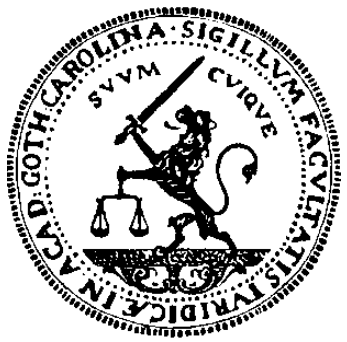

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Data Protection Considerations in EU Competition Law – A Natural Evolution or Disruptive Development?

LAGM01 Master Thesis

European Business Law
30 higher education credits

Supervisor: Julian Nowag

Term: Spring 2020

TABLE OF CONTENT

Summary

It goes without saying that the world that we live in is becoming increasingly digitised. People communicate on Facebook, order products on Amazon, and use Google Search to find everything the Internet has to offer. A common denominator of these services is that they are all offered for free. Instead of requiring payment, the business model of such undertakings is to maximise data collection on its users, establish their preferences, and sell advertisement space to other undertakings that benefit from targeted advertising. Data has consequently become an essential component of thriving in the digital era. While the collection of (personal) data is mostly a concern related to data protection laws, many of the digital markets are dominated by extremely large market players. Search engines have Google, online retail has Amazon, consumer communication has Facebook; the list goes on. In turn, certain harmful behaviour conducted by large undertakings is precluded through the application of competition law. The commercialisation of data and personal data has led to the intersection between data protection law and competition law. As such, a question arises whether data protection considerations can be taken into account in competition law.

The thesis examines how, and in which ways, data protection considerations can form part of the competitive assessment in EU law. The thesis explains the roles of data and personal data in the digital era and how their processing can both lead to positive and negative effects vis-à-vis consumers. It continues to explore the commonalities and divergences between EU data protection law and EU competition law. Although being separate legal instruments, it is demonstrated that they share a lot of similarities. Having described the legal frameworks, the thesis analyses cases comprising the latest application of competition law treating data protection-related questions. While finding that institutions generally avoid directly applying data protection considerations in competition law, it is shown that some data protection-related concepts have been injected into the competitive assessment. As conclusion, the thesis acknowledges that data protection considerations can form part of the competitive assessment in EU law in different ways. However, it is noted that the interactions between EU data protection law and EU competition law are still largely unexplored. Guidance from the relevant EU institutions is therefore required to bring about much needed legal certainty.

Sammanfattning

Det kan konstateras utan vidare att den världen som vi lever i håller på att bli allt mer digitaliserad. Människor kommunicerar på Facebook, beställer varor på Amazon och använder sig av Google Search för att komma åt allting som Internetet har att erbjuda. En gemensam nämnare för dessa tjänster är att de erbjuds gratis. Affärsmodellen för dessa företag är istället att maximera upptagningen av data angående deras användare, etablera deras preferenser och sedan sälja reklamutrymme till andra företag som nyttjas av riktad marknadsföring. Data har på så sätt blivit en väsentlig del för att kunna frodas i den digitala eran. Medan insamlingen av personuppgifter huvudsakligen regleras av dataskyddslagar så är många av de digitala marknaderna dominerade av extremt stora marknadsaktörer. Sökmotorer har Google, online-återförsäljning har Amazon och konsumentkommunikation har Facebook; listan fortsätter. I sin tur förbjuds visst skadligt beteende av stora företag genom tillämpningen av konkurrensrätt. Kommersialiseringen av data och personuppgifter har lett till sammankopplingen av dataskyddslagstiftning och konkurrensrätt. En fråga som därmed uppkommer är huruvida dataskyddshänsynstaganden bör beaktas i konkurrensrättsliga bedömningar.

Den här avhandlingen utreder hur, och på vilka sätt, dataskyddshänsynstaganden kan utgöra en del i konkurrensrättsliga bedömningar i EU-rätten. Avhandlingen förklarar data och personuppgifters roll i den digital eran samt hur deras behandling kan medföra både positiva och negativa effekter gentemot konsumenter. Den fortsätter med att utforska likheterna och olikheterna mellan EU dataskyddslagstiftning och EU konkurrenslagstiftning. Även om det rör sig om två separata rättsliga instrument, påvisas det att de har mycket gemensamt. Efter att ha redogjort för de rättsliga ramverken analyserar avhandlingen rättsfall som utgör den senaste tillämpningen av konkurrensrätt och som berör dataskyddsrelaterade frågor. Generellt sett undviker institutionerna att direkt tillämpa dataskyddshänsynstaganden i konkurrensrättsliga sammanhang men samtidigt har vissa dataskyddsrelaterade koncept blivit infogade. Som slutsats finner avhandlingen att dataskyddshänsynstaganden kan utgöra en del av konkurrensrättsliga bedömningar i EU-rätten på flera olika sätt. Dock noteras det att interaktionerna mellan EU dataskyddslagstiftning och EU konkurrensrätt förblir tämligen outforskade. Därför krävs vägledning från de relevanta EU-institutionerna för att generera välbehövd rättsäkerhet.

Preface

Writing this thesis, as well as studying law, has been a bit like riding an emotional rollercoaster. It started out like a fun idea, followed by a rush of excitement, and then an inescapable sense of dread once you realise what you have just gotten yourself into. Still, in the end, when you have said all your prayers, made all the loops, and squelched your urges to scream, you finally arrive at the end of the line and you think to yourself: hey that wasn't so bad!

First, I would like to extend my deepest gratitude to all the wonderful professors and teachers at the Faculty of Law for exemplary service. A special thank you to my supervisor, Julian Nowag, for providing invaluable feedback and helpful insights during the course of writing this thesis. I would also like to thank the class of the Swedish Law Programme of 2015. Our careful balancing between serious study and a bit less serious 'nollning' made the start of my law career, and the start in Lund, the best one I could ever imagine. Thank you, fellow colleagues of the Master's Programme for an amazing experience and a great time together. A very special thank you to Emily, Zhengmin, and Marie-Françoise, for a tough yet unforgettable experience during the European Law Moot Court Competition 2019-2020.

Finally, I would like to thank my dear Victoria for always standing by my side. You helped me when the times were tough, you inspired me to persevere, and you made sure that I crossed the finish line, with a smile.

Despite my studies ending under the less favourable circumstances of the corona-crisis, I feel like I am finally ready to move on. Looking back on all my years in Lund at the Master's Programme and the Swedish Law Programme, I can safely say that it has indeed been a rollercoaster – but I don't regret riding it for a second.

På återseende Lund!

Lund, May 2020

Adam Alfredsson

Abbreviations

AI	Artificial Intelligence
Cf	Conferatur (compare with)
CFREU / Charter	Charter of Fundamental Rights of the European Union
CJ / the Court	Court of Justice
CJEU	Court of Justice of the European Union
Commission	European Commission
DPD	Data Protection Directive
ECHR	European Convention on Human Rights
ECtHR	European Court of the Human Rights
EDPB	European Data Protection Board
EDPS	European Data Protection Supervisor
EU	European Union
EUMR	European Union Merger Regulation
GC	General Court
GDPR	General Data Protection Regulation
GWB	Gesetz gegen Wettbewerbsbeschränkungen
Ibid	Ibidem (in the same place)
I.e	Id est (that is)
OLG	Oberlandesgericht Düsseldorf (Higher Regional Court Düsseldorf)
OECD	Organisation for Economic Cooperation and Development
PSN	Professional Social Network
SSNDQ	Small but Significant Non-transitory Decrease in Quality
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
WP29	Article 29 Working Party

1 Introduction

1.1 Background

In the distant year of 2006: a time before one was presumed to be involved in a social network and in which a functional life could be lived without the dependence on a smartphone, the Court of Justice (CJ) made a short yet perplexing statement in the case of *Asnef-Equifax* that would come to shape European Union (EU) competition policy in digital sectors for years to come:

> "[…] 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."[1]

Preliminarily, the statement makes sense: data protection laws should be the primary legal norms pursued in order to resolve issues relating to the protection of personal data. However, should it be interpreted as entailing that data protection considerations are never relevant in EU competition law?

Fast forward to present time where we are currently living in what has been dubbed the 'new economy'[2] or 'the digital era'; characterised by rapid innovation and technological change.[3] Without a doubt, over the past decade there have been major technological advancements which have brought about a magnitude of new services and concepts, providing individuals with new innovations and efficiencies for undertakings. Conversely, the digital era has given rise to an equal number of concerns, three of which being of particular significance.

First, there has been a surge in 'free' services, in which consumers are no longer paying with their money, but rather their data.[4] By extension, people are increasingly concerned

[1] Case C-238/05, *Asnef-Equifax*, ECLI:EU:C:2006:734, para. 63.
[2] Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (6th ed, Oxford University Press 2016), p. 48.
[3] Jacques Crémer, Yves-Alexandre de Montjoye, and Heike Schweitzer, *Competition Policy for the Digital Era* (Final Report, European Commission 2019).
[4] The recurring terms 'data' and 'personal data' are respectively defined in Sections 2.1.1 and 2.1.2.

with their privacy and wonder what companies are doing with their personal data.[5] Second, the digital era has certain characteristics which benefit large market players. These characteristics have enabled many digital markets being dominated by a handful of undertakings, reinforcing economic inequality as well as raising concerns related to market power.[6] Third, while such undertakings keep growing and accumulating more personal data; little is being commented on by the relevant institutions – as demonstrated by the case of *Asnef-Equifax*. As such, there are legitimate concerns over regulatory frameworks lagging behind.

Already in 2012, the then Commissioner for competition, Joaquín Almunia, envisaged in a speech the possibility that an undertaking could think to infringe privacy laws to gain an advantage over its competitors.[7] Advancing this idea, the late European Data Protection Supervisor (EDPS) Giovanni Buttarelli, warned that the EU should be prepared for potential abuse of dominance under Article 102 of the Treaty on the Functioning of the European Union (TFEU)[8] which involve a breach of data protection rules.[9] While the same level of resourcefulness cannot be seen in the EU jurisprudence, the aforementioned considerations finally came to fruition in the first true application of data protection considerations in competition law: the *Facebook-decision* by the German competition authority (Bundeskartellamt) in 2019.[10] From that point and onwards, it has become abundantly clear that there is *something* about data protection and competition law. What else is clear is that the digitisation brought about by the new economy is not going away anytime soon, and the interaction between competition law and data protection law is still in its infancy. Therefore it is not only an intriguing issue to explore, but it may be one of the most crucial questions to resolve for an appropriate development of the digital era: how can data protection considerations be taken into account in competitive assessments?

[5] Jones and Sufrin (n 2), p. 50.
[6] Crémer, de Montjoye, and Schweitzer (n 3), p. 12.
[7] Joaquín Almunia, 'Competition and personal data protection' (Privacy Platform event: Competition and Privacy in Markets of Data, 26 November 2012) SPEECH/12/860 <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_12_860> accessed 17 May 2020.
[8] Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202/1.
[9] Giovanni Buttarelli, 'Competition Rebooted: Enforcement and personal data in digital markets' (Joint ERA-EDPS seminar, 24 September 2015) <https://edps.europa.eu/data-protection/our-work/publications/speeches/competition-rebooted-enforcement-and-personal-data_en> accessed 17 May 2020.
[10] Bundeskartellamt, Decision B6-22/16.

1.2 Scope and Purpose

The main purpose of this thesis is to investigate how data protection considerations can fit within the current EU competition law framework. Specifically, this thesis engages in the substantive application of Articles 101 and 102 TFEU and how data protection considerations can form part of those Articles and subsequently formulate an infringement of EU competition law. Within that main purpose, this thesis seeks to elucidate the important and multifaceted roles that personal data serves in the digital era as well as outline the overarching issue of how data protection law and competition law have become increasingly intertwined.

1.3 Research Questions

In line with the envisaged scope and purposes of this thesis, the following research questions are intended to be answered:

- What is the role of data and personal data in the digital era?
- How do EU competition law and EU data protection law interact with each other in the context of the digital era?
- How have data protection considerations in EU competition law been applied by EU institutions?
- Can data protection considerations be taken into account in competitive assessments in EU law, and if so, how can such considerations be implemented?

1.4 Delimitations

While this thesis explores data protection considerations in EU competition law, it focuses on the competitive assessment conducted under Articles 101 and 102 TFEU. A third branch of EU competition law is the review of concentrations with an EU dimension pursuant to the European Union Merger Regulation (EUMR).[11] However, given how the competitive assessment of concentrations is of a prospective nature, it inherently differs from traditional competitive assessments. Therefore, the assessment of concentrations falls outside the scope of this thesis. Commission decisions relating to

[11] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) OJ L 24/7.

concentrations will nevertheless be considered, insofar as they elucidate how data protection considerations can be incorporated into EU competition law.

An important element that forms part of all EU competitive assessments is market definitions. As an example, a prerequisite for the establishment of an abuse of a dominant position pursuant to Article 102 TFEU, is that the undertaking has a dominant position in a defined market. Market definitions in the new economy and multi-sided markets are very complex, entailing that this issue will not be further analysed due to the already broad scope of this thesis.

This thesis focuses on EU law and national laws will therefore generally not be taken into account in the analysis in this thesis. However, the Bundeskartellamt provided substantially relevant considerations in its *Facebook-decision*, and German competition law will consequently play a limited role in providing background information and inspiration.

Finally, while data and personal data may generate a number of competitive concerns, this thesis focuses on 'data protection considerations'. For the purposes of this thesis, this term is used to describe any potential issue with the right to protection of personal data. As such, competitive concerns which merely *involve* personal data do not fall within the scope of this thesis.

1.5 Methodology and Perspectives

Multiple methods are used in different parts throughout the thesis. As this thesis is structured to assess current legal positions and analyse different legal frameworks, the *main* underlying methods employed are twofold: legal dogmatic method[12] and EU legal method[13]. Although difficult in defining, legal dogmatic method is not necessarily considered a methodological tool in how to answer a specific question, but rather a fluctuating concept of how different legal norms should be interpreted in different situations. One situation may call for a specific set of norms, whereas another situation

[12] Jan Kleineman, 'Rättsdogmatisk metod' in Maria Nääv and Mauro Zamboni, *Juridisk Metodlära* (2nd ed, Studentlitteratur 2018), p. 21.
[13] Jane Reichel, 'EU-rättslig metod' in Maria Nääv and Mauro Zamboni, *Juridisk Metodlära* (2nd ed, Studentlitteratur 2018), p. 109.

requires that the researcher focuses on another set of norms. While the flexibility of the legal dogmatic method grants the researcher the advantage to tackle a legal question on his or hers own terms, it conversely has the disadvantage of potentially being inconsistent as a scientific method.[14] Nonetheless, it is the opinion of the Author that a legal dogmatic method is necessary to take into account a wide spectrum of legal norms in order to satisfactorily analyse normative parts of this thesis.

As for the EU legal method, it is essential for the writing of this thesis because of two core reasons. First, it explains to the researcher the hierarchy of norms which are imperative when determining applicable law within the EU legal order.[15] Secondly, it allows for a plethora of interpretative tools when interpreting those legal instruments.[16] Amongst those interpretative methods, besides textual interpretation and systematic interpretation, lies the *teleological* interpretative method, which the Court of Justice of the European Union (CJEU) is most known for utilising when interpreting EU law. While generally considered a subsidiary interpretative method, it bears great importance for the EU legal framework as many provisions are imprecisely drafted, and are given much more depth in the jurisprudence of the CJEU.[17] As seen in the seminal case of *CILFIT v Ministero della Sanità*, the CJ considers that a teleological approach is necessary for understanding how EU law should be interpreted:

> "[…] every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied."[18]

In addition to the methods, the thesis will incorporate two perspectives. The first one being of *comparative* nature, as the thesis will investigate the relationship between two legal frameworks. The second one being a *de lege ferenda* perspective, as not only will this thesis try to outline applicable law, but examine what will, or *should*, come of the

[14] Kleineman (n 12), p. 24.
[15] Jörgen Hettne and Ida Otken Eriksson, *EU-rättslig metod: Teori och genomslag i svensk rättstillämpning* (2nd ed, Norstedts Juridik 2011), p. 39-40; Ulf Bernitz and Anders Kjellgren, *Europarättens grunder* (5th ed, Norstedts Juridik 2014), p. 178-181.
[16] Hettne and Eriksson (n 15), p. 159; Reichel (n 13), p. 122.
[17] Bernitz and Kjellgren (n 15), p. 186; Hettne and Eriksson (n 15), p. 168-170.
[18] Case C-283/81, *CILFIT v Ministero della Sanità*, ECLI:EU:C:1982:335, para. 20.

future.[19] Aside from contributing to the purposes of this thesis, this perspective is also important to further the academic discussion on the legal areas that are competition law and data protection law.

1.6 Material and State of Research

In line with the methods chosen for this thesis, the material used is varied. However, given its focus on EU law, particular weight is granted to the accepted legal norms pursuant to EU legal method, that is: primary law; Treaty on European Union (TEU),[20] TFEU, Charter of Fundamental Rights of the European Union (CFREU),[21] and the general principles of EU law; secondary law, the jurisprudence of the CJEU, decisions of the Commission relating to concentrations pursuant to the EUMR, and finally judgements delivered by the European Court of the Human Rights (ECtHR), insofar as they are relevant in determining the scope and meaning of EU law.[22]

Additionally, documents provided by EU institutions and other bodies, although not necessarily legally binding, provide guidance and clarify the practical enforcement of various legal areas. Of specific importance is the Commission's guidance on the application of competition law, as well as guidance from the Article 29 Working Party (WP29), European Data Protection Board (EDPB) and EDPS. In this connection it must be noted that the WP29 was an independent advisory body with the task to provide guidance on the uniform interpretation of the provisions of the Data Protection Directive (DPD).[23] The DPD was repealed and replaced by the General Data Protection Regulation (GDPR) on 25 May 2018, and subsequently the WP29 was replaced by the EDPB.[24] The EDPB has officially endorsed the WP29 documents relating to the GDPR and concepts which are both pertinent in the DPD and GDPR, meaning that documents

[19] Bernitz and Kjellgren (n 15), p. 193.
[20] Consolidated version of the Treaty on European Union [2016] OJ C 202/1.
[21] Charter of Fundamental Rights of the European Union [2016] OJ C 202/389.
[22] Bernitz and Kjellgren (n 15), p. 179; Hettne and Eriksson (n 15), p. 40.
[23] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281/31; see: DPD Articles 29 and 30.
[24] 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) OJ L 119/1; see: GDPR, Recital 139 and Article 70.

from both bodies may be of import.[25] The EDPB serves a similar function as the WP29 did, in that shall ensure a consistent application of the relevant data protection rules and advise the EU institutions.[26] However, a major difference between the two is that the EDPB is an independent body of the EU and has a legal personality, in accordance with Article 68(1) GDPR. Therefore, it may be subsumed that guidance by the EDPB may come to have more importance to the development of data protection laws than its predecessor. Indeed, the documents of the WP29 have, as far as the Author is currently aware of, been considered by the CJEU in its judgements only once.[27] The EDPS is a separate institute which must not be confused with the aforementioned bodies. While the EDPB is to ensure the uniform application throughout the Member States, the EDPS main focus lies in monitoring the EU institutions, and ensuring that the fundamental rights and freedoms of natural persons, in particular the right to data protection, are respected by EU institutions and bodies.[28]

Seeing as the *Facebook-decision* by the Bundeskartellamt presents itself as the vanguard of applying data protection considerations in traditional competitive assessments, the thesis will address the relevant national material in relation to that case. Specifically, the official English translation of the Bundeskartellamt decision is used. As for the interim decision of the Higher Regional Court Düsseldorf (OLG),[29] the official German version is used in conjunction with an unofficial English translation by D-kart. This material, together with the Author's limited German linguistics, is used to understand and contextualise the German 'Facebook-saga'.

Finally, the subject matter of this thesis is currently a 'hot topic' in the EU, not the least considering the ongoing Facebook-saga in Germany. Concurrently, there is a vivid debate on academic level which has brought great inspiration and thought-provoking arguments to the subject at hand. Therefore, to enhance the legal discussion, secondary

[25] EDPB, 'Endorsement of GDPR WP29 guidelines by the EDPB' (Endorsement, 2018) <https://edpb.europa.eu/node/89> accessed 17 May 2020.
[26] GDPR, Article 70.
[27] Case C-25/17, *Jehovan todistajat*, ECLI:EU:C:2018:551, para. 21.
[28] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC OJ L 295/39; see: Articles 1(3) and 52.
[29] OLG, Decision VI-Kart 1/19 (V).

sources such as academic books and articles are used throughout this thesis. As for the state of the research, it is the opinion of the Author that while there is much literature on the subject, the final answers to the questions posed in this thesis remain ambiguous. Naturally, certain commentators may fiercely advocate for a certain outcome which may or may not be influenced by their respective background, but from an objective standpoint, it is very difficult in establishing any semblance of a consensus.

1.7 Outline

This thesis consists of a total of six chapters ('Chapter'), each containing a varying amount of sections ('Sections'). Chapter one outlines the current issue at hand and explains the foundational elements of this thesis. Chapter two introduces many of the recurring buzzwords that permeate the digital era. Some key terms like 'data', 'personal data', and 'big data' are explained. This Chapter proceeds by investigating how those concepts co-exist within the new economy, specifically exploring how the processing of personal data, and certain characteristics of digital markets, may both have positive and negative consequences for consumers and competition alike.

The third Chapter investigates the two legal frameworks that are of importance for the purposes of this thesis: competition law and the protection of personal data. The basic principles of those legal frameworks are explained, as well as a comparison of their respective goals. In essence, this Chapter serves as background to the next Chapter. Chapter four investigates how different institutions, both EU and German, have applied data protection considerations in competitive assessments within their respective jurisprudence. Multiple cases are analysed in a chronological perspective for a pedagogical understanding of how the view on data protection in competition law has evolved. Furthermore, this Chapter analyses the Bundeskartellamt decision in the Facebook case as well as the subsequent interim decision by the OLG.

The fifth Chapter contains the main analysis of the thesis. The main question posed on how data protection concerns can be taken into account in the competitive assessment will be answered as well as further analysed as to how they can form part of that assessment. In the sixth and final Chapter the thesis is concluded with a summarisation of its findings as well as a comment from the Author on what the future may hold.

2 The Role of Data in the Digital Era

2.1 Some Key Concepts

2.1.1 Defining 'Data'

As a preliminary point, it must be noted that the term 'data' neither has a common nor legal definition. According to the Merriam-Webster online dictionary, 'data' may be defined as "factual information (such as measurements or statistics) used as a basis for reasoning, discussion, or calculation" or "information in digital form that can be transmitted or processed".[30] On that basis, data could be interpreted very broadly, possibly encompassing every piece of information, irrespective of size, form, or content. Despite its diluted definition, 'data' appears to be colloquially used today in a specific context, namely information that is collected and made digitally available and possibly in a state to be further processed.[31] For the purposes of this thesis, 'data' is therefore used to refer to any piece of information that is made available in a digital form.

Having defined data, it is necessary to establish that data is heterogeneous; in the sense that data is extremely diverse and subsequently there is a plethora of ways to categorise said data.[32] Without wandering too deep into the jungle that is categorising data, it shall here be mentioned one of the most important categorisation methods, namely the *type* of data. Depending on what type of information the data represents, it may be subject to certain regulation and be of varying usefulness to undertakings. For instance, if data constitutes 'personal data' within the meaning of Article 4(1) of the GDPR, such data may be subject to rules laid down in that legislative framework. The following Section will explore this important distinction made between the types of data.

2.1.2 Defining 'Personal Data'

The concept of 'personal data' is defined in Article 4(1) GDPR as meaning "[…] any information relating to an identified or identifiable natural person ('data subject')". As

[30] 'Merriam-Webster: Definition of Data' <https://www.merriam-webster.com/dictionary/data> accessed 17 May 2020.

[31] Cf. Autorité de la Concurrence and Bundeskartellamt, 'Competition Law and Data' (Joint Report, 2016), p. 4; Crémer, de Montjoye, and Schweitzer (n 3), p. 12.

[32] For a more extensive discussion on the different ways of categorizing data, such as methods in which data is collected, see: Autorité de la Concurrence and Bundeskartellamt (n 31), p. 5-7; Crémer, de Montjoye, and Schweitzer (n 3), p. 8 and 74-76.

such, a crucial component for establishing whether the data in question may be subject to the rules set out in the GDPR is determining if it is 'personal'. In accordance with the continuation of Article 4(1), data shall be considered personal data if it allows for the direct or indirect identification of a natural person, and in particular where such identification is enabled:

> "[…] by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person".[33]

Two important caveats should be mentioned before proceeding. First, the GDPR is not applicable in relation to personal data of deceased persons,[34] and secondly, the GDPR does not cover the processing of personal data which concerns legal persons.[35] The wording of Article 4(1) GDPR nonetheless suggests that there is no exhaustive list of which data falls within the definition laid down in that Article, and the Recitals of the GDPR suggests that the concept of personal data should be extensively interpreted.[36] That finding is not only supported by Opinion 4/2007 of the Article 29 Working Party (WP29) when interpreting the DPD, but also the rulings of the CJ.[37] In *Lindqvist*, the Court considered that telephone coordinates and information on a person's hobbies and working conditions 'undoubtedly' was covered by the concept of personal data.[38] In *Patrick Breyer v Bundesrepblik Deutschland*, questions arose whether Internet Protocol addresses (IP addresses) constituted personal data. The Court clarified that for information to be considered personal data, it is not necessary that that information alone allows the data subject to be identified and all information enabling the

[33] GDPR, Article 4(1).
[34] GDPR, Recital 27.
[35] GDPR, Recital 14.
[36] GDPR, Recitals 26 and 30.
[37] WP29, 'Opinion 4/2007 on the concept of personal data' (Opinion, 2007) WP 136, p. 5-6; Tobias Kugler and Daniel Rücker, *New European General Data Protection Regulation: A Practitioner's Guide* (Nomos 2018), p. 14.
[38] Case C-101/01, *Lindqvist*, ECLI:EU:C:2003:596, para. 24; although the concept of personal data was not the main focus, the reasoning in Lindqvist appears to have influenced the Court in reaching its outcome in the case of *Google Spain and Google*, see Case C-131/12, *Google Spain and Google*, ECLI:EU:C:2014:317, para. 26.

identification of the data subject need not be in the hands of one person.[39] In its conclusion, the Court considered that IP addresses may constitute personal data[40], regardless of whether they are dynamic or static.[41] A similar reasoning can be seen in the case of *Scarlet Extended*.[42] Finally, in one of the most recent cases from 2019, *Planet49*, the Court considered that cookies may also be considered personal data, insofar as they enable the identification of a natural person.[43]

Consequently, data that does not relate to an identified or identifiable natural person cannot constitute personal data and will thus fall outside the scope of application any rules pertaining to the protection of personal data, such as the GDPR.[44] Moreover, if personal data is rendered anonymous in such a way that it is no longer possible to identify a data subject, it will not be covered by the concept of 'personal data'.[45] At any rate, it is clear from the wording and structure of the GDPR, as well as the jurisprudence of the CJ, that many forms of data may constitute personal data – meaning that entities that process data need to be attentive whether data protection laws are applicable.

2.1.3 The Rise of 'Big Data' and its Definition

Similar to the situation of 'data', the term 'big data' is a recurring buzzword that lacks common or legal definitions. When looking to various scientific articles, it becomes evident that the notion of big data has been subject to academic discussion since the mid-nineties.[46] In a research note from 2001, analyst Doug Laney discussed new approaches to deal with the business conditions which were 'pushing traditional data management principles to their limits, giving rise to novel, more formalised approaches', as a result of the surge in e-commerce. In that research note, the three main business conditions identified to pose significant challenges were: data volume, data

[39] Case C-582/14, *Patrick Breyer v Bundesrepublik Deutschland*, ECLI:EU:C:2016:779, paras. 41-43.
[40] Case C-582/14, *Patrick Breyer v Bundesrepublik Deutschland*, ECLI:EU:C:2016:779, para. 49.
[41] For an explanation on the distinction, see: Case C-582/14, *Patrick Breyer v Bundesrepublik Deutschland*, ECLI:EU:C:2016:779, para. 36.
[42] Case C-70/10, *Scarlet Extended*, ECLI:EU:C:2011:771, para. 51.
[43] Case C-673/17, *Planet49*, ECLI:EU:C:2019:801, paras. 45 and 67.
[44] Cf. WP29, 'Opinion 4/2007 on the concept of personal data' (n 37), p. 24.
[45] GDPR, Recital 26.
[46] Gil Press, 'A Very Short History of Big Data' (*Forbes*, 9 May 2013) <https://www.forbes.com/sites/gilpress/2013/05/09/a-very-short-history-of-big-data/#17d5d2e265a1> accessed 17 May 2020.

velocity, and data variety.[47] Those conditions are what have become the general defining characteristics of 'big data', or more popularly called 'the three V's of big data'. As seen in in the often-referenced Gartner Glossary, big data may be defined as:

> "high-volume, high-velocity and/or high-variety information assets that demand cost-effective, innovative forms of information processing that enable enhanced insight, decision making, and process automation."[48]

Being a fairly new concept, big data's definition remains subject to debate as some scholars argue to incorporate additional V's in its description, such as data Veracity[49] and data Value.[50] As such, the following Sections will briefly examine the five V's of big data in order to understand it as a concept.

2.1.3.1 Volume

The first and the most ubiquitous of the V's defining big data relates to the incomprehensibly large amounts of data that currently exists and is continuously generated. Though it arguably is impossible to quantify existing data on a worldwide basis, the International Data Corporation (IDC) stated in a white paper that the global data volume in 2018 amounted to 33 zettabytes,[51] a number which is predicted to grow

[47] Doug Laney, '3D Data Management: Controlling Data Volume, Velocity, and Variety' (*META Group*, 6 February 2001) <https://blogs.gartner.com/doug-laney/files/2012/01/ad949-3D-Data-Management-Controlling-Data-Volume-Velocity-and-Variety.pdf> accessed 17 May 2020.

[48] 'Gartner Glossary: Definition of Big Data', <https://www.gartner.com/en/information-technology/glossary/big-data> accessed 17 May 2020.

[49] Tal Z. Zarsky, 'Incompatible: The GDPR in the Age of Big Data' (2017) Vol. 47, No. 4(2) Seton Hall Law Review 995, p. 998-999; Tom Verdonk, 'Planting the Seeds of Market Power: Digital Agriculture, Farmers' Autonomy and the Role of Competition Policy' in Leonie Reins (ed) *Regulating New Technologies in Uncertain Times* (Springer 2019), p. 109; Mira Burri, 'Understanding the Implications of Big Data and Big Data Analytics for Competition Law: An Attempt for a Primer' in Klaus Mathis and Avishalom Tor (eds) *New Developments in Competition Law and Economics* (Springer 2019), p. 242.

[50] OECD, *Supporting Investment in Knowledge Capital, Growth and Innovation* (OECD Publishing 2013) p. 325; Allen P. Grunes and Maurice E. Stucke, 'No Mistake About It: The Important Role of Antitrust in the Era of Big Data' (2015) Antitrust Source, p. 2; Anna Colaps, 'Big Data: Is EU Competition Law Ripe Enough to Meet the Challenge?' in Roberto Mastroianni and Amedeo Arena, *60 Years of EU Competition Law: Stocktaking and Future Prospects* (Napoli 2017) p. 33-34.

[51] A zettabyte (ZB) is a measurement of storage capacity like a gigabyte (GB). Approximately, 1 ZB is equal to that of 1 Trillion GB, or 1 Billion Terabytes (TB), see: Thomas Barnett, 'The Zettabyte Era Officially Begins (How much is That?)' (*Cisco Blogs*, 9 September 2016) <https://blogs.cisco.com/sp/the-zettabyte-era-officially-begins-how-much-is-that> accessed 17 May 2020.

to 175 zettabytes in 2025.[52] A more helpful representation may be demonstrated with the infographic created by Desjardins, visualising what is happening during one minute on the Internet. Amongst other things, the infographic shows that 188 Million e-mails are sent, 1 million users log in to Facebook, and an estimated 3.8 Million search queries are made on Google Search.[53] Increased availability of Internet access in conjunction with reduced costs in collecting, storing, and processing data has led to an overall increase in the *volume* of data that exists as well as the magnitude of data collection.[54]

2.1.3.2 Velocity

Velocity refers to the speed at which data is generated, accessed, processed and subsequently analysed.[55] As seen in the infographic in the Section above, it is quite clear that there is a lot of data generated at an incredible speed. Moreover, the developments in computational power and machine learning algorithms means that the processing time of data sets have been significantly reduced, as well as enabled automatised analysing of data.[56] An important aspect of machine learning algorithms is that the algorithm is self-learning, meaning that it enables autonomous alterations to its output based on the data processed.[57]

2.1.3.3 Variety

As previously mentioned in Section 2.1.1, and as exemplified in the aforementioned infographic, data may come in all shapes and sizes and comprise of virtually any type of information – leading to a wide *variety* in data. Additionally, fusion of different types of data may in turn also create new data, which can help companies in better understanding potential data outcomes.[58] Not only the data may vary, but also the method in which the data is collected and processed. In a recent communication from the Commission, it is

[52] David Reinsel, John Gantz, and John Rydning, 'Digitization of the World – From Edge to Core' (2018) IDC White Paper US44413318, p. 3.
[53] Jeff Desjardins, 'What Happens in an Internet Minute in 2019?' (*Visual Capitalist*, 13 March 2019) <https://www.visualcapitalist.com/what-happens-in-an-internet-minute-in-2019/> accessed 17 May 2020.
[54] Maurice E. Stucke and Allen P. Grunes, *Big Data and Competition Policy* (1st ed, Oxford University Press 2016), p. 17-20.
[55] OECD, *Supporting Investment in Knowledge Capital, Growth and Innovation* (n 50), p. 324.
[56] For a brief history in how computational power has increased, see: Han Hu and others, 'Towards Scalable Systems for Big Data Analytics: A Technology Tutorial' (2014) IEEE Access Vol. 2, 652, p. 655.
[57] Information Commissioner's Office, 'Big Data, Artificial Intelligence, Machine Learning and Data Protection' (2017) Ver. 2.2., p. 7-8.
[58] Stucke and Grunes, *Big Data and Competition Policy* (n 54), p. 21-22.

currently estimated that 80 % of the processing and analysis of data takes place in data centres and centralised computing facilities, and 20 % in smart connected objects such as cars, home appliances or manufacturing robots. By 2025 however, it is predicted that those proportions will be inverted, and most of the data will be collected and subsequently processed by such smart connected objects.[59] This new upcoming phenomenon is known as the 'Internet of Things', or 'industry 4.0', where most technological equipment will essentially be connected to, and communicating via, the Internet, leading to an even more *varied* big data.[60]

2.1.3.4 Veracity

As outlined by Burri, given the increase in volume and variety of data, when data is collected it is bound to be 'messy'.[61] The accuracy and the truth (i.e. *veracity*) behind big data is therefore dependent on having an adequate processing method in order to verify it to its corresponding purpose and subsequently become of commercial value.[62]

2.1.3.5 Value

The fifth and final V, embodying the defining characteristics of the concept of 'big data' is *value,* which refers to the ability to extract the relevant information from big data in order to turn it into something that has a purpose and, hopefully, provides benefits.[63] The potential value of big data is great, but in order to unlock it, companies have to address the other V's of big data. For instance, companies have to have adequate storage solutions to accommodate for its large volume, many processors of high quality to be able to process all the data within reasonable time frames, multiple data-collecting mediums to get a full picture of the relevant data area, and finally smart technologies that may verify the data in relation to its purpose for collection. In the next Section, the value of big data will be examined more thoroughly as this thesis will try to explain how data, personal data, and big data all intersect in the commercial world.

[59] Commission, 'A European Strategy for Data' (Communication, 2020) COM(2020) 66 final, p. 2.
[60] European Parliament, 'Industry 4.0' (Study for the ITRE Committee, 2016), p. 20-22.
[61] Burri (n 49), p. 244.
[62] Autorité de la Concurrence and Bundeskartellamt (n 31), p. 6.
[63] Burri (n 49), p. 244; Stucke and Grunes, *Big Data and Competition Policy* (n 54), p. 23.

2.2 The Commercial Value of Data and Personal Data

2.2.1 General

Regardless of the difficulties of engaging with big data, as manifested by the five V's of big data, undertakings have not been discouraged from approaching it. According to a survey from 2020 on organisations strategies in relation to new technologies, 98.8 % of the 70 respondents reported to be investing in big data and Artificial Intelligence (AI) initiatives, with 46.5 % of those investing over $50 Million. Some of the principle drivers behind said investments were attempts at transforming the company, seeking innovation, attaining competitive advantages, and enabling cost-savings.[64] Taking those facts into account, it appears that data is quite valuable, as companies spend a lot of money on aspects revolving around big data. Indeed, some commentators have even gone so far as to acknowledge data, and personal data, as being the new oil.[65] The Author considers that while oil and data are not comparable as regards quality, the comparison does shed some light as regards how valuable data can really be. The fact that many undertakings with a digital presence offer access to their services, free of monetary costs, and monetising it through the processing of user data is an ample illustration of its potential – which will be further discussed in the following Sections.

2.2.2 Potential Data-derived Benefits

As shown in the survey presented in the Section above, some of the principal drivers for investing in big data and AI technologies are transformation, innovation, competition, and price reductions. Moreover, and as stated by Lerner, "The widespread collection of customer data by firms of all types and sizes indicates that there are important procompetitive reasons for the collection of user data by online providers."[66] There is a general consensus in academia that undertakings benefit from an increase in disclosure,

[64] NewVantage Partners, 'Big Data and AI Executive Survey 2020' (2020), p. 8-9 <http://newvantage.com/wp-content/uploads/2020/01/NewVantage-Partners-Big-Data-and-AI-Executive-Survey-2020-1.pdf> accessed 17 May 2020.

[65] 'The World's Most Valuable Resource is no Longer Oil, but Data' (*The Economist*, 6 May 2017) <https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data> accessed 17 May 2020; Meglena Kuneva, 'Keynote Speech' (Roundtable on Online Data Collection, Targeting and Profiling, Brussels, 31 March 2009) SPEECH/09/156 <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_09_156> accessed 17 May 2020.

[66] Andres V. Lerner, 'The Role of "Big Data" in Online Platform Competition' (2014), p. 10 <https://ssrn.com/abstract=2482780> accessed 17 May 2020.

collection and processing of personal data.[67] Some of the most prevalent practices will therefore be more closely examined, to illustrate how data is used and how it may have pro-competitive effects.

2.2.2.1 Quality Improvements to a Product or Service

A very traditional approach on collecting and using data is rating and review systems. Through such systems, consumers may submit information on its experience with the commodity in question, enabling the producer or service provider to develop its production and deliver a better product to the consumers. Rating and review systems are utilised by brick-and-mortar firms as well as undertakings with a digital presence.[68] Some markets in which such forms of data processing are key in are 'vertical' search engine providers, which are used to find results relating to a particular type of service or product.[69] Some of the more well-known vertical search engines are hotel booking services (like Hotels.com and Trivago.com), flight booking services (like Expedia.com and Booking.com), and general travel services (Tripadvisor.com and Yelp.com). In a survey conducted by a company on the behalf of TripAdvisor, 96 % of the 14 996 respondents considered reading reviews 'important' when planning trips and booking hotels, and 83 % would 'usually' or 'always' reference review before deciding to book a hotel.[70]

A less conventional, but more direct, way of improving products and services that has been enabled in the age of big data is through the usage of algorithms. Companies that provide search engine services often utilise complex algorithms in order to help improve the results listed after users' search queries, such as based on the users' location, age,

[67] Samson Esayas 'Competition in (Data) Privacy: 'Zero' Price Markets, Market Power and the Role of Competition Law' (2018) International Data Privacy Law 8(3); Marco Botta and Klaus Wiedemann, 'The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey' (2019) 64(3) Antitrust Bulletin 428, p. 430; Alessandro Acquisiti, Curtis Taylor, and Liad Wagman, 'The Economics of Privacy' (2016) Journal of Economic Literature Vol. 54(2), 442, p. 444-445.

[68] Lerner (n 66), p. 9;

[69] For a distinction between different types of search engines, see: Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility* (Kluwer Law International 2016), p. 10.

[70] Phocuswright, 'Custom Survey Research Engagement' (2015) <https://www.tripadvisor.com/TripAdvisorInsights/w661> accessed 17 May 2020.

and search history (personal) data.[71] Moreover, most websites track user activity with cookies, helping the service providers in detecting and analysing technical issues with the functioning of their services and websites.[72]

2.2.2.2 Personalised Experiences and Targeted Advertising

Big data has led to companies being able to rely on algorithms in order to establish behavioural patterns on consumer behaviour. With the help of such algorithms, the preferences of a user of a specific service or product may be established, which may enable the undertakings to deliver a product or service that corresponds with the preferences of the created user-model. In the context of online advertising, this process is known as 'targeted advertising' and 'behavioural targeting', as the advertisements presented to individuals are based on the user-models created by their own online habits. In this connection, not only the users may benefit from more relevant advertisements, but the online advertisement service becomes more attractive from the perspective of the actual advertisers.[73]

Although such practices can be considered as a form of invasion of privacy, it conversely may be argued that it enables companies to avoid serving uninteresting advertisements to people at random, thus minimising the intrusion. Indeed, 42 % of 21 707 respondents from all 28 Member States of the EU (now 27)[74] in the Special Eurobarometer on Data Protection from 2015 reported that they were comfortable with targeted advertising.[75]

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[71] Damien Geradin and Monika Kuschewsky, 'Competition Law and Personal Data: Preliminary Thoughts on a Complex Issue (2013), p. 3 <https://ssrn.com/abstract=2216088> accessed 17 May 2020; Autorité de la Concurrence and Bundeskartellamt (n 31) p. 9; Lerner (n 66), p. 10-11.

[72] Examples of such usage of cookies may be seen in the cookie policies of Google, and Facebook, see respectively: Google, 'Types of Cookies used by Google' <https://policies.google.com/technologies/types?hl=en-US> accessed 17 May 2020; Facebook, 'Cookies & other storage technologies' <https://www.facebook.com/policy/cookies/> accessed 17 May 2020.

[73] Torsten Körber, 'Is Knowledge (Market) Power? – On the Relationship Between Data Protection, 'Data Power' and Competition Law' (2018), p. 4 <https://ssrn.com/abstract=3112232> accessed 17 May 2020; Geradin and Kuschewsky (n 71), p. 3; Autorité de la Concurrence and Bundeskartellamt (n 31) p. 10-11.

[74] Note that the United Kingdom has since withdrawn from the EU and ceased being a Member State on 1 February 2020, see: Commission, 'Questions and Answers on the United Kingdom's withdrawal from the European Union on 31 January 2020' <https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_104> accessed 17 May 2020.

[75] More specifically, the participants were asked "How comfortable are you with the fact that […] websites use information about your online activity to tailor advertisements or content to your hobbies and interests?". 36 % were 'fairly comfortable', 6 % were 'very comfortable', 36 % were 'fairly

2.2.2.3 Cost Reductions and Alternative Monetisation

A third aspect, which is inextricably linked to all the previously mentioned, is that the processing of data and personal data may enable certain cost reductions. Utilising data in the context of targeted advertising will help undertakings reduce advertising costs, as companies will have an easier time in targeting and serving the most relevant advertisements to their respective target audience.[76] In turn, consumers will also potentially benefit from various cost reductions, as targeted advertising increases the likelihood that the right commodity is advertised to the right consumer and it is more likely that the consumer receives advertisements on products that better suit his or hers preferences (lower search costs).[77] Additionally, targeted advertising in conjunction with big data has also facilitated the creation of a new business model in which no monetary costs are incurred on a specific consumer on the market, namely online platforms.

2.2.3 Multi-sided Markets and Online Platforms

As noted by Jones and Sufrin, there has been a recent explosion in online platforms in the new economy, such as search engines, comparison shopping services, and social media networks.[78] Indeed, some of the most lucrative businesses in terms of market capitalisation are in fact companies that engage in various data-related business like Apple, Amazon, Microsoft, and Alphabet (Google).[79] All the aforementioned companies, as well as other companies like Facebook, Tripadvisor, and eBay thrive in multiple markets and yet, they charge no fees for actually using their respective online platform services. Instead, data is used as an asset to monetise the services provided. Seeing as online platforms constitute a core part of the new economy, it is necessary to examine those particular markets more thoroughly.

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uncomfortable', 17 % were 'very uncomfortable' and 5 % responded 'don't know'; see: Commission, 'Eurobarometer 431 – Data Protection' (Report, 2015), p. 39-41.

[76] Pierre Larouche, Martin Peitz, and Nadya Purtova, 'Consumer Privacy in Network Industries' (2016) CERRE Policy Report, p. 19-20; Autorité de la Concurrence and Bundeskartellamt (n 31), p. 10.

[77] Ibid.

[78] Jones and Sufrin (n 2), p. 48.

[79] Crémer, de Montjoye, and Schweitzer (n 3) p. 13.

‘Multi-sided markets’ refers to markets in which undertakings simultaneously compete for more than one group of consumers.[80] Although not all multi-sided markets are online platforms, those are indubitably the most commonplace markets that exist in the digital era which are of a multi-sided nature. Online platforms, also known as ‘networks’[81], is a term that is used to describe digitally active businesses that act as an intermediary between different groups of consumers on various markets.[82] Intermediaries between market players creates a triangular relationship, a defining characteristic of platforms, which in the context of online platforms often is between the users (private individuals), the platform (such as Facebook), and the producers (advertisers). Instead of requiring fees, revenue is created through the collection of user data, which is then passed on to the producers who subsequently pay the platform to display advertisements that correlate to the established user-models’ preferences. Thus, value is created by streamlining the interactivity between two separate consumer groups: the core business model of online platforms. Taking the aforementioned into account, competition in online platforms takes place in several ways as illustrated by Stucke and Grunes:

> “Competition […] takes place in several areas: first, on non-price parameters (such as quality, which includes privacy protections and innovation) on the ‘free’ side of the market; second, on the ‘paid’ side of the multi-sided market (such as advertising); and third, among firms to collect valuable data as a key input across different markets.”[83]

As exemplified in the preceding Section, an online platform setup can be extremely lucrative. Some of the reasons for why online platforms are so large and profitable is because those markets enjoy economies of scale and network effects, which are receiving increased returns in the digital era.[84]

[80] Jones and Sufrin (n 2), p. 49.
[81] Crémer, de Montjoye, and Schweitzer (n 3) p. 22.
[82] Commission, ‘Online Platforms and the Digital Single Market Opportunities and Challenges for Europe’ (Communication, 2016) COM(2016) 288 final, p. 2-3; Graef (n 69), p. 9.
[83] Stucke and Grunes, *Big Data and Competition Policy* (n 54), p. 116.
[84] Crémer, de Montjoye, and Schweitzer (n 3) p. 15.

2.2.3.1 Economies of Scale

As already demonstrated above, undertakings that wish to enter markets that revolve around big data have to make substantial investments, such as acquiring the necessary data storage equipment, adequate server facilities, and developing advertising tools and necessary algorithms. In economic terms this translates to that digital markets, such as online platforms, are characterised by having high fixed costs, constituting a barrier to entry for potential entrants to such markets.[85] Moreover, costs of transmitting data are very low in relation to the number of consumers that are capable of being served.[86] This means that once an online platform is up and running, the operator *may* be able to recuperate the sunk costs that preceded the investment. However, in order to do that profitably, and within a reasonable timeframe, it is necessary to have a large customer base on both sides of the online platform. Incumbents in online platform markets therefore enjoy competitive advantages in the form of economies of scale, and potential market entrants are at a disadvantage because of the aforementioned.[87] Moreover, due to network effects and positive feedback loops, market entry becomes even more difficult in digital markets.

2.2.3.2 Network Effects

Network effects is a term that is used to describe how a product or service becomes more valuable with increased usage. Network effects can either be direct or indirect. Direct network effects concerns the situation where the product or service increases in value in relation to its number of users. Indirect network effects occur when increased usage of a product increases a complementary product's or service's value.[88]

Direct and indirect network effects are prevalent on most digital markets, and especially in online platforms. Using Facebook as an example, it enjoys *direct network effects* as increases to the number of users connected to Facebook will incite people to join Facebook rather than a less populated social-network, as it is more likely that they will be able to interact with more friends, colleagues, and others. Another form of direct network effects can also be considered in the context of search engines, in which the

[85] Case C-27/76, *United Brands v Commission*, ECLI:EU:C:1978:22, para. 122; Graef (n 69), p. 32-33.
[86] Crémer, de Montjoye, and Schweitzer (n 3) p. 20.
[87] Jason Furman and others, Unlocking Digital Competition: Report of the Digital Competition Expert Panel (UK Government, 2019), p. 32.
[88] Jason Furman and others (n 87), p. 35; Jones and Sufrin (n 2), p. 48; Graef (n 69), p. 33-35.

value of the product or service increases *indirectly* through its usage. An example of this would be how search engine algorithms become more accurate, and display more relevant results, when it has more data to process and learn from.[89] Additionally, Facebook enjoys *indirect network effects* in the sense that, as a vehicle for serving advertisements, it will become more attractive to producers as more users on the platform equals a broader advertisement audience and potential customer basis.

The aforementioned gives rise to positive 'feedback-loops', in which an online platform can cement its position and incrementally become more attractive for both sides of the parties to the platform. As aptly illustrated in a background note from the Organisation for Economic Cooperation and Development (OECD), companies may on the one hand collect more data to autonomously improve the quality of the service provided, thereby attracting more users to its service. On the other hand, companies may collect more data to improve the advertisement and monetisation of the service, leading to more funds to invest in the quality of the service and thus also attracting more users.[90]

Strong network effects, in combination with positive feedback loops, creates a risk that a market will 'tip' in favour of an incumbent once it reaches a certain scale. Rather than having competition *in* a given market, the competition takes place *for* the market, in which the proverbial saying 'the winner takes it all' applies. Indeed, as has been noted by the Commission, some of the largest companies have already occupied some markets.[91]

2.3 Considerations Relating to Personal Data

In Section 2.2 some of the effects of processing data and personal data were presented. Additionally, some of the defining characteristics of online platforms were discussed. In this Section, the aspect that will be subject to scrutiny is whether the current situation as regards data processing gives rise to concerns related to the protection of personal data.

[89] Marc Bourreau and Alexandre de Streel, 'Digital Conglomerates and EU Competition Policy' (2019), p. 14 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3350512> accessed 17 May 2020.
[90] OECD, 'Big Data: Bringing Competition Policy to the Digital Era' (Background note, 2016), p. 10.
[91] Crémer, de Montjoye, and Schweitzer (n 3) p. 13; see also: Bourreau and de Streel (n 89), p. 19.

2.3.1 The 'Privacy Paradox'

At the risk of stating the obvious, individuals may be keen on keeping their personal data private. Personal data may be misused, not only in situations where malicious intent is involved, but other situations in which its usage does not correspond to the expectations of the person concerned. In the Special Eurobarometer on Data Protection, the top five risks associated with providing personal information online were (1) becoming a victim of fraud, (2) having one's online identity used for fraudulent purposes, (3) having one's information used without knowledge, (4) having one's personal information stolen, and (5) having one's information shared with third parties without prior consent.[92] Moreover, it is also clear from the same study that a majority of people *are* concerned about the misuse of personal data,[93] and almost two thirds of the respondents did not trust online businesses like search engines to protect their personal information.[94] In that connection, one of the principle drivers for introducing the GDPR was to address the widespread public perception that there are significant risks to data protection, in particular with regard to online activity.[95]

At any rate, it would be reasonable to assume that most people, who are concerned about the handling of their personal data, would also endeavour to take reasonable steps in protecting such data. However, only 18 % of the 21 707 respondents stated that they fully read privacy statements, 49 % read them partially, and 31 % did not read them at all.[96] These results excellently illustrate the 'privacy paradox'; the phenomenon that a majority of individuals claim to care about privacy and data protection, yet do not act in accordance with those purported preferences.[97]

[92] Commission, 'Eurobarometer 431' (n 75), p. 100-101.
[93] Commission, 'Eurobarometer 431' (n 75), p. 68.
[94] Commission, 'Eurobarometer 431' (n 75), p. 63.
[95] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)' (Communication, 2012) COM(2012) 11 final, p. 2; GDPR, Recital 9.
[96] Commission, 'Eurobarometer 431' (n 75), p. 84.
[97] Botta and Wiedemann, 'The Interaction of EU Competition, Consumer, and Data Protection Law' (n 67), p. 432; Acquisiti, Taylor, and Wagman (n 67), p. 476-477; Wolfgang Kerber, 'Digital Markets, Data and Privacy: Competition Law, Consumer Law and Data Protection (2016) MAGKS Joint Discussion Paper Series in Economics No. 14-2016, p. 6.

2.3.2 Market Failures which Need Addressing

The privacy paradox is problematic in the context of the new economy for several reasons, the main one being that the demand for increased data protection remains unsatisfactorily met by the market forces. In such a situation a market failure arises, which may or may not need regulatory intervention in order to resolve. The risk of such a market failure is particularly high in online platforms due to power asymmetries and information asymmetries.

First, as regards power asymmetries, it was established in Section 2.2.3 that digital markets and especially online platforms enjoy economies of scale and network effects which in turn facilitates market concentration. Consequently, users may have limited choice as to which service provider to choose, and in the end, only one relevant provider may remain if the network effects and positive feedback loops are sufficiently strong, giving rise to a 'natural monopoly'. In such a situation, the choice available in a given market becomes very narrow and companies may be in a position to abuse that market power.

Second, information asymmetries arise in online platforms. As a preliminary point, the lack of information on the user may partly be attributed on the previously established fact that, statistically, people tend to not fully read privacy statements. However, the reason for not reading them might not be only because they are negligent as to the protection of their personal data, but rather on other factors. Once again looking to the Special Eurobarometer on Data Protection, out of the 17 356 respondents who did not fully read privacy statements, 67 % considered them too long to read, 38 % found them unclear and too difficult to understand, and 15 % considered that the websites would not honour them anyway.[98] As was shown in Section 2.2, undertakings generally profit from an increase in collection of personal data, which indicates that companies do not have an incentive to draft short and clear privacy statements.

The combination of user cynicism (in form of the privacy paradox) and the lack of incentive of undertakings to cater for the demand for privacy lead to a certain

[98] Commission, 'Eurobarometer 431' (n 75), p. 87.

phenomenon that has been named the 'dysfunctional equilibrium' by commentators such as Farrell[99] and Esayas,[100] and can be summarised as follows:

1. Few consumers show interest in having a higher level of data protection than that already offered by undertakings.
2. Undertakings therefore consider that there is no profitable incentive to pursue a higher level of data protection.
3. The undertakings adopt privacy statements and business choices that maximise revenue (i.e. collecting more personal data), and competing undertakings follow suit in order to stay competitive.
4. Consumers perceive that undertakings behave in the same way, not 'caring' about the protection of personal data and essentially offer the same conditions.
5. Consumers consider that reading privacy statements will not be a rewarding activity as undertakings offer the same conditions.

This cycle means that a dysfunctional equilibrium is very difficult in escaping. It is especially problematic from a competition law perspective as even if a smaller new entrant to the market would like to break up the equilibrium, that ability is limited because consumers do not reward such behaviour. More protective privacy statements will therefore only lead to a reduction in revenue gained from personal data (potentially leading to it having to foreclose). As Farrell argues, to break the dysfunctional equilibrium it is required action by the larger players on the market.[101] However, as already shown in Section 2.2, increases to data collection are in the general interest of companies, which is why such action remains unlikely without regulatory intervention.

2.4 Interim Summary: The Role of Data

Data, personal data, and big data are all concepts that have become increasingly important in society at large. Not only do they present themselves as vital information, there is a lot of economic value attached as well. Undertakings may engage in various

[99] Joseph Farrell, 'Can Privacy be Just Another Good?' (2012) Journal on Telecommunications and High Technology Law Iss. 2, 251, p. 256-259.
[100] Samson Esayas, 'Data Privacy in European Merger Control: Critical Analysis of Commission Decisions Regarding Privacy as a Non-Price Competition' (2019) European Competition law Review 40(4), 166, p. 19-22.
[101] Farrell (n 99), p. 259.

data processing practices in order to gain efficiencies: usually connected with quality improvements, personalised customer experiences, and reduced costs at different levels of production. Such efficiencies are also generally extended to private individuals.

Given how personal data usually forms part of the business model of digitally present companies in the new economy, those practices may conversely give rise to data protection concerns. Many individuals are concerned about what happens to their personal data shared with companies, yet studies show that individuals seldom act in ways to protect their personal data. This privacy paradox can be attributed, on the one hand to the fact that many digital markets are occupied by extremely large and influential undertakings, giving users little choice but accepting their terms, and on the other hand the so called dysfunctional equilibrium – keeping the market players from developing and competing on data protection.

3 Interactions between EU Competition Law and Data Protection Law

3.1 General

EU competition law and data protection law share a number of similarities, but they also have their own peculiarities. In the following Sections, the basics of EU competition law and EU data protection law will be summarised in order to determine their respective objectives and enforcement methods.

3.2 EU Competition Law

3.2.1 The Goals of EU Competition Law

When the Lisbon Treaty entered into force on 1 January 2009, Article 3(1)(g) EC[102] was repealed, which laid down an obligation that the activities of the Union shall include a system ensuring that competition in the internal market is not distorted. That obligation was moved to Protocol No. 27,[103] annexed to the Treaties, which provides that the internal market, as set out in Article 3 TEU, includes a system ensuring that competition is not distorted. Article 51 TEU affirms that Protocols and Annexes to the Treaties form an integral part thereof, thus constituting primary law. Moreover, as seen in the case-law of the CJ, Protocol No. 27 has been relied upon when interpreting competition law frameworks.[104] As such, it is clear that when the EU is fulfilling its objective to establish an internal market, in accordance with Article 3(3) TEU, it must be pursued in such a way that competition is not distorted. While the Protocol may show the function of EU competition law, it does not explain the objectives and policy considerations that should be guiding to its application. As for Articles 101 and 102 TFEU, they provide substantive rules in relation the enforcement of competition law and do not further specify any objectives. This ambiguity does give EU competition law some flexibility, but likewise, uncertainty. Indeed, the scope of protection and objectives which EU competition law shall pursue is still subject to vigorous debate.[105] Nevertheless, one of

[102] Consolidated Version of the Treaty Establishing the European Community [2002] OJ C 325/33.
[103] Protocol (No 27) on the internal market and competition [2016] OJ C 202/308.
[104] Case C-52/09, *TeliaSonera Sverige* ECLI:EU:C:2011:83, para. 20; Case C-496/09, *Commission v Italy* ECLI:EU:C:2011:740, para. 60.
[105] Jones and Sufrin (n 2), p. 34.

the most recurring themes is that EU competition policy seeks to enhance *consumer welfare*.

The Commission has consistently held that it focuses on preventing conduct that is harmful to consumers. In the guidelines on the application of Article 101(3) TFEU (ex Article 81 EC), it is specified that "The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources."[106] Similarly in relation to Article 102 TFEU (ex Article 82 EC), it is stated in the Commission's guidance on the enforcement priorities in applying Article 102 TFEU that the Commission will "[…] focus on those types of conduct that are most harmful to consumers. Consumers benefit from competition through lower prices, better quality and a wider choice of new or improved goods and services."[107] The focus on consumer welfare is apparent from many other documents from the Commission.[108] In applying EU competition policy, the Commission is influenced by a 'more economic approach'. It focuses on the effects of certain conduct on consumer welfare, in which reliance on economic methods for establishing facts are paramount.[109]

Notwithstanding the guidance from the Commission, the goals of EU competition law have also been revealed in the jurisprudence of the CJEU. The CJEU have not completely accepted the consumer welfare approach, as proposed by the Commission, but appears to at least consider it being part of the overall objective of EU competition law. In the judgement of *Österreichische Postsparkasse v Commission*, the General Court (GC) considered that the "[…] ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of

[106] Commission, 'Guidelines on the Application of Article 81(3) of the Treaty' (Communication, 2004) OJ C 101/08, para. 13.
[107] Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' (Communication, 2009) OJ C 45/02, para. 5.
[108] See, e.g: Commission, 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' (Communication, 2004) OJ C 31/03, para. 8; Commission, 'Guidelines on the assessment of non-horizontal mergers' (Communication, 2008) OJ C 265/6, para. 10; Commission, 'Guidelines on Vertical Restraints' (Information, 2010) OJ C 130/01, para. 7; Commission, 'Guidelines on technology transfer agreements' (Communication, 2004) OJ C 89/03, para. 5.
[109] Jones and Sufrin (n 2), p. 37-40.

consumers."[110] That approach, bearing striking resemblance to that of the Commission, was later affirmed by the GC in a judgement delivered three months later, in the seminal case of *GlaxoSmithKline Services v Commission*.[111] That case was later appealed before the CJ in which the CJ reiterated the aims of the EU competition law framework:

> "[…] like other competition rules laid down in the Treaty, Article 81 EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price […]"[112]

The CJEU has since repeatedly held that EU competition law seeks to prevent conduct, entailing that consumers may be harmed directly, or conduct which, through their impact on an effective competition structure as such, indirectly causes harm to consumers.[113] Those cases also show that the term 'consumer' does not only encompass the final consumer but intermediate customers as well.[114] To that end, EU competition law tries to enhance consumer welfare in three main ways, (1) by intervening against anticompetitive collusion between undertakings (Article 101 TFEU), (2) preventing abusive behaviour of dominant undertakings (Article 102 TFEU), and (3) precluding concentrations that would significantly impede effective competition (EUMR).

3.2.2 Enforcing EU Competition Law

The EU competition law framework is applicable in relation to 'undertakings', a concept defined as 'any entity that is engaged in an economic activity, regardless of the

[110] Joined Cases T-213/01 and T-214/01, *Österreichische Postsparkasse v Commission*, ECLI:EU:T:2006:151, para. 115.
[111] Case T-168/01, *GlaxoSmithKline Services v Commission*, ECLI:EU:T:2006:265, para. 118.
[112] Case C-501/06 P, GlaxoSmithKline Services and Others v Commission and Others, ECLI:EU:C:2009:610, para. 63.
[113] Case T-286/09, *Intel v Commission* ECLI:EU:T:2014:547, para. 105; Case C-280/08 P, *Deutsche Telekom v Commission*, ECLI:EU:C:2010:603, para. 176; Case C-52/09, *TeliaSonera Sverige*, ECLI:EU:C:2011:83, para. 24; Case C-209/10, *Post Danmark (I)*, ECLI:EU:C:2012:172, para. 20 and 44; Case C-23/14, *Post Danmark (II)*, ECLI:EU:C:2015:651, para. 69.
[114] Jones and Sufrin (n 2), p. 39-40.

legal status of the entity and the way in which it is financed'.[115] In that connection, the CJ has consistently held that the offering of goods and services on a market is an economic activity.[116]

Article 101(1) TFEU prohibits agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between Member States, and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. As such, there are two types of restrictions: the first being conduct which is presumed to have negative effects on competition (restriction by object) and the second one being conduct which must be proven to have negative effects on competition (restriction by effect). Restrictions by object are generally established through the experience gathered by the Court, and in particular where the conduct reveals a 'sufficient degree of harm to competition' in light of its legal and economic context.[117]

Article 102 TFEU prohibits any abuse by one or more undertakings of a dominant position in the internal market, or a substantial part of it, in so far as it affects trade between Member States. A common distinction is made between exclusionary and exploitative abuses; the former concerns the situation where the dominant undertaking excludes competitors from the relevant market, and the latter refers to where a dominant undertaking exploits its customers directly. Article 102(a) TFEU provides a non-exhaustive list of exploitative abuses, such as the imposition of unfair prices and trading conditions. Another aspect of importance in relation to Article 102 TFEU is that the CJ has established that once an undertaking enjoys a dominant position in certain market, it has a *special responsibility* to not allow its conduct to impair genuine undistorted competition on the common market.[118] It is still permitted to engage in competition on

[115] Case C-41/90, *Höfner and Elser v Macrotron*, ECLI:EU:C:1991:161, para. 21; Joined Cases C-180 to 184/94, *Pavlov and Others*, ECLI:EU:C:2000:428, para. 74; Case C-138/11, *Compass-Datenbank*, ECLI:EU:C:2012:449, para. 35.
[116] Case C-475/99, *Ambulanz Glöckner*, ECLI:EU:C:2001:577, para. 19; Case C-205/03 P, *FENIN v Commission*, ECLI:EU:C:2006:453, para. 25; Case C-138/11, *Compass-Datenbank*, ECLI:EU:C:2012:449, para. 35.
[117] Case C-32/11, *Allianz Hungária Biztosító and Others*, ECLI:EU:C:2013:160, para. 46; Case C-373/14, *Toshiba Corporation v Commission*, ECLI:EU:C:2016:26, para. 27.
[118] Case C-322/81, *Michelin v Commission*, ECLI:EU:C:1983:313, para. 57; Case C-202/07, *France Télécom v Commission*, ECLI:EU:C:2009:214, para. 105; Case C-209/10, *Post Danmark (I)*, ECLI:EU:C:2012:172, para. 23.

the merits, and the CJ was adamant to clarify that Article 102 TFEU is not designed to protect less efficient competitors.[119] Although unclear, it appears that the degree of dominance in the market concerned may be relevant in assessing the scope of the special responsibility imposed on dominant undertakings.[120]

The prohibitions laid down in Article 101(1) TFEU and Article 102 TFEU may be rendered inapplicable if certain conditions are met. In relation to Article 101 TFEU, paragraph 3 thereof provides four cumulative conditions which the restrictive practice needs to meet in order to be justified: it shall (1) contribute to improving the production or distribution of goods or promote technical or economic progress, (2) allow consumers a fair share of the resulting benefit, (3) not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, and (4) not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. Article 102 TFEU does not expressly provide the same derogation to that of Article 101(3) TFEU, however, the Commission considers that essentially the same conditions shall be applied in relation to abuses of dominant positions.[121] Moreover, it is clear from the case-law of the CJ that an abuse of a dominant position, *a priori* prohibited by Article 102 TFEU, may be justified.[122]

3.3 EU Data Protection Law

3.3.1 Data Protection as a Fundamental Right

Following the entry into force of the Lisbon Treaty in 2009, at the same time as the creation of Protocol No. 27, a wide variety of provisions entered into force which specifically regulates the protection of personal data and individuals' right to privacy. Article 16 TFEU was introduced, in paragraph 1 granting everyone the right to protection of personal data concerning them, and in paragraph 2 providing a new legal

[119] Case C-209/10, *Post Danmark (I)*, ECLI:EU:C:2012:172, paras. 22-25.
[120] Case C-333/94 P, *Tetra Pak v Commission*, ECLI:EU:C:1996:436, para. 24; Case C-52/09, *TeliaSonera Sverige*, ECLI:EU:C:2011:83, para. 81; Case C-209/10, *Post Danmark (I)*, ECLI:EU:C:2012:172, para. 23.
[121] Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings' (n 107), para. 28.
[122] Case C-27/76, *United Brands v Commission*, ECLI:EU:C:1978:22, para. 184; Case C-95/04 P, *British Airways v Commission*, ECLI:EU:C:2007:166, para. 69; Case C-209/10, *Post Danmark (I)*, ECLI:EU:C:2012:172, para. 42.

basis for the adoption of rules relating to the protection of personal data. More importantly, the CFREU entered into force, and within it: Article 7, concerning the respect for private and family life, and Article 8, on the protection of personal data. Article 6 TEU stipulates that the provisions of the CFREU have the same legal value as the Treaties, putting the CFREU on the same level on the hierarchy of norms as primary law. Article 8(1) CFREU provides an identical protection as Article 16(1) TFEU. Additionally, Article 8(3) CFREU provides that compliance with the rules laid down in Article 8 shall be subject to control by an independent authority, similarly as Article 16(2) TFEU. A difference between the two Articles emerges in Article 8(2) CFREU, where it is further specified requirements in relation to the processing of personal data:

> "Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified."

Pursuant to Article 51(1) CFREU, the provisions enshrined in the CFREU are applicable in relation to the institutions, bodies, offices and agencies of the EU, and the Member States when they are implementing EU law. Further, that Article states that those entities shall respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.

3.3.1.1 The Right to Privacy and Right to Data Protection

Although 'data protection' and 'privacy' may, to some extent, be interchangeable terms, there are differences between the two which require elucidation. Article 7 CFREU provides that "Everyone has the right to respect for his or her private and family life, home and communications" and Article 8(1) provides that "Everyone has the right to the protection of personal data concerning him or her". As such, it is clear that the two rights have some similarities, that is granting protection to certain information and aspects that are of a personal and private nature. Indeed, the CJ has stated that the fundamental right enshrined in Article 8(1) CFREU is 'closely connected' with the right

to respect of private life, as laid down in Article 7 CFREU.[123] Moreover, in *Volker und Markus Schecke and Eifert*, the CJ quite confusingly stipulated that a right to respect for private life, with regard to the processing of personal data, is recognised by Articles 7 *and* 8 CFREU.[124] In the light of that statement, one might pose the question whether the rights are identical as to their scope? As argued by Kokott and Sobotta, it is the position of the Author that the answer to that question must be in the negative.[125] That finding is supported in two ways.

First, the rights enshrined in Articles 7 and 8 CFREU are derived from different sources. While not being a binding legal instrument,[126] the explanations to the CFREU shows that Article 7 CFREU corresponds to the rights guaranteed by Article 8 of the ECHR, whereas Article 8 CFREU is based on multiple legal sources.[127] From the wording of the CJ in the case *Promusicae*, the case where the CJ for the first time acknowledged the existence of a stand-alone right to personal data protection, it appears that the explanations to the charter are correct.[128] In accordance with Article 52(3) CFREU, the case-law of the ECtHR is guiding as to defining the scope of Article 8 ECHR, and subsequently the scope of Article 7 CFREU, but not necessarily Article 8 CFREU.[129]

Second, having established the relationship between Article 7 CFREU and Article 8 ECHR, Article 7 and 8 CFREU have different substantive scopes. At the risk of stating the obvious, the right to private life may be applicable in situations where personal data is not involved, whereas the right to data protection cannot – meaning that the Article 7 CFREU can be considered as having a wider substantive scope.[130] However, in situations which *do* concern personal data, the roles are arguably reversed. The ECtHR

[123] Case C-92/09, *Volker und Markus Schecke and Eifert*, ECLI:EU:C:2010:662, para. 47; Joined Cases C-468/10 and C-469/10, *ASNEF*, ECLI:EU:C:2011:777, para. 41.
[124] Case C-92/09, *Volker und Markus Schecke and Eifert*, ECLI:EU:C:2010:662, para. 52; see also: Joined Cases C-468/10 and C-469/10, *ASNEF*, ECLI:EU:C:2011:777, para. 42.
[125] Juliane Kokott and Christoph Sobotta, 'The Distinction Between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR' (2013) International Data Privacy Law Vol. 3(4).
[126] According to Article 52(7) CFREU, the explanations of the CFREU provide guidance as to its interpretation, and "shall be given due regard by the courts of the Union and of the Member States".
[127] Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17.
[128] Case C-275/06, *Promusicae*, ECLI:EU:C:2008:54, para. 64.
[129] See to that effect: Case C-400/10 PPU, *McB*, ECLI:EU:C:2010:582, para. 53; Case C-256/11, *Dereci and Others*, EU:C:2011:734, para. 70; Case C-419/14, *WebMindLicences*, ECLI:EU:C:2015:832, para. 70.
[130] Kokott and Sobotta (n 125), p. 225.

has stressed in its case-law that *temporal* aspects, as well as the fact whether the personal information has been *systematically collected*, play important roles in determining whether the situation falls within the scope of Article 8 ECHR, as is most clearly illustrated in the recent case of *M.M.*[131] (but previously hinted in the older cases of *Rotaru v Romania* and *Segerstedt-Wiberg and Others v Sweden*)[132]. This approach may lead to the situation where personal data is processed, but nonetheless, does not amount to an infringement of the right to private life. In *Österreichischer Rundfunk and Others*, the CJ considered that a mere recording could not constitute an interference with the right to private life. However, any subsequent communication of that personal data to third parties *would* amount to an infringement of that right.[133] Similarly in the case of *Bavarian Lager*, the GC stipulated that while the right to protection of personal data may constitute one of the aspects of the right to private life, that "[…] does not mean that all personal data necessarily fall within the concept of 'private life'". It continued by stating that not all personal data are by their nature capable of undermining the private life of a person.[134]

As such, it is clear that while the collection and storing of personal information may interfere with the right to privacy, as enshrined in Article 8 ECHR and Article 7 CFREU, not all processing of personal data may amount to an infringement of a person's right to private life. Conversely, the right to data protection in Article 8 CFREU is applicable in relation to *all* data falling within the definition of 'personal data' – which, as discussed Section 2.1.2, is a very broad concept. Despite the similarities and interconnectivity between Articles 7 and 8 CFREU, the CJ appears to be moving towards only applying one of the Articles in relation to matters concerning personal data – namely Article 8 CFREU.[135] On that note, and to finalise this Section, their relationship may be metaphorically summarised, as done by Tzanou in 2013, as a 'parent-child relationship':

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[131] ECtHR, *M.M. v UK*, App. No. 24029/07 (13 November 2012), para. 188.
[132] See respectively: ECtHR, *Rotaru v Romania*, App. No. 28341/95 (4 May 2000), paras. 43-44; ECtHR, *Segerstedt-Wiberg and Others v Sweden*, App. No. 62332/00 (6 June 2006), para. 72.
[133] Joined Cases C-465/00, C-138/01 and C-139/01, *Österreichischer Rundfunk and Others*, ECLI:EU:C:2003:294, paras. 74-75.
[134] Case T-194/04, *Bavarian Lager v Commission* ECLI:EU:T:2007:334, paras. 118-119.
[135] Gloria González Fuster, The Emergence of Personal Data Protection as a Fundamental Right of the EU (Springer 2014), p. 236-245.

> "Data protection appeared as an offspring of privacy and the two rights still seem inextricably tied up together with a birth cord. However, -as any child-, data protection is trying to mark its own way in life."[136]

3.3.2 The GDPR

3.3.2.1 The Goals of the GDPR

The GDPR, adopted on the legal basis of Article 16(2) TFEU,[137] repealed and replaced the DPD on 25 May 2018.[138] While both legal instruments are similar as to their substantive scope, it should be borne in mind that the GDPR is a regulation, thereby being directly applicable in all Member States, whereas the DPD was a directive which require implementing measures in order to become judicially effective.[139] From the recitals of the GDPR, as well as the impact assessment made by the Commission in 2012, it is clear that the main underlying reason for repealing the DPD was the issue that, being a directive, it resulted in a fragmented and inconsistent enforcement of data protection rights throughout the Member States.[140] Irrespective of the differences as regards type of legislative instrument, their objectives remain similar: ensuring a consistent and high level of protection of natural persons' fundamental rights, in particular the right to protection of personal data, and maintaining a free flow of personal data between the Member States.[141] It is important to note in this connection that not only does the GDPR seek to ensure that the right to data protection is guaranteed, but the level of protection afforded shall be *high*. While that condition may be observed in Recitals 6 and 10 GDPR, the CJ has consistently affirmed the same reasoning in the case-law on the application of the DPD.[142] More importantly, the CJ

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[136] Maria Tzanou, 'Data Protection as a Fundamental Right next to Privacy? 'Reconstructing' a Not So New Right' (2013) International Data Privacy Law, 88, p. 88.

[137] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (Communication, 2012) COM(2012) 11 final, p. 5; GDPR, Recital 12.

[138] GDPR, Article 99(2) and Recital 171.

[139] TFEU, Article 288; Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (6th ed, Oxford University Press 2015), p. 107-108.

[140] Commission, 'Impact Assessment' (Commission Staff Working Paper, 2012) SEC(2012) 72 final, p. 21; GDPR, Recital 9, 13, and also 170.

[141] DPD, Article 1 and Recital 10; GDPR, Article 1 and Recitals 3, 6, 10, and 170.

[142] Case C-101/01, *Lindqvist*, ECLI:EU:C:2003:596, para. 96; Joined Cases C-468/10 and C-469/10, *ASNEF*, ECLI:EU:C:2011:777, paras. 28-29; Case C-131/12, *Google Spain and Google*, ECLI:EU:C:2014:317, para. 66; Case C-398/15, *Manni*, ECLI:EU:C:2017:197, para. 37.

explicitly clarified in a recent Grand Chamber judgement from 24 September 2019, that the "objective of that directive [*DPD*] and that regulation [*GDPR*] is to guarantee a high level of protection of personal data throughout the European Union".[143]

In addition to the aforementioned, the GDPR appears to have been intended to go beyond matters of 'mere' data protection. While the DPD did mention how the processing of personal data occurs in various spheres of economic activities,[144] the GDPR further recognises the interaction between economic activity and data protection and, to that end, stipulates in Recital 2:

> "This Regulation is intended to contribute to the accomplishment of an area of freedom, security and justice and of an economic union, to economic and social progress, to the strengthening and the convergence of the economies within the internal market, and to the well-being of natural persons."

As such, while the main objective of the GDPR arguably is to ensure a *high* level of protection of personal data to natural persons, another important overarching objective in the light of Recital 2 GDPR, is to interpret and apply the provisions of the GDPR in a way that they *contribute* to the economic concepts laid down in Recital 2 in the context of the internal market, as well as the well-being of natural persons.[145]

3.4 Interim Summary: Interactions

From the preceding Sections, the main objectives and provisions of EU competition law and EU data protection law have been summarised. This Section seeks to underline the commonalities and divergences between the two legal frameworks.

First, EU competition law and EU data protection law are quite similar as to their respective objectives. EU competition law seeks to protect consumer welfare through either preventing deleterious conduct directly affecting consumers or conduct which is

[143] Note, content in brackets are the authors additions to the quote. For the citation, see: Case C-507/17, *Google (Protée territorial du déréférencement)*, ECLI:EU:C:2019:772, para. 54.
[144] DPD, Recitals 4, 5, and 7.
[145] Recalling the teleological interpretation method employed by the CJ, see footnote (n 18); for a more recent application, and in relation to the context of data protection provisions, see: Case C-673/17, *Planet49*, ECLI:EU:C:2019:801, para. 48.

harmful to competition as such in the internal market. EU data protection law, on the one hand, seeks to attain a high level of protection of personal data, and on the other, there are clear indications in the GDPR that data protection rules also shall contribute in various economic aspects and further the 'well-being of natural persons' in the internal market. Taking into account that the concept of 'consumer' in EU competition law incorporates natural persons, it may subsequently be argued that the two legal frameworks share a common overarching objective of protecting the welfare of natural persons on a given market.[146] In that connection, the Author agrees with the observation made by Botta and Wiedemann that both legal frameworks are characterised by trying to resolve power asymmetries between individuals and undertakings.[147]

Second, it is clear that EU competition law and EU data protection law have different scope of application. Rules relating to data protection are only applicable insofar as an activity involves the processing of personal data, whereas competition rules may be applied in relation to any form of economic activity.[148] Regardless, as has been demonstrated in Chapter 2, economic activities and the processing of personal data are increasingly becoming intertwined in the new economy, which is why both legal frameworks are of great importance in digital markets.

Third, even if EU competition law and EU data protection law can be seen as sharing a common overarching objective, the methods of attaining said objective are different. On a macro-level, EU competition law mainly functions through negative integration: prohibiting conduct that hampers effective competition to the detriment of consumer welfare. EU data protection law on the other hand is characterised by positive integration, through the adoption of harmonising legislation such as the GDPR.[149] Moreover, ensuring consumer welfare from the perspective of the Commission has consistently revolved around preventing *economic* harm, such as negative impact on

[146] Cf. Botta and Wiedemann, 'The Interaction of EU Competition, Consumer, and Data Protection Law' (n 67), p. 434; Francisco Costa-Cabral and Orla Lynskey, 'Family ties: the intersection between data protection and competition in EU law (2017) Common Market Law Review 54(1), 11, p. 14 and 21.
[147] Botta and Wiedemann, 'The Interaction of EU Competition, Consumer, and Data Protection Law' (n 67), p. 434.
[148] Costa-Cabral and Lynskey (n 146), p. 17-18.
[149] Inge Graef, 'Blurring Boundaries of Consumer Welfare: How to Create Synergies Between Competition, Consumer and Data Protection Law in Digital Markets' in Mor Bakhoum and others (eds), *Personal Data in Competition, Consumer Protection and Intellectual Property Law: Towards a Holistic Approach?* (Springer 2018), p. 131; Costa-Cabral and Lynskey (n 146), p. 21.

parameters of price, quality, choice, and innovation, which are more easily measured in terms of effects on consumers.[150] Ensuring consumer welfare from a data protection point of view does not necessarily relate to an economic harm, but intervention is rather motivated where one of the principles or rights relating to data protection is undermined.[151]

These differences, as Costa-Cabral and Lynskey argue, may explain why data protection and competition law have, so far, been separately applied by the EU institutions.[152] In the next Chapter, the position of competition law enforcers shall be closely examined as well as demonstrate how the traditional separation of these legislative frameworks might be changing.

[150] Maureen K. Ohlhausen and Alexander P. Okuliar, 'Competition, Consumer Protection, and the Right [Approach] to Privacy' (2015) Antitrust Law Journal Vol 80(1), 121, p. 152-153; Costa-Cabral and Lynskey (n 146), p. 18; Stucke and Grunes, *Big Data and Competition Policy* (n 54), p. 112-113.
[151] Graef, 'Blurring Boundaries of Consumer Welfare: How to Create Synergies Between Competition, Consumer and Data Protection Law in Digital Markets' (n 149), p. 131.
[152] Costa-Cabral and Lynskey (n 146), p. 19.

4 Assessing Data Protection Concerns in Competition Law

4.1 The Current Position of the Court of Justice and the Commission

4.1.1 Asnef-Equifax and Early Commission Decisions

The first, and thus far the only, time which the CJEU has expressly commented on the interrelationship between EU competition law and EU data protection law was in a judgement delivered on 23 November 2006 in the case of *Asnef-Equifax*.[153] It was a reference for a preliminary ruling under Article 234 EC (now Article 267 TFEU) from the Spanish Supreme Court, concerning the interpretation of Article 81 EC (now Article 101 TFEU). The background to the issue in the main proceedings was that Asnef-Equifax (an association of financial institutions) sought to establish a register for the purpose of providing information between financial institutions on the solvency of customers.[154] Spanish authorities had authorised the register, but that decision was contended by Ausbanc, which argued that the register restricted free competition. On appeal, the Spanish Supreme Court considered that there was doubt as to whether such a register, capable of promoting and facilitating collusion between financial institutions, was compatible with Article 81 EC and whether it could be justified under Article 81(3) EC. In answering the questions referred, the CJ considered that such a register did not, in principle, have its effect the restriction of competition and that it was for the national court to determine whether the conditions set out in Article 81(3) EC were satisfied. Before arriving at its conclusion, the CJ stated the following in paragraph 63, in an *obiter dictum*:

> "Furthermore, since […] any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection. In the main proceedings, it is apparent from the documents before the Court that, under the rules applicable to the register, affected consumers may, in

[153] Case C-238/05, *Asnef-Equifax*, ECLI:EU:C:2006:734.
[154] Case C-238/05, *Asnef-Equifax*, ECLI:EU:C:2006:734, paras. 6-7.

> accordance with the Spanish legislation, check the information concerning them and, where necessary, have it corrected, or indeed deleted."[155]

While *prima facie* appearing to disapprove data protection considerations in competitive assessments, the statement of the CJ should not be interpreted as completely precluding such considerations.[156] Although being a rather cryptic statement, the Author considers that the CJ merely indicates that issues pertaining to data protection are best resolved through the application of provisions governing data protection. From a textual reading, the CJ merely stated that issues relating to the sensitivity of personal data were not a matter for competition law *as such*, and that such issues *may* be resolved on the basis of relevant data protection provisions. In spite of the aforementioned ambiguity, the Commission was quick to interpret the statement made by the CJ in the sense that data protection considerations should not be part of the competitive assessment. The initial position of the Commission is most clearly seen in the 2014 *Facebook/WhatsApp* decision.[157] However, its approach may already be observed in data-driven merger decisions from 2008 and onwards.[158]

In *Google/DoubleClick*,[159] the Commission assessed a concentration in which Google acquired the sole control of DoubleClick by way of share purchase.[160] Google is most known for its Internet search engine, as well as other online software such as G-mail, Google maps, and YouTube. DoubleClick was a company that mainly sold advertisement serving, management and reporting technology. The Commission recognised that Google provided its services to end users free of charge, and subsequently derived almost all of its revenue from online advertising. As such, both undertakings were considered to be active in the 'online advertising' industry.[161] Despite noting that "internet service providers can track all of the online behaviour of their users" and that "particularly large internet service providers could thus try to team

[155] Case C-238/05, *Asnef-Equifax*, ECLI:EU:C:2006:734, para. 63.
[156] Graef (n 69), p. 334.
[157] More specifically para. 164 thereof which is an almost *ad verbatim* application of the CJ's statement, see: Commission, COMP/M. 7217, *Facebook/WhatsApp*, para. 164.
[158] For an excellent overview of data-driven concentrations, see: Anca D. Chirita, 'Data-Driven Mergers Under EU Competition Law' in Orkun Akseli and John Linarelli (eds), *The Future of Commercial Law: Ways Forward for Harmonization* (Hart Publishing 2019).
[159] Commission, COMP/M. 4731, *Google/DoubleClick*.
[160] Commission, COMP/M. 4731, *Google/DoubleClick*, para. 1.
[161] Commission, COMP/M. 4731, *Google/DoubleClick*, paras. 4-5.

up with advertisement companies to make use of this data" the Commission never assessed any potential exploitative effects of the concentration on end users.[162] As is quite clear from the conclusion of the decision, the reason for not looking into effects on end users may be explained on the grounds that the decision referred "exclusively to the appraisal of this operation with Community rules on competition" and that it was "without prejudice to the obligations imposed unto the parties by Community legislation in relation to the protection of individuals and the protection of privacy with regard to the processing of personal data".[163] Consequently, any considerations relating to potential negative effects on data protection and privacy, as a result of the merger, fell outside the scope of the investigation conducted by the Commission. The Commission declared the concentration compatible with the internal market.[164]

During the years between *Google/DoubleClick* in 2008 and *Facebook/WhatsApp* in 2014, the Commission assessed several other data-driven concentrations.[165] In none of those investigations did the Commission assess exclusionary effects on end users or take into account any potential effects related to privacy or data protection.

4.1.2 Facebook/WhatsApp

In the seminal *Facebook/WhatsApp* case from 2014, the Commission assessed a concentration in which Facebook sought to acquire the sole control of WhatsApp. Facebook is a provider of websites and applications for mobile devices, offering a social networking platform (Facebook.com), a consumer communications application (Facebook Messenger) and a photo and video-sharing platform (Instagram). WhatsApp is a provider of consumer communications services via the WhatsApp application.[166] While Facebook offer their services to end users for free and derive revenue from selling advertisement space and using the user data for targeted advertising, similarly as in the situation of Google, WhatsApp did not, and monetised its services by charging a

[162] Commission, COMP/M. 4731, *Google/DoubleClick*, para. 271.
[163] Commission, COMP/M. 4731, *Google/DoubleClick*, para. 368.
[164] Commission, COMP/M. 4731, *Google/DoubleClick*, para. 367.
[165] Some examples being: Commission, COMP/M. 5727, *Microsoft/Yahoo! Search Business*; Commission, COMP/M. 6281, *Microsoft/Skype*; Commission, COMP/M.6314, *Telefónica UK/Vodafone UK/Everything Everywhere/JV*.
[166] Commission, COMP/M. 7217, *Facebook/WhatsApp*, paras. 2-3.

small annual subscription fee in most Member States.[167] The Commission assessed the concentration on three different markets: consumer communication services, social networking services, and online advertising services.

Even though the Commission considered that privacy was an important competition parameter in the market for consumer communication services,[168] it clarified once again that privacy considerations did not fall within the scope of EU competition law, but within the scope of EU data protection law.[169] Despite echoing the statement made by the CJ in *Asnef-Equifax*, the Commission appears to have at least *considered* (albeit not applying) a novel theory of harm in relation to privacy, as a result from the concentration. In its considerations pertaining to the online advertising market the Commission briefly assessed the incentives for the merged entity to introduce targeted advertising on WhatsApp, and potentially use WhatsApp user data for advertising on Facebook. In order to do so, WhatsApp would have to change its privacy policy and WhatsApp would have to increase the amount of data collected from users. The Commission considered such changes unlikely, as it would prompt users who valued privacy and security more to switch to another product.[170] Additionally, the notifying parties successfully convinced the Commission that any merging of data on Facebook and WhatsApp was prevented by major technical obstacles.[171] Contrasting to the previous Commission Decisions, in *Facebook/WhatsApp* the Commission at least considered the potential negative effects on the user side of the platform market in the form of a reduction of the level of privacy offered by WhatsApp as well as a reduction of choice in products offering a high level of privacy. Nonetheless, the Commission once again reeled in any potential advancements of data protection related theories of harm by asserting that the concentration would only raise competitive concerns if there would be an insufficient amount of effective alternatives to Facebook for the purchase of online advertising space or if the accumulation of data within Facebook's control were to allow it to strengthen its position in advertising.[172] As such, the Commission

[167] Commission, COMP/M. 7217, *Facebook/WhatsApp*, para. 90.
[168] Commission, COMP/M. 7217, *Facebook/WhatsApp*, para. 87.
[169] Commission, COMP/M. 7217, *Facebook/WhatsApp*, para. 164.
[170] Commission, COMP/M. 7217, *Facebook/WhatsApp*, paras. 172-174 and 186.
[171] Commission, COMP/M. 7217, *Facebook/WhatsApp*, para. 185.
[172] Commission, COMP/M. 7217, *Facebook/WhatsApp*, paras. 176 and 187.

returned to focusing on the effects on the producer side of the platforms but, in the end, the concentration was declared compatible with the internal market.[173]

Approximately two years after the transaction had been cleared; WhatsApp completely removed its subscription fees and opted for providing the application free of monetary charges.[174] Moreover, while third-party advertisements never were introduced on WhatsApp, the privacy policy of WhatsApp was changed on 25 August 2016 to the effect that data generated on WhatsApp is shared with Facebook. According to the WhatsApp blogpost, the motivations behind the change was to track metrics on the usage of the services, better fight spam on WhatsApp, and enabling Facebook to show more relevant advertisements (if WhatsApp users had a Facebook account).[175] These events were completely contrary to the predictions of the Commission. Indeed, while the Commission also had predicted that the users would switch to more privacy-friendly alternatives, should WhatsApp's privacy policy change, the number of monthly active WhatsApp users was not reduced, but rather continued to steadily increase.[176] In February 2016 it was reported that the amount of users amounted to 1 Billion,[177] whereas in February 2020 the amount has doubled to 2 Billion.[178] As a result, the Commission imposed on Facebook fines, amounting to €110 Million, for negligently supplying incorrect and misleading information in the merger review proceedings.[179] Irrespective of the misconduct, the Commission noted that it did not have any impact on the competitive assessment.[180]

[173] Commission, COMP/M. 7217, *Facebook/WhatsApp*, para. 191.
[174] WhatsApp Blog, 'Making WhatsApp free and more useful' (18 January 2016) <https://blog.whatsapp.com/making-whats-app-free-and-more-useful> accessed 17 May 2020.
[175] WhatsApp Blog, 'Looking ahead for WhatsApp' (25 August 2016) <https://blog.whatsapp.com/looking-ahead-for-whats-app>; note however that data is currently not shared between WhatsApp and Facebook in order to provide more relevant ad experiences on Facebook because of discussions with various Data Protection Authorities, see: WhatsApp, 'Security and Privacy FAQ' <https://faq.whatsapp.com/en/general/26000112?eea=1> accessed 17 May 2020.
[176] J. Clement, 'Number of monthly active WhatsApp users worldwide from April 2013 to December 2017' (*Statista*, 19 August 2019) <https://www.statista.com/statistics/260819/number-of-monthly-active-whatsapp-users/> accessed 17 May 2020.
[177] WhatsApp Blog, 'One Billion' (1 February 2016) <https://blog.whatsapp.com/one-billion> accessed 17 May 2020.
[178] WhatsApp Blog, 'Two Billion Users – Connecting the World Privately' <https://blog.whatsapp.com/two-billion-users-connecting-the-world-privately> accessed 17 May 2020.
[179] Commission, COMP/M. 8228, *Facebook/WhatsApp*, para. 108.
[180] Commission, COMP/M. 8228, *Facebook/WhatsApp*, para. 100.

4.1.3 Microsoft/LinkedIn

In 2016, the Commission assessed a concentration in which Microsoft sought to acquire the sole control of LinkedIn by way of share purchase.[181] Microsoft is a global technology company, offering operating systems (Windows), search engines (Bing), and various software solutions and hardware devices. LinkedIn operates a professional social network (PSN) (LinkedIn), in which it generates revenue through (1) recruiting tools and online education courses, (2) advertisement arrangements with enterprises to LinkedIn members, and (3) subscription fees for 'premium' users and businesses.[182]

Both of the undertakings were active in providing online advertisement services, and in this particular horizontal market overlap, the Commission investigated whether any competition concerns would arise resulting from the combination of data of the merged entity. The Commission continued by positing that "[…] any such data combination could only be implemented by the merged entity to the extent it is allowed by applicable data protection rules."[183] While not looking into the exact implications of data protection rules on the merged entity's future behaviour, the Commission explicitly acknowledged that the introduction of 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 […]."[184] However, when conducting its assessment under the assumption that such data combination was allowed under data protection legislation, the Commission only considered that competitive concerns would arise if the data combination resulted in two situations. First, if the data combination resulted in an increase of the merged entity's market power in a hypothetical market for the supply of the data or increased barriers to entry/expansion for actual or potential competitors which may need the data to operate on that market. Second, if the merger resulted in an elimination of competition between the data controlled. As such, while the Commission considered the data controlled by both undertakings to be an important parameter of competition, no data protection considerations were taken into account when assessing the horizontal effects. Moreover, the Commission considered that there still will be a

[181] Commission, COMP/M. 8124, *Microsoft/LinkedIn*, para. 1.
[182] Commission, COMP/M. 8124, *Microsoft/LinkedIn*, paras. 2-4.
[183] Commission, COMP/M. 8124, *Microsoft/LinkedIn*, para. 177.
[184] Commission, COMP/M. 8124, *Microsoft/LinkedIn*, para. 178.

large amount of user data valuable for advertising that is not within Microsoft's control, meaning that no competitive concerns were found.[185]

The Commission also assessed whether the transaction would result in foreclosure of other PSN. In particular, the Commission investigated the concerns of exclusionary conducts in the form of pre-installing LinkedIn on the Windows operating system as well as integrating LinkedIn features into other software programs under Microsoft (tying/bundling).[186] Taking into consideration the already very strong position of LinkedIn, in the PSN services market within the EEA, and the very high market shares of Windows for operating systems for personal computers at a worldwide level,[187] the Commission noted that such conduct would lead to enhancing the visibility of LinkedIn to a very large number of users.[188] That, in conjunction with network effects, indicated that the market for PSN would tip in the merged entity's favour.[189] After making that assessment, the Commission concluded that this would lead to the foreclosure of competitors and lead to consumer harm in two main ways. Firstly, it would entail a substantial reduction of consumer choice. Secondly, and more important, the Commission stated the following:

> "[…] to the extent that these foreclosure effects would lead to the marginalisation of an existing competitor which offers a greater degree of privacy protection to users than LinkedIn (or make the entry of any such competitor more difficult), the Transaction would also restrict consumer choice in relation to this important parameter of competition when choosing a PSN."[190]

Consequently, the Author considers that the Commission clearly articulated a theory of harm based on a reduction of consumer choice in relation to the level of data protection offered by undertakings. While that, in itself, is quite remarkable when comparing with the brusque approach in *Google/DoubleClick* and previous proceedings, the

[185] Commission, COMP/M. 8124, *Microsoft/LinkedIn*, paras. 178-181.
[186] Commission, COMP/M. 8124, *Microsoft/LinkedIn*, para. 306.
[187] Commission, COMP/M. 8124, *Microsoft/LinkedIn*, paras. 286-289.
[188] Commission, COMP/M. 8124, *Microsoft/LinkedIn*, para. 328.
[189] Commission, COMP/M. 8124, *Microsoft/LinkedIn*, paras. 340-347.
[190] Commission, COMP/M. 8124, *Microsoft/LinkedIn*, para. 350.

continuation of the Commission decision is even more intriguing. After having asserted the aforementioned, the Commission proceeded to illustrate *how* the choice of level of privacy would be restricted by comparing LinkedIn with its competitors, specifically XING. Preliminarily, the Commission considered that XING 'seemed to offer a greater degree of privacy protection than LinkedIn' and based that analysis on the method and process in which users accept the different PSNs' privacy policies. XING asked users to tick a box to accept its privacy policy, whereas users automatically accepted LinkedIn's privacy policy when they pressed the button 'join now'. Additionally, when XING introduces new features, which affects the processing of user data, users may elect to not consent without losing any functionalities of the PSN they previously had access to. In contrast, if LinkedIn makes changes to its processing of user data, users are merely informed and if users continue using its services it is presupposed that the users have accepted the changes.[191]

While reaffirming in the press release accompanying the *Microsoft/LinkedIn* decision that "privacy related concerns as such do not fall within the scope of EU competition law […]", it is fully clear that if privacy constitutes an important parameter of competition in a given market, such considerations will be taken into account in the competitive assessment undertaken by the Commission.[192]

4.2 The Facebook Case in Germany

4.2.1 Background

In the wake of the acquisitions by Facebook of Instagram in 2012, and WhatsApp in 2014, the German Competition Authority (Bundeskartellamt) instituted investigations against Facebook in 2016, suspecting that Facebook's conditions of use were in violation of data protection provisions.[193] The Bundeskartellamt specifically investigated the situation of that individuals wanting to use Facebook's social network

[191] Ibid; the implications of *Microsoft/Linkedin* will be further analysed in Section 5.2.1.
[192] Commission, 'Mergers: Commission approves acquisition of LinkedIn by Microsoft, subject to conditions' (6 December 2016) IP/16/4284 <https://ec.europa.eu/commission/presscorner/detail/en/IP_16_4284> accessed 17 May 2020.
[193] Bundeskartellamt, 'Bundeskartellamt initiates proceeding against Facebook on suspicion of having abused its market power by infringing data protection rules' (2 February 2016) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html> accessed 17 May 2020.

could only do so if they fully agreed to the terms of service. In turn, the terms of service stipulates that Facebook can collect data outside of the Facebook website, such as from Facebook owned subsidiaries (e.g. Instagram, WhatsApp, Oculus, and Masquerade.) as well as third party websites and apps that have one of Facebook's APIs (e.g. a 'Like', 'Share' or 'Log in with Facebook' button) and assign these data to the Facebook users' accounts.[194] After three years of investigation, on 6 February 2019, the Bundeskartellamt delivered a decision[195] in which it found that Facebook's imposition of its current terms of service and privacy policies constituted an abuse of a dominant position in the market for social networks for private users, in the form of abusive business terms under German competition law, because, as a manifestation of market power, those terms violated the principles of the GDPR.[196] In short, the Bundeskartellamt found an infringement of competition law, by considering an infringement of data protection law as being constituent in an abuse of a dominant position. This is the first and thus far only time in which a competition authority has explicitly relied on data protection laws in finding an infringement of competition law.

4.2.2 Ruling

As a preliminary point it must be highlighted that the decision of the Bundeskartellamt is, as regards the application of competition law, solely based German competition law, more specifically Article 19(1) of the Gesetz gegen Wettbewerbsbeschränkungen (GWB).[197] That Article translates to 'The abuse of a dominant position by one or more undertakings is prohibited.'[198] Being essentially a reproduction of Article 102 TFEU,

[194] Bundeskartellamt, 'Background information on the Bundeskartellamt's Facebook proceeding' (2019), p. 1 <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.html;jsessionid=B48FE167BAE09E50244AB71986905A8A.1_cid362?nn=3600108> accessed 17 May 2020.

[195] The official English version may be found here: Bundeskartellamt, Decision B6-22/16 <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.html> accessed 17 May 2020.

[196] Bundeskartellamt, Decision B6-22/16, paras. 523 and 525.

[197] Gesetz gegen Wettbewerbsbeschränkungen in der Fassung der Bekanntmachung vom 26 Juni 2013 (BGBl. I S. 1750, 3245), das zuletzt durch Artikel 1 des Gesetzes vom 25. März 2020 (BGBl. I S. 674) geändert worden ist.

[198] Article 19(1) GWB reads: "Die missbräuchliche Ausnutzung einer marktbeherrschenden Stellung durch ein oder mehrere Unternehmen ist verboten."

Member States are bound by Article 3(1) of Regulation 1/2003[199] to also apply Article 102 TFEU in parallel with national competition law. However, the Bundeskartellamt considered that Article 19(1) GWB has a wider scope of application than Article 102 TFEU,[200] in this case in relation to taking into account fundamental rights and ordinary law in the competitive assessment, which is why it based its decision solely on German competition law.[201]

First, the Bundeskartellamt established that Facebook enjoys a dominant position in the market of social networks for private users in Germany.[202] Some of the key elements in finding the dominant position were very high user-based market shares (continuously exceeding 90 % since 2012 with an upward trend),[203] the existence of strong direct network effects (creating a lock-in effect of users),[204] as well as indirect network effects which increases the barriers to entry for competitors.[205]

Second, having established the dominant position of Facebook, the Bundeskartellamt argued on the basis of German case-law that unfair terms of use can constitute an abuse of a dominant position. Moreover, that same case-law was used by the Bundeskartellamt to extend the scope of Article 19(1) GWB to data processing terms.[206] Given the direct applicability of the GDPR, and since it specifically lays down provisions concerning data protection and when data is lawfully processed, the Bundeskartellamt stipulated that the GDPR is relevant to take into account when assessing whether the terms of use were abusive or not.[207] The Bundeskartellamt proceeded by examining whether the collection of user data and subsequent combination and assignment to the respective Facebook user accounts were actually lawfully processed pursuant to Article 6(1) GDPR. While Facebook invoked all legal bases provided for in Article 6(1) GDPR, the

[199] 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 OJ L 1/1
[200] Bundeskartellamt, Decision B6-22/16, para. 914.
[201] Which in terms of compatibility with EU law is not precluded, pursuant to Article 3(2) of Regulation 1/2003.
[202] Bundeskartellamt, Decision B6-22/16, paras. 374-521.
[203] Bundeskartellamt, Decision B6-22/16, para. 413.
[204] Bundeskartellamt, Decision B6-22/16, paras. 425-431.
[205] Bundeskartellamt, Decision B6-22/16, paras. 442-449.
[206] Bundeskartellamt, Decision B6-22/16, paras. 522-524.
[207] Bundeskartellamt, Decision B6-22/16, paras. 531-532.

Bundeskartellamt rejected all of them.[208] Of most relevance here is consent, performance of contract, and legitimate interest.

In relation to consent, as found in Article 6(1)(a) GDPR, the Bundeskartellamt claimed that the users were not given any real or free choice, referencing Recitals 42 and 43 of the GDPR. This was so, because of the 'clear imbalance' between the position of users vis-à-vis Facebook's dominant market position, in combination with network effects keeping users from switching to other services. Moreover, it appears that the Bundeskartellamt considered 'not using Facebook' to actually be an option, as it would have considerable disadvantages for the users as they would no longer be able to fulfil their need to participate in the social network.[209] As for the legal basis of performance of contract, as found in Article 6(1)(b) GDPR, the Bundeskartellamt considered that a dominant undertaking, *unilaterally* imposing the contractual content, could not rely on that legal basis.[210] Of importance, once again, was the fact that Facebook held a dominant position in the market in which users could not exert any influence on the contractual provisions, which require a disproportionate amount of data processing. Additionally, the Bundeskartellamt rejected Facebook's claim that the criticised data processing constituted a key element of the services provided, specifically necessary in order to provide a personalised Facebook user experience, mainly because it was not shown that Facebook would be unable to provide a personalised experience without the practice.[211] Last, in relation to the legal basis of legitimate interest, Article 6(1)(f) GDPR, the Bundeskartellamt stated that even if Facebook tried to rely on that legal basis, the potential 'legitimate interest' was not sufficiently clearly articulated to be seriously considered.[212] Moreover, referencing the guidelines issued by the WP29, the Bundeskartellamt pointed out that the extensive data collection practices, imposed by the terms of use, went beyond what was absolutely necessary in attaining the purposes pursued by Facebook (such as personalisation).[213]

[208] Bundeskartellamt, Decision B6-22/16, paras. 573 and 630.
[209] Bundeskartellamt, Decision B6-22/16, paras. 645-646.
[210] Bundeskartellamt, Decision B6-22/16, paras. 676-677.
[211] Bundeskartellamt, Decision B6-22/16, paras. 691 and 695-696.
[212] Bundeskartellamt, Decision B6-22/16, paras. 736-738.
[213] Bundeskartellamt, Decision B6-22/16, paras. 742 and 746.

Third, and finally, the Bundeskartellamt considered that the aforementioned data processing conditions, infringing the GDPR, were abusive within the meaning of Article 19(1) GWB. The ability to impose the terms of use, despite their unlawfulness, was made possible as a result of Facebook's 'special market power', and those conditions gave rise to anti-competitive effects in the form of harming users' right to self-determination, as granted by data protection law.[214]

In conclusion, the Bundeskartellamt used data protection law (GDPR) as a normative benchmark for assessing whether the business terms imposed by Facebook were 'unfair', and subsequently precluded as an abuse of a dominant position under German competition law pursuant to Article 19(1) GWB.

4.2.3 After

Although the decision was welcomed at the time by the EDPS,[215] not all commentators were satisfied with the findings and novel approach employed by the Bundeskartellamt.[216] Naturally, Facebook appealed the decision before the OLG. On 26 August 2019 the OLG delivered an interim judgement[217] putting the decision in suspensive effect pending the full judgement of the OLG, as there are 'serious doubts' as to the legality of the decision'[218] The OLG criticised the decision of the Bundeskartellamt and rejected the finding of an abuse of exploitation in the form of an abuse of conditions to the detriment of the users of Facebook because of three core deficiencies.

First, the OLG, pointed out that the Bundeskartellamt did not sufficiently investigate the counterfactual and whether other terms of use would have created under normal

[214] Bundeskartellamt, Decision B6-22/16, paras. 871 and 876.
[215] EPDS, 'This is Not an Article on Data Protection and Competition Law' (2019) <https://edps.europa.eu/sites/edp/files/publication/19-03-11_cpi_buttarelli_en.pdf> accessed 17 May 2020.
[216] For a critical review and excellent dissection of the implications of the *Facebook-decision*, see: Pranvera Këllezi, 'Data protection and competition law: non-compliance as abuse of dominant position' (2019) sui-generis, 343.
[217] The official German version may be found here: OLG, Decision VI-Kart 1/19 (V) <https://www.olg-duesseldorf.nrw.de/behoerde/presse/archiv/Pressemitteilungen_aus_2019/20190826_PM_Facebook/20190826-Beschluss-VI-Kart-1-19-_V_.pdf> accessed 17 May 2020; The unofficial English translation may be found here: Rupprecht Podszun, 'Facebook vs. Bundeskartellamt' (*D-kart*, 30 August 2019) <https://www.d-kart.de/en/blog/2019/08/30/en-facebook-vs-bundeskartellamt/> accessed 17 May 2020.
[218] OLG, Decision VI-Kart 1/19 (V), p. 6.

competitive circumstances.[219] Second, the OLG rejected the claim that the excessive data collection practices, in violation of data protection law, were harming users in the form of 'losing their right to self-determination'. Notably, the OLG considered that that data was collected and processed with the consent of Facebook users and, in such a situation, there would be no loss of control over the data.[220] Third, and lastly, the OLG considered that the behaviour causality between the market power and the abuse was not sufficiently substantiated by the Bundeskartellamt.[221]

What is noteworthy is that the OLG did not rule on the compatibility of the Facebook terms of use with the GDPR, which is to be further investigated in the upcoming full assessment.[222] Even more interesting is that the OLG does not appear to reject the approach of the Bundeskartellamt in its entirety. Rather, most of the criticism arising from the OLG judgement is that the Bundeskartellamt has failed to attain the requisite legal standard of proof in relation to showing alternative results as to the counterfactual and the necessary correlation between the market power and the abuse. Indeed, the OLG appears to open up to the situation in which illegal or inappropriate terms of use may be considered abusive, irrespective of whether it results in anti-competitive market effects, but in such a situation, there must be shown a sufficient causality between those unfair terms and the market power enjoyed by the undertaking.[223]

In turn, the Bundeskartellamt intends to appeal the interim judgement delivered by the Regional Court to the German Federal Court of Justice, and it remains to be seen whether the Bundeskartellamt decision will be upheld or not.[224]

[219] OLG, Decision VI-Kart 1/19 (V), p. 7-8 and 13 (specifically para. 1a, and 4.2(aa) respectively).
[220] OLG, Decision VI-Kart 1/19 (V), p. 7-8 and 25.
[221] OLG, Decision VI-Kart 1/19 (V), p. 26 (specifically para. (cc).
[222] OLG, Decision VI-Kart 1/19 (V), p. 12 (specifically para. 4.1).
[223] OLG, Decision VI-Kart 1/19 (V), p. 21.
[224] Competition Policy International, 'Germany: Facebook succeeds in blocking German ban on data collection' (26 August 2019) <https://www.competitionpolicyinternational.com/germany-cartel-office-to-take-facebook-case-to-high-court/> accessed 17 May 2020.

4.3 Interim Summary: Data Protection as a Competition Concern

From the perspective of EU institutions, the Commission has consistently shied away from directly incorporating data protection considerations in its decision-making. This approach can be traced back to the statement made by the CJ in 2006 in the case of *Asnef-Equifax*. Still, in recent Commission decisions on data-driven concentrations, data protection considerations have started appear on the radar. Most importantly, the Commission has considered privacy as potentially constituting a parameter of competition, thus bringing the notion of data protection within the ambit of competition law. While theories of harm related to data protection remains undeveloped, the *Microsoft/LinkedIn* Commission decision clearly indicates that such a theory of consumer harm is not unthinkable.

In that connection, the Bundeskartellamt's *Facebook-decision* has provided compelling arguments as to how data protection considerations may be injected into the competitive assessment. However, the OLG did not share the enthusiasm and considered that the assessment made by the Bundeskartellamt was far-fetched in many aspects. Yet, the OLG did not dismiss the core arguments, meaning that a potential abuse of a dominant position in the form of unfair data processing terms could fall within the scope of German competition law.

5 How Can Data Protection Considerations be Taken into Account in EU Competition Law?

5.1 Introduction – Why Should Data Protection Considerations Matter?

Before proceeding to answering the question *how* data protection considerations can be taken into account in EU competition law, it is necessary to establish *why* that question is important to answer in the first place. After all, the EU legislator has decided to adopt separate legislative frameworks for dealing with data protection concerns (Article 8 CFREU and the GDPR) and competition law (Articles 101 and 102 TFEU). Are those frameworks, by themselves, not sufficient to handle the complexities of the new economy?

As the main argument for not incorporating data protection considerations in competition law goes: they serve different objectives, and therefore there is a risk that competition law could be used as a guise to advance goals that have nothing to do with competition law. Indeed, if the Commission were able to preclude conduct without proving all the constituent elements of an infringement of EU competition law, that would be an unlawful expansion of its current competition law competences.[225] That being said, it is clear from Section 3.4 that the goals and objectives of EU data protection law and EU competition law are not entirely irreconcilable. They both seek to (1) enhance the well-being (or welfare) of individuals, (2) resolve power asymmetries between different market players, and (3) contribute to the functioning of the internal market. Even if their respective enforcement methods differ, these similarities converge in the digital era where competition, economics, and personal data interact.

EU competition law and EU data protection law are rigorous. However, as was demonstrated in Section 2.3, there still exists market failures (the privacy paradox and the dysfunctional equilibrium), related to personal data. These market failures are benefitting large undertakings engaged in data processing, while harming individuals and competition as the level of data protection offered is either decreased or remains stagnant. Such a situation arose in the wake of the *Facebook/WhatsApp* decision, after

[225] Costa-Cabral and Lynskey (n 146), p. 48.

which Facebook, contrary to the prediction of the Commission, changed its privacy policy. When viewing the turn of events through the lens of the aforementioned market failures, the fact that undertakings benefit from the increase in data collection, and the power asymmetries: the behaviour of the merged entity does not really come as a surprise.

The failure of the Commission to assess and identify consumer harm arising from such behaviour may be explained by the fact that competition authorities have yet to produce a theory of data protection-related consumer harm.[226] Most of the cases presented under Section 4.1 successfully identified data-related theories of harm, but they focused on the role of personal data as a source of market power and subsequent exclusionary effects. While competition authorities *may* take into account non-price competition parameters, those are generally not assessed on their own and have seldom been regarded as the main concern. This neglect of theorising exploitative effects with regard to personal data may, in turn, be attributed to the Commission's focus on applying price-centric approaches to finding consumer harm, which is difficult to reconcile with, as well as justify, in zero-price markets which are commonplace in the digital era.[227] As hinted by the *Microsoft/LinkedIn* decision, the pervasiveness of relying on economic theory in competitive assessments might be changing. Indeed, in the recent decision of *Dow/Dupont*, the Commission journeyed outside its comfort zone and constructed a theory of harm based on a reduction of *innovation*.[228] As is argued below, not all consumer harm needs to be economic, and data protection considerations may therefore be relevant for EU competition law.

The remainder of this Chapter will analyse how data protection considerations *can* be taken into account in the competitive assessment in EU law. Taking into account the current applicable law and the material presented in the previous Chapters, the Author considers that data protection considerations are of particular relevance for the competitive assessment in two ways: (1) where data protection is found to be a

[226] Elias Deutscher, 'How to measure privacy-related consumer harm in merger analysis? A critical reassessment of the EU Commission's merger control in data-driven markets' (2018) European University Institute LAW 2018/13, p. 9-10.
[227] Deutscher (n 226), p. 12; Stucke and Grunes, *Big Data and Competition Policy* (n 54), p. 107-117; Graef (n 69), p. 176-179; Chirita (n 158).
[228] Commission, COMP/M. 7932, *Dow/DuPont*, paras. 2000-2016.

parameter of competition, and (2) when the obligations to respect and promote the fundamental right to data protection under Article 8 CFREU require so.

5.2 Data Protection as a Competition Parameter

As discussed in Section 4.1, the recent Commission decisions in *Facebook/WhatsApp* and *Microsoft/LinkedIn*, show that privacy (i.e. data protection) may constitute a parameter of competition in certain markets.[229] Commission officials have elaborated, stipulating that personal data may be viewed as the currency being paid by users (price) or as a dimension of product quality.[230] In addition to that statement, the Author asserts that data protection may also constitute an important element of consumer choice as well as potentially constituting a trading condition within the meaning of Article 102(a) TFEU.

5.2.1 Data Protection as 'Quality'

The Commission has repeatedly held in several decisions that when the service of product offered is free, quality will often be considered a significant parameter of competition.[231] Consequently, if the level of data protection offered by a product or service would be considered an element of its quality, it would be possible to consider a reduction of the level of data protection as entailing consumer harm.[232] Such an approach appears to have been hinted by the Commission in *Facebook/WhatsApp*, in which it was recognised that privacy was a valued functionality of consumer communication apps.[233]

As highlighted by Stucke and Grunes, a general issue arising from assessing consumer harm through a decrease in quality is that, as a competition parameter, it is subjective,

[229] See respectively: Commission, COMP/M. 7217, *Facebook/WhatsApp*, para. 87; Commission, COMP/M. 8124, *Microsoft/LinkedIn*, para. 350.
[230] Eleonora Ocello, Cristina Sjödin, and Anatoly Subočs, 'What's Up with Merger Control in the Digital Sector? Lessons from the Facebook/WhatsApp EU merger case' (2015) Competition Merger Brief Iss. 1/2015, p. 6.
[231] Commission, COMP/M. 5727, *Microsoft/Yahoo! Search Business*, para 101; Commission, COMP/M. 6281, *Microsoft/Skype*, para 81.
[232] EDPS, 'Opinion 8/2016 on coherent enforcement of fundamental rights in the age of big data' (2016), p. 13 <https://edps.europa.eu/sites/edp/files/publication/16-09-23_bigdata_opinion_en.pdf> accessed 17 May 2020.
[233] Commission, COMP/M. 7217, Facebook/WhatsApp, para. 87.

multi-dimensional, and difficult to quantify.[234] Subjective, in the sense that different consumers may value certain attributes differently and multi-dimensional meaning that a product or service encompasses a varying amount of attributes, such as its durability, design, performance,[235] and as presented in this thesis, the level of data protection offered. Because of the aforementioned nature of quality, it is generally more difficult to evaluate than the transparent parameter of price. While the effects of price-increases are easily understood and measured through the 'small but significant non-transitory decrease in quality test' (SSNIP-test), the same cannot be conducted on a product or service lacking monetary price. Some commentators have contemplated a SSNDQ-test (small but significant non-transitory decrease in quality) in which it would be possible to assess whether an undertaking is able to profitably lower product quality to the detriment of consumers.[236] However, the SSNDQ-test is contingent on having a precise and measurable quality attribute and has yet to be applied in practice. Indeed, the lack of an objective and measurable quality attribute is one of the core reasons for why competition authorities and courts have neglected the test.[237] Assessing a decrease in data protection as a quality attribute arguably faces even more challenges which may be illustrated through two points.

First, given the versatile nature of data, a more extensive collection of personal data may enable undertakings to improve product quality, as illustrated in Section 2.2.2.1. While an undertaking may pursue more intrusive data processing practices, lowering the quality attribute of data protection, it may simultaneously increase other quality attributes such as improving the relevance of listed results in a search engine or more personalised experiences.[238] Consequently, it would be necessary to weigh the potential data-driven benefits against the decrease in data protection quality, which could

[234] Stucke and Grunes, *Big Data and Competition Policy* (n 54), p. 117; similarly, see: Maurice E. Stucke and Ariel Ezrachi, 'The Curious Case of Competition and Quality' (2015) Journal of Antitrust Enforcement Vol. 3, Iss. 2, 227, p. 227-230.
[235] OECD, 'The Role and Measurement of Quality in Competition Analysis' (Competition Policy Roundtable, 2013), p. 5-6.
[236] Stucke and Grunes, *Big Data and Competition Policy* (n 54), p. 117-121; Graef (n 69), p. 102.
[237] Crémer, de Montjoye, and Schweitzer (n 3) p. 45; OECD, 'The Role and Measurement of Quality in Competition Analysis' (n 235), p. 15 and 164.
[238] Cf. Section 2.2.2.1; Commission, COMP/M. 5727, *Microsoft/Yahoo! Search Business*, paras. 223-226.

possibly take place in the justification part of Article 101(3) TFEU and Article 102 TFEU respectively.[239]

Second, and more important, the question remains open on how to reliably measure a decrease in data protection. After all, an objection for incorporating data protection as a quality attribute is that there are no concrete benchmarks for measuring such a decrease.[240] A fairly straight-forward approach would be to equate more personal data collected with a lower quality of data protection. This approach, however, faces difficulties in line with the first point mentioned above, as more personal data collected may lead to higher quality products.[241]

The reasoning of the Commission in *Microsoft/LinkedIn* presents another method which may circumvent the aforementioned problems. While the Commission never specifically referred to EU data protection provisions in that decision, the theory of harm, and the subsequent comparison between XING's and LinkedIn's respective privacy policies, reflects what can only be considered as qualitative competitive assessments made in respect of user consent.[242] To reformulate and further the discussion in Section 4.1.3: the Author argues that the Commission made an assessment of the level of conformity with EU data protection concepts (the nature of the consent to privacy policies) and considered that the approach of XING was more in line with those values than that offered by LinkedIn.

Consequently, data protection as a quality attribute may materialise in several dimensions; not only as the amount of personal data collected, but also as users (consumers) ability to control their data, such as through consenting to disclose their personal data. The Author must here draw parallels to the *Facebook-decision* of the Bundeskartellamt in which it was argued that the terms of use gave rise to anti-competitive effects in the form of harming users' right to self-determination. While it

[239] Cf. Bundeskartellamt, Decision B6-22/16, paras. 702 and 743.
[240] Cf. Esayas, 'Data Privacy in European Merger Control: Critical Analysis of Commission Decisions Regarding Privacy as a Non-Price Competition' (n 100), p. 25.
[241] For a discussion on this particular argument on why privacy considerations should not form part of quality in the competitive assessment, see: James Cooper, 'Privacy and Antitrust: Underpants Gnomes, the First Amendment, and Subjectivity' (2013) George Mason law Review Vol. 20, No. 4, 1129, p. 1135-1138; Graef (n 69), p. 322.
[242] Commission, COMP/M. 8124, *Microsoft/LinkedIn*, para. 350.

acknowledged that the extent of data processing can be seen as an element of the quality of the service,[243] the Bundeskartellamt neglected the 'data protection as quality' argument when constructing the theory of harm. Making a clearer link between the level of data protection offered with it being a quality attribute perhaps could have convinced the OLG to a greater extent.

In summary, data protection considerations may form part of the competitive assessment as a quality attribute, in which consumer harm could be assessed through either an increase in the amount of personal data required to disclose, or the level of conformity with data protection concepts. The Commission made such assessments in *Microsoft/LinkedIn* without resorting to EU data protection law and it may be subsumed that a degradation of data protection as a quality attribute may be found independently from other legislative frameworks. Referencing EU data protection laws could further cement such an argumentation however, and as is argued below in Section 5.2.5, such referencing may be possible under applicable law.

5.2.2 Data Protection as 'Choice'

Another way in which data protection considerations can be incorporated into the competitive assessment is to view data protection as an element of choice. This approach, as is most clearly seen in *Microsoft/LinkedIn*, entails that it may not always be necessary to quantify any data protection decreases in order to show consumer harm.

Where data protection and privacy constitute an important competition parameter, an elimination of choice as regards a higher level of data protection may, in itself, prove harmful for competition.[244] It should be pointed out that this approach is most relevant when assessing concentrations and abuses of dominant positions under Article 102 TFEU, and not as much Article 101 TFEU. As this competitive assessment is more related to the traditional harm of a reduction of choice, this aspect will not be further analysed.

[243] Bundeskartellamt, Decision B6-22/16, para. 379.
[244] Commission, COMP/M. 8124, *Microsoft/LinkedIn*, para. 350; Esayas, 'Data Privacy in European Merger Control: Critical Analysis of Commission Decisions Regarding Privacy as a Non-Price Competition' (n 100), p. 25.

5.2.3 Data Protection as 'Price'

In Section 2.2, one of the new developments of online businesses in the new economy was shown to be that many individuals are using services, free of monetary charges, in exchange for providing their personal data. Personal data has in many ways replaced monetary payments, in which consumers (the users) 'pay' with their personal data to gain access to services. Therefore, it may be argued for equating the level of data protection provided, or rather the amount of personal data users are required to disclose, with a non-monetary price paid.[245] Some of the aforementioned scholars have claimed that this method was employed by the Bundeskartellamt in its decision. The Author, however, contends that such claims are false, as the Bundeskartellamt explicitly considered the terms of use as constituting trading conditions, not as non-monetary price.[246] Equating the amount of personal data disclosed with price is nevertheless not completely without merit as it most definitely may be considered as a form of counter-performance for using a product or service.[247] Imposing unfair prices may constitute an abuse of a dominant position pursuant to Article 102(a) TFEU. As such, there lies potential in applying Article 102(a) TFEU analogously in relation to excessive or otherwise unfair personal data collection practices.

However, as pointed out by Robertson, the central pillar of finding an unfair or excessive price lies in the existence of a monetary price.[248] The OECD has acknowledged some novel methods of calculating the monetary value of personal data, but it is highly questionable on how to reliably measure personal data as price.[249] So while personal data collection theoretically could be incorporated into the competitive assessment as a non-monetary price, it is the contention of the Author that it is more consistent with applicable law if incorporated as a trading condition under Article

[245] Deutscher (n 226), p. 137-138.
[246] See Section 4.2.2; Bundeskartellamt, Decision B6-22/16, paras. 569-572.
[247] Marco Botta and Klaus Wiedemann, 'Exploitative Conducts in Digital Markets: Time for a Discussion after the Facebook Decision' (2019) Journal of European Competition Law & Practice Vol. 10, No. 8, 465, p. 466-467.
[248] Viktoria H.S.E Robertson, 'Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data' (2020) Common Market Law Review Vol. 57(1), 161, p. 173.
[249] OECD, 'Exploring the Economics of Personal Data: A Survey of Methodologies for Measuring Monetary Value' (2013) OECD Digital Economy Papers No 220, p. 18-32.

102(a) TFEU. Perhaps the concept of privacy-price will be more relevant in the future.[250]

5.2.4 Data Protection as 'Trading Conditions'

A fourth way in which data protection considerations can form part of the competitive assessment is to take inspiration from the Bundeskartellamt's *Facebook-decision* and consider the data processing conditions for using a product or service as 'trading conditions' under Article 102(a) TFEU. According to Article 102(a) TFEU, unfair trading conditions may constitute an abuse of a dominant position.

The CJEU have thus far not clearly defined what constitutes a 'trading condition' nor when it is to be considered 'unfair'. Nonetheless, Article 102(a) has been consistently applied in relation to *contractual terms* imposed by an undertaking in a dominant position.[251] While the focus in those cases has been on assessing contractual terms in business-to-business relationships, the Author agrees with the opinion of Botta and Wiedemann that there is nothing suggesting that unfair contractual terms imposed on final consumers would fall outside the scope of Article 102(a) TFEU.[252] Similarly as the Bundeskartellamt argued that Facebook's data processing terms fell within the scope of Article 19(1) GWB as 'abusive business terms',[253] the Author argues that terms of use or other conditions and obligations imposed on individuals when accessing a service, requiring the disclosure and collection of personal data (data processing terms), may constitute a trading condition under Article 102(a) TFEU.

The question which remains is: when does the data processing terms become unfair? *BRT v SABAM* is one of the few cases in which the CJ has explicitly elucidated on the test of 'unfairness' of a trading condition. It concerned a copyright association's statutes and contractual relationships with its members, in which the Court considered that a breach of Article 102(a) TFEU arises where an undertaking in a dominant position "[…] imposes on its members obligations which are not absolutely necessary for the

[250] Robertson (n 248), p. 177-178; Botta and Wiedemann, 'Exploitative Conducts in Digital Markets' (n 247), p. 467.
[251] Case C-27/76, *United Brands v Commission* ECLI:EU:C:1978:22, paras. 130-161; Case C-127/73, *BRT v SABAM* ECLI:EU:C:1974:25, para. 7; Case T-139/98, *AAMS v Commission* ECLI:EU:T:2001:272, paras. 73-80.
[252] Botta and Wiedemann, 'Exploitative Conducts in Digital Markets' (n 247), p. 471.
[253] Bundeskartellamt, Decision B6-22/16, paras. 522-524.

attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright […]".[254] The Commission interpreted and applied this test in *GEMA statutes*, in which it was inferred from the *BRT v SABAM* case that the decisive factor in finding an 'unfair' trading condition was whether "[…] they exceed the limits absolutely necessary for effective protection (indispensability test) and whether they limit the individual copyright holder's freedom to dispose of his work no more than need be (equity)."[255] Additionally, in its decision in *DSD*, the Commission interpreted the case of *United Brands* as meaning that commercial terms are 'unfair' where such terms fails to comply with the principle of proportionality.[256] Although the CJEU focused on the proportionality of the fees required to the economic value of the service, the argumentation of the Commission persevered both in the GC and CJ.[257]

In light of the aforementioned, the Author subsumes that data processing terms imposed by an undertaking in a dominant position could be precluded by Article 102(a) TFEU where they are not absolutely necessary for the attainment of the object of a contract and such data processing terms disproportionately encroaches upon the fundamental right to protection of personal data, as enshrined in Article 8 CFREU. In turn, the proportionality assessment requires that such terms (1) seek to attain a legitimate aim, (2) are appropriate in attaining that aim, and (3) do not go beyond what is necessary in attaining that aim.[258] As regards restrictions in relation to the protection of personal data, it should be mentioned that the CJEU has only permitted such restrictions in so far as they are *strictly necessary*.[259]

Taking the aforementioned into account and contrary to the position of the Bundeskartellamt,[260] the Bundeskartellamt might have had successfully argued for a breach of Article 102(a) TFEU in the Facebook case. As the scholars Robertsons and

[254] Case C-127/73, *BRT v SABAM* ECLI:EU:C:1974:25, paras. 11 and 15.
[255] Commission, COMP IV 29.971, *GEMA statutes*, para. 36.
[256] Commission, COMP D3/34493, *DSD*, para. 112.
[257] See respectively, Case T-151/01, *Duales System Deutschland v Commission* ECLI:EU:T:2007:154, para. 121; Case C-385/07 P, - *Der Grüne Punkt - Duales System Deutschland v Commission* ECLI:EU:C:2009:456, paras. 141-143.
[258] Cf. Article 52(1) CFREU.
[259] Case C-73/07, *Satakunnan Markkinapörssi and Satamedia* ECLI:EU:C:2008:727, para. 56; Case C-92/09, *Volker und Markus Schecke and Eifert* ECLI:EU:C:2010:662, para. 77; Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and Others* ECLI:EU:C:2014:238, para. 52.
[260] Cf. Bundeskartellamt, Decision B6-22/16, para. 914.

Volmar and Helmdach convincingly argue, it might even have had *more* success under Article 102(a) TFEU instead of Article 19 GWB, as there might not be a requirement of a causal link between the dominant position and the abuse committed in certain cases.[261] Indeed, looking to the jurisprudence of the CJEU, the Author considers that the current legal position on this matter is highly ambiguous.[262] In that connection it should be noted that the CJ did not seem to require such causality in a recent excessive pricing case.[263] Given the previous argument on viewing data protection as a quality attribute, a reduction in data protection quality in the form of excessive personal data processing or invalid processing grounds could be challenged directly as exploitative conduct in the form of an unfair trading condition. Regardless, a causal link could be established where the undertaking's dominant position leaves users with not a sufficient amount of alternatives available to them, meaning that they are left with a 'take it or leave it' situation.[264] Such was, in essence, the situation in *BRT v SABAM* and *AAMS v Commission*.

5.2.5 Using Data Protection Law as a Normative Benchmark

As seen in the preceding sections, data protection considerations can form part of the competitive assessments as a competition parameter. More specifically, the Author considers that the level of data protection provided by undertakings is *well suited* as a quality attribute, an element of consumer choice, and as a trading condition. Such data protection considerations could potentially be applied without resorting to data protection laws. However, data protection laws could provide relevant benchmarks and bring about clarity and predictability as regards potential adverse effects on data protection. While it was established in Section 4.1 that EU institutions have tried to keep competition law and data protection laws separate, such a separation is difficult to justify when data protection considerations are integrated into competitive assessments. Moreover, in the recent case of *Allianz Hungária Biztosító and Others*, it became quite

[261] Robertson (n 248), p. 185-186; Maximilian N. Volmar and Katharina O. Helmdach, 'Protecting consumers and their data through competition law? Rethinking abuse of dominance in light of the Federal Cartel Office's Facebook investigation' (2018) European Competition journal, Vol. 14 No. 2-3, 195, p. 213; see also: Costa-Cabral and Lynskey (n 146), p. 35.
[262] Case C-6/72, *Europemballage Corporation and Continental Can Company v Commission*, ECLI:EU:C:1973:22, para. 27; Case C-85/76, *Hoffman-La Roche v Commission* ECLI:EU:C:1979:36, para. 91; although compare with Case C-52/09, *TeliaSonera Sverige* ECLI:EU:C:2011:83, para. 86.
[263] Case C-177/16, AKKA/LAA ECLI:EU:C:2017:689.
[264] Körber (n 73), p. 23.

clear that other legal frameworks than competition law can be of importance in competitive assessments.

The case concerned bilateral agreements between insurance companies and car dealers in Hungary, and it arrived at the CJEU in the form of a preliminary ruling under Article 267 TFEU. Questions arose whether the agreements in the main proceedings qualified as having their object the prevention, restriction or distortion of competition, and thus incompatible with Article 101(1) TFEU.[265] In the substantive assessment of the question referred, the CJ reaffirmed its case-law on restrictions by object, stating that "[…] certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition […]" and in determining whether an agreement constitutes a restriction by object, account shall be taken to the content of its provisions, its objectives, and the economic and legal context of which it forms a part.[266] The CJ elected to give the factor of 'economic and legal context' particular weight, which could reveal that the agreements were sufficiently injurious to competition to constitute a 'by object' restriction.[267] The CJ then continued and stated the following:

> "That could in particular be the case where […] domestic law requires that dealers acting as intermediaries or insurance brokers must be independent from the insurance companies."[268]

While the CJ left it for the national courts to make the final decision, the CJ considered that the agreements in the main proceedings could constitute a restriction by object.[269]

Many commentators argue that the statement made in paragraph 47 of *Allianz Hungária Biztosító and Others* opens up for taking into account breaches of data protection law in the competitive assessment.[270] The Author is inclined to agree with those contentions.

[265] Case C-32/11, *Allianz Hungária Biztosító and Others* ECLI:EU:C:2013:160, para. 14.
[266] Case C-32/11, *Allianz Hungária Biztosító and Others* ECLI:EU:C:2013:160, paras. 35-36.
[267] Case C-32/11, *Allianz Hungária Biztosító and Others* ECLI:EU:C:2013:160, para. 46.
[268] Case C-32/11, *Allianz Hungária Biztosító and Others* ECLI:EU:C:2013:160, para. 47.
[269] Case C-32/11, *Allianz Hungária Biztosító and Others* ECLI:EU:C:2013:160, paras. 47-51.
[270] EDPS, 'Report of workshop on Privacy, Consumers, Competition and Big Data' (2014), p. 3 <https://edps.europa.eu/sites/edp/files/publication/14-07-11_edps_report_workshop_big_data_en.pdf > accessed 17 May 2020; Autorité de la Concurrence and Bundeskartellamt (n 31), p. 23-24; Costa-Cabral

When reading the paragraph, it appears that the Court considered that if the undertakings concerned were acting in a fashion that is contrary to law (unrelated from competition law) that context may 'in particular' be relevant in finding a restriction by object. Drawing a parallel to the assessment made in the *Microsoft/LinkedIn* Commission decision, when assessing practices which affects data protection, data protection laws (and concepts therein) may provide useful 'legal context' for normative guidance. This means that data protection laws (such as the GDPR) could play a vital role for authorities in assessing issues like *when* data protection as a quality attribute has actually been decreased or *whether* the data processing terms imposed by a dominant undertaking disproportionately encroaches upon the right to data protection and thus become 'unfair' within the meaning of Article 102(a) TFEU.

In relation to quality, the principle of data minimisation in Article 5(1)(c) GDPR and Article 7 GDPR on consent could further flesh out an analysis on a potential degradation of the level of data protection. The former being a principle limiting the collection of personal data to what is necessary to accomplish a specified and legitimate purpose and the latter specifying the elements of a valid consent. Taking the previously discussed situation in *Microsoft/LinkedIn* as an example, the Commission could have referred to these principles in order to substantiate its claims as to why XING offered a PSN with a higher level of data protection than LinkedIn. In relation to trading conditions, the principle of data minimisation could also serve as guiding for finding whether the processing of personal data really is absolutely necessary for the attainment of the object of a contract. Moreover, Article 6 GDPR, providing the lawful grounds of processing personal data, could help authorities in establishing whether the data processing terms are in fact based on a legitimate ground. If not, that would most likely mean that the data processing terms unfairly encroach upon the right to data protection, seeing as a legitimate basis for the processing of personal data is unconditionally mandated by both Article 6 GDPR and Article 8 CFREU.

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and Lynskey (n 146), p. 32; Aymeric de Moncuit, 'In which ways should privacy concerns serve as an element of the competition assessment' (2018), p. 7 <https://ec.europa.eu/competition/information/digitisation_2018/contributions/aymeric_de_moncuit.pdf> accessed 17 May 2020.

At the same time, as Körber points out, caution is advised as to not end up in the situation where any potential data protection law infringement *automatically* entails in a breach of competition law.[271] Nonetheless, *if* there is a clear link between a breach of data protection law and an undertaking in a dominant position, the Author considers that such factors may be relevant in assessing whether Article 102 TFEU has been breached.[272]

5.3 The External Constraints of the Charter

In the previous Sections, much focus was put on how data protection considerations can form part of the competitive assessment from a substantive perspective. Under this Section, it is argued that data protection considerations may also act as an external constraint on the application of competition law. It is submitted that in order to ensure a consistent and high level of protection of personal data in the area of competition in the internal market, the Commission and national competition authorities are bound by the obligations arising from Article 8 CFREU when applying competition law falling within the scope of EU law.

As stated in Section 3.3.1, Article 51(1) CFREU provides that EU institutions (such as the Commission) always must respect the provisions of the CFREU, and Member States (and consequently national competition authorities) when implementing EU law. Also of importance in this respect is Article 7 TFEU, obliging the Union to ensure consistency between its policies and activities, taking into account all of its objectives. This becomes of particular importance in competition cases involving personal data, since the Commission is bound by the CFREU when adopting legally binding decisions.[273] As an example, Graef argues that data and personal data troves, could potentially constitute an essential facility under EU competition law.[274] In such a situation, the Commission could potentially require the dominant undertaking to share such personal data with competitors. It is imperative for the Commission to be able to assess whether such a requirement is compatible with Article 8 CFREU and Article 7 TFEU in order to ensure a consistent enforcement of the right to protection of personal

[271] Körber (n 73), p. 25-27.
[272] Compare with the analysis above, in Section 5.2.4.
[273] Costa-Cabral and Lynskey (n 146), p. 41.
[274] Graef (n 69), p. 342.

data. The aforementioned illustrates the negative duty to refrain from infringing (respecting) the fundamental rights.[275]

As for the positive duty for the Commission to promote the right to data protection, it goes beyond the scope of this thesis to outline to what extent the Commission should promote the right to protection of personal data. Regardless, it must here be noted that Article 51(1) CFREU specifies that such promotion shall be made in accordance with the institutions' respective powers and within the limits of the powers of the Union. Further, Article 51(2) clarifies that the CFREU does not establish any new power or task for the Union. As such, it would be contrary those foundational principles of the Union were the Commission (at least in its role as enforcer of EU competition law) able to promote data protection concerns in the absence of any element that triggers the application of EU competition law, such as Articles 101 and 102 TFEU.[276] Therefore, one of the key areas in which Article 8 CFREU can, and should, exert a normative influence on the competitive assessment, is where data protection is found to constitute a parameter of competition as found under Section 5.2 above.

[275] Ibid.
[276] Graef (n 69), p. 343.

6 Conclusion

This thesis arrives at the conclusion that data protection considerations can form part of the competitive assessment in EU competition law. While this subject has long been discussed on an academic level, recent institutional decision-making has legitimised such claims as to no longer be completely unsubstantiated; such as the *Microsoft/LinkedIn* Commission decision and the *Facebook-decision* of the Bundeskartellamt. The level of data protection afforded by a product or service may constitute a quality attribute in several dimensions, meaning that competition authorities could formulate a theory of harm of a degradation of quality in relation to data protection. Additionally, where the conduct of undertakings results in a reduction in consumer choice as regards the level of data protection provided, consumer harm can be assessed through traditional metrics already employed by competition authorities. While it also is theoretically possible to equate the amount of personal data required to disclose as a non-monetary price paid, such an analogy needs more development in order to be convincingly applied under applicable law. Regardless, since the digital era facilitates market concentration, there is a real possibility that undertakings in a dominant position in digital markets might try to exploit users through unfair data processing terms to increase the data collected. Such practices may potentially be precluded under Article 102(a) TFEU where they unfairly encroach upon to the right to protection of personal data. Lastly, it is worth remembering that the right to protection of personal data constitutes a fundamental right, and both EU and national competition authorities should act accordingly when applying competition law in order to respect and promote that right. Considering the omnipresence of personal data in modern business, taking into account data protection considerations in EU competition law is, indeed, a natural evolution. It remains to be said that the interaction between EU competition law and EU data protection law will only become of greater importance, especially considering the coming of the Internet of Things. While this thesis supports the incorporation of data protection considerations in EU competition law, guidance is much needed from the EU institutions on this matter. The ongoing Facebook-saga presents itself an excellent opportunity for clarity. German courts could potentially request a reference for a preliminary ruling with the CJEU, which would provide much needed legal certainty, not only for undertakings but also the citizens of the EU.

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