to render traditional antitrust tools more adherent to a changed economic landscape.

The investigation launched by the *Bundeskartellamt* against Facebook perfectly reflects this need and proposes an evolutionary interpretation of the conduct of abuse of market dominance stemming from the imposition of 'misleading' privacy policies. By analysing Facebook's conduct under art. 102 TFEU, the German antitrust authority does not appear to inappropriately guard Facebook's users' right to data protection through competition law but rather to sensitively recognise new phenomena of anti-competitive behaviour in the data-driven economy.

As this contribution has argued, the relationship between Facebook's infringements of data protection law and their anti-competitive outcomes under art. 102 TFEU will have to be carefully assessed by reference to the parameters developed by the European case law regarding exploitative abuses. This case law sets appropriate and precise limits under art. 102 TFEU for the imposition of unlawful terms and conditions. Indeed, not only must the terms and condition violate proportionality, necessity and transparency standards, but the violation of these standards must be causally rooted in the company's market dominance.

As the cited European precedents suggest, the imposition of 'misleading' privacy policies could thus with reason be prosecutable as an abuse of market dominance if they are found unfair within the meaning of art. 102 TFEU. Hence, by relying on this framework, it was the *Bundeskartellamt*'s task to demonstrate that Facebook is disproportionately exploiting users by virtue of its dominant position in the relevant market,[119] restraining users' control over data and thus deteriorating the quality of the social networking service.[120]

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who are faced with a dominant suppliers of advertising space'. Bundeskartellamt (n 5), 4.

115 For a general assessment on the issue see OECD, 'Excessive prices', 2011, <http://www.oecd.org/competition/abuse/49604207.pdf>. On the issue see G. Monti, *EC Competition law* (Cambridge University Press, 2007) 218.

116 The BKA's approach in Facebook thus need not entail the automatic instrumentalisation of competition law to the goals pursued by other legal regimes. Compare Ariel Ezrachi, 'Sponge' (2017) 5 Journal of Antitrust Enforcement 49; Yane Svetiev, 'Antitrust Law and Development Policy: Subordination, Self-Sufficiency or Integration?' (2013) 4 European Yearbook of International Economic Law 223, canvassing the use of antitrust beyond privacy protection for other market regulation, distributional or developmental policies.

117 Daniel Sokol and Roisin Comerford (n.8) 271.

118 Anca Daniela Chirita, 'The rise of Big Data and the Loss of Privacy', in Mor Bakhoum-Beatriz Gallego Conde- Peter Melzer Mackenordt-Gintare Surblyte, Berlin Heidelberg Chirita, D. Anca (ed.), *Personal Data in Competition, Consumer Protection and IP Law—Towards a Holistic Approach?*, (Springer, 2018) <https://ssrn.com/abstract=2795992>.

119 Stressing the need for the Bundeskartellamt to define the relevant market and to give proof of Facebook's dominant position in it, Matthew Newman (n 47).

120 The Bundeskartellamt has announced that a full decision in the case is not expected before early summer 2018. Bundeskartellamt (n 5), 5.

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