The Controversial Interface between Competition and Data Protection Law

An Analysis of Privacy Concerns in the context of Merger Control

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Abstract

In the digital market, data has become an invaluable asset that businesses strive to achieve. Since most of the data acquired is personal data, current legal and academic debates have begun to investigate whether and how privacy is addressed within the context of merger control. The purpose of this thesis is to shed light on the role of competition law in safeguarding consumers from potential privacy breaches. It examines various competition rulings to determine how adjudicators have incorporated privacy concerns in data-driven mergers assessment. It further seeks to explore ways to fit the protection of personal data into merger or acquisition control by analyzing and interpreting the relevant legal instruments. The paper concludes that privacy concerns might prevent or shape a merger when the two legal fields overlap. The research further found that data protection consideration might be assessed in the merger process to the extent that it is viewed as an aspect of consumer welfare or if Member States consider it as a legitimate interest under the Merger Regulation. Finally, this thesis concludes that Digital Markets Act serves as a tool to connect the dots and bridge the gap between competition and data protection law.

Foreword

I am extremely grateful for the privilege to be part of Lund University. The knowledge and experience acquired here have influenced my perspective and opened doors to new and exciting opportunities.

I would like to express my deepest gratitude to my supervisor Jörgen Hettne. His mentorship, support and keen eye have made this journey an incredible one. It has been a great pleasure to work under your guidance.

In addition, I want to express my sincere appreciation to the amazing professors at the Department of Business Law who have motivated, challenged and inspired us to learn and grow professionally and personally.

List of abbreviations

DMA	Digital Markets Act
EC	European Commission
EDPS	European Data Protection Supervisor
EU	European Union
EUMR	European Union Merger Regulation
FCO	Federal Cartel Office
GDPR	General Data Protection Regulation
M&A	Merger and Acquisition
OECD	Organisation for Economic Co-operation and Development
SSNDQ	Small, but Significant, Non-transitory Decline in Quality
TFEU	Treaty on the Functioning of the European Union

1. Introduction

1.1 Background

For the last decade, privacy has received a lot of scrutiny in talks about competition law due to the increasing economic significance of data in the digital environment,[1] especially when businesses in data-rich industries are looking to combine or acquire one another.[2] This has sparked the ambition to achieve a synergy between these fields to better protect individuals in the digital market.

The intersection between competition and data protection law is new, explaining why there is little study or proof regarding data breaches occurring before or after a merger or acquisition [hereinafter M&A] transaction. The biggest violation of data related to M&A occurred following Verizon's acquisition of Yahoo in 2013, affecting nearly 3 billion users by combining passwords, card details, names and contact information.[3]

Given that the public has begun to focus more on data privacy[4] and that digital businesses rely on gathering, analyzing, and exchanging personal data, it is important to examine if and how data privacy concerns could be handled within the context of EU merger control.

The growing number of mergers in the digital market where the databases of undertakings are combined has raised concerns regarding the infringement of General Data Protection Regulation [hereinafter GDPR] provisions and principles such as purpose limitation, which implies handling data in a way that is compatible with the purposes for which the data originally was collected. It is

[1] Organisation for Economic Co-operation and Development. *Supporting investment in knowledge capital, growth and innovation*. OECD, 2013, p.319.
[2] EDPS Preliminary Opinion on *Privacy and Competitiveness in the Age of Big Data*, 2014. EDPS explained how data protection and competition law, interact in the digital economy, Available at https://edps.europa.eu/data-protection/our-work/publications/opinions/privacy-and-competitiveness-age-big-data_en.; In September 2016, EDPS issued another opinion that included recommendations that are more concrete.
[3] The breach was not discovered until 2016. Gazdecki Andrew, *Data Privacy, Cybersecurity, Mergers, And Acquisitions*, Forbes, 2018, Available at: <https://www.forbes.com/sites/allbusiness/2018/11/11/data-privacy-cybersecurity-mergers-and-acquisitions/?sh=221e2b4172ba> Accessed 9 May 2023.
[4] An example is the Facebook-Cambridge Analytica scandal which involved the illegal collection of personal data from 87 million Facebook users for electoral manipulation, and it has changed the consumers' perceptions of the value of their personal data and has acknowledged the power of digital platforms over the privacy protection. BBC News, Facebook Oversight Board Upholds Trump Ban, 23 December 2022, Available at: <https://www.bbc.com/news/technology-64075067> Accessed on: 6 May 2023.

questionable if privacy breaches can be used ex-ante in the merger control process to make it subject to certain conditions or even to block a merger. In addition, there is uncertainty and disagreement regarding the extent to which competition authorities should consider the decrease in the level of personal data protection post-merger.

Two opposing perspectives have evolved regarding the importance of data protection in the context of competition law. On the one hand, in light of the fact that currently exists a legal instrument aimed at safeguarding personal data, the question asked is why merger control should be applied in addition to GDPR in order to protect personal data. The widely held perspective, which is still predominant, is that the primary function of the GDPR is to protect the personal data of individuals,[5] while competition law focuses on the economic value of transaction and it is responsible for overseeing market power and protecting the economic welfare of consumers within the market.[6] According to this separatist theory, these two law fields should be viewed independently. It implies that they are distinct from one another and do not overlap.

Some competition academicians[7] claim that privacy provisions are a matter of personal choice and should be left to each individual to deal with it in accordance with privacy regulations. They also argue that safeguarding privacy does not fit into the economic goals of competition law, as consumer welfare[8] is narrowly defined and fails to include non-economic criteria. The major concern is that incorporating privacy issues in the assessment of competition law would be confusing, especially when applied to consumer welfare standard.[9] Besides, it would place an extra burden on both the parties that are combining and the competition authorities, and it would be challenging to incorporate the data privacy analysis into merger enforcement.

On the other hand, the integrationist theory acknowledges the inclusion of privacy concerns into the framework of competition law, highlighting that these areas of law should work together.[10] According to this view, the EU data protection framework outlines the procedures for using,

[5] Article 1(2) Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), [2016] OJ L 119, [hereinafter GDPR].

[6] Gerber David, *Competition Law and Antitrust*, Clarendon Law Series, Oxford, 2020; p. 17.

[7] Ohlhausen Maureen and Alexander Okuliar, *Competition, consumer protection, and the right [approach] to privacy*. *Antitrust* Vol. 80, No. 1, 2015, p. 159.

[8] The content of consumer welfare, which is one of the competition's goals, has never been clarified, and it refers to consumer concerns such as privacy only indirectly.

[9] Ohlhausen and Alexander Okuliar, (n 7) p. 138.

[10] Commission Antitrust: *Commission opens investigation into possible anti-competitive conduct by Facebook in the online advertising technology sector*, Press Release, 22 June 2021. < https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2848 >

obtaining, and transferring personal data,[11] but it proves to be inefficient in addressing concerns linked to the collection of data. The GDPR does not offer instruments to evaluate circumstances in which the combined entities would potentially exchange data between them post-merger. Thus, only merger control can address issues like limitations in consumer options[12] or the decrease in the level of data protection resulting from a merger. Moreover, it has long been said[13] that some non-economic interests or public goals are so essential that they must be taken into account when applying competition law; especially in the merger process where consumer welfare is influenced by both price and non-economic elements. It has also been argued that private data is so important that it is frequently the only factor causing a merger transaction.[14] Therefore, even though not being a form of currency, it could be said that personal information has monetary value.

Competition law may influence privacy matters in online markets. For instance, competition law remedies for data-sharing can promote competition while also having detrimental impacts on privacy.[15] The rise in privacy concerns has compelled competition authorities and regulators to analyze the interface between competition and data protection laws[16] and to investigate ways to use merger review tools when GDPR fails to tackle the problems relating to data aggregation. This thesis will examine whether a more integrated approach is necessary and more importantly valid.

1.2 Purpose and Research Questions

The need to study this topic is justified by the fact that the boundaries of competition and data protection law are not clear-cut. Even though the traditional approach has adopted "parallel pathways", the interface between these two legal fields is becoming increasingly important in the digital age, making it one of the most debated topics in the competition community among lawmakers, practitioners, and academics.[17]

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[11] Articles 2, 6, 13, 15, 17, 23, 30, 40 GDPR.
[12] Due to less or even lack of competition in the market on the base of data protection, businesses may have a lower motivation to improve data security futures, which will worsen off consumers' welfare.
[13] Townley Christopher. *Article 81 EC and public policy*. Bloomsbury Publishing, 2009, p.252.
[14] Fabio Ferreira Kujawski and others, *Personal Data Protection in the Context of Mergers and Acquisitions*, 2021, The Guide to Data as a Critical Asset, edition 1, Global Data Review, Available at: <https://globaldatareview.com/guide/the-guide-data-critical-asset/edition-1/article/personal-data-protection-in-the-context-of-mergers-and-acquisitions> Accessed 9 May 2023.
[15] Kerber Wolfgang, *Taming Tech Giants: The Neglected Interplay Between Competition Law and Data Protection (Privacy) Law*. The Antitrust Bulletin 67.2, 2022, p.283; For instance, a dominant firm in a certain field might be forced to grant entry-level smaller businesses access to its data.
[16] See EDPS *Opinion 8/2016 on coherent enforcement of fundamental rights in the age of big data*, Available at: <https://edps.europa.eu/sites/edp/files/publication/16-09-23_bigdata_opinion_en.pdf>; EDPS Preliminary Opinion 2014, (n. 2).
[17] Wasastjerna Maria C. *The implications of big data and privacy on competition analysis in merger control and the controversial competition-data protection interface*. European Business Law Review, 2019, p.339; See also: Gene Quinn, 'Has Big Tech Finally

The aim of this thesis is to shed light on the complex relationship between the two legal areas and suggests possible ways in which they can interact. The purpose of this thesis is to describe and analyze the interrelation between competition and data protection laws, and to evaluate whether infringements of data protection can be claimed and assessed in competition law, with a focus on digital merger review. The thesis seeks to investigate ways to integrate data protection aspects into the assessment of merger control and to analyze CJEU's and competition authorities' judgments within this debate**.** In this context, it will also be evaluated and determined how the new EU legal instrument concerning digital market may serve the interest of data protection in the context of competition law in the future?

Based on this, the following research questions might be formulated:

1. How has data privacy been assessed by the EU Court and the European Commission in competition law context, with a focus on EU merger control?
2. How and to what extent, if any, may privacy aspects be included in the EU merger control process?
3. How does the new EU regulation regarding digital market address the interaction between competition law and data protection law?

1.3 Delimitations

From the beginning, it should be made clear that this thesis is focused on EU competition law. However, there are no legal cases from the EU courts or decisions from the EU Commission directly addressing privacy aspects in merger control. In order to address and support the questions at hand, the thesis will therefore stray into case law from other national jurisdictions applying EU competition law, namely the German Competition Authority and German courts.

The present thesis is mainly based on personal data in competition law context; but to a limited extent, some reference to non-personal data would be made in order to illustrate how general data can be used as a tool to protect personal data.

Become Too Big for the FTC to Ignore?' IPWatchdog, 21 June 2018,< https://ipwatchdog.com/2018/06/21/big-tech-finally-become-big-ftc/id=98598/>. See also: Monopolkommission, *Call for contributions, Shaping Competition Policy in the Era of Digitization*, 2018, <https://ec.europa.eu/competition/information/digitisation_2018/contributions/monopolkomission.pdf>; HM Treasury, The Economic Value of Data: Discussion Paper 17, August 2018, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/731349/20180730_HMT_Discussion_Paper_-_The_Economic_Value_of_Data.pdf >.

Given that violation of data protection through agreements falling under Article 101 TFEU has received little attention,[18] the study will focus on the interplay between data protection and merger review, as well as, to a limited extent, unilateral anti-competitive activity.

Furthermore, various merger and competition law cases will be outlined in this paper but only to the extent, that there is a link to privacy concerns. As a result, the thesis will not delve into specifics on how a particular merger can limit competition or how unilateral actions might be viewed as abusive.

Finally, this paper does not cover private enforcement but it focuses only on the public litigation of EU competition regulation. In this regard, the thesis will mostly concentrate on the Commission's powers as the main investigator of the EU's competition provisions and just addresses the powers of national competition authorities to the degree that it is required to answer the research questions.

1.4 Method and Materials

1.4.1 Chosen Methods

The focus of this study is on the EU law; therefore, in order to achieve its goal and answer the research questions, *the legal dogmatic method* in combination with *the EU legal method* will be adopted. The combination of these two is effective as the legal dogmatic method offers legal analysis and explanations of legal materials such as legislative movement, executive actions, and rulings by courts; while the EU legal method identifies local legal sources, which are EU primary and secondary law,[19] and evaluates their interrelationships as well as the effects they have on the national law of the Member States. Thus, the legal dogmatic method and the EU legal method are not two separate methods, rather they relate and interconnect. In the following sections, these two methods will be explained in more detail.

1.4.2 Legal Dogmatic Method

The legal dogmatic method relies on the idea that the law is a standalone and consistent set of norms that is interpreted in order to clarify the content and function of legal sources**.** It is centered on the systematization and analysis of positive law and jurisprudence, without considering non-

[18] Organisation for Economic Co-operation and Development, *Quality Considerations in Digital Zero-Price Markets:* OECD Background Paper, *DAF/COMP, 2018, Available at: https://ssrn.com/abstract=3862529> Accessed 09 May 2023.*
[19] Sypris Phil, *The relationship between primary and secondary law in the EU*, Common Market Law Review, Issue 52(2), 2015, p. 461-487.

legal material and theories from other fields.[20] Thus, once the external aspects, such as economic, social, or historical are included into the study, it can no longer be regarded as a strictly legal method.[21] Legal dogmatic method consists of the following three key components.

First, there is the *doctrinal approach* that enables legal scholars to "think like a lawyer" and to look into the complex nature of legal issues from the inside of the legal framework, rather than from the outside.[22] They are able to interact with lawmakers and provide them with alternatives to the decisions they make.

Secondly, instead of simply being a collection of norms and court decisions, the law is viewed as a *system*. This method acknowledges the interplay of legal principles, cases, and concepts as well as how they are a component of a broader framework of legal decision-making.[23] Smith argues that by looking at the law as a system, legal researchers may achieve a greater understanding of the law and assist in guaranteeing that legal norms and decisions are based on a consistent understanding of law.

The third element is the *systematization* of the present law,[24] according to which, the law is not a static system, rather it regularly changes and adapts to new social, political, and economic events. As a result, in order to maintain a current and relevant state of the law, legal researchers must be prepared to recognize and assess new advances and amendments to the legal system.

Furthermore, the essential aspect of the dogmatic legal method is finding the main legal issue and developing specific research questions. This may involve an in-depth examination of the concepts, guidelines, and principles governing a particular legal system with a view to identifying and addressing the gaps or inconsistencies in the existing legislation.[25]

First, the applicable law will be established, by systematizing, analyzing and interpreting legal sources and it will be determined how it is applicable in relevant circumstances. Subsequently, it will be examined if the law could be applied to the particular legal issue.[26] The legal problems

[20] Anthea Roberts, *Is International Law International?*, Oxford University Press, 2017, p. 218.
[21] Jan Smits, *What Is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research* in Rob van Gestel, Hans Micklitz and Edward L Rubin (eds), *Rethinking Legal Scholarship: A Transatlantic Dialogue*, Cambridge University Press, 2017, p.6.
[22] ibid p.5.
[23] ibid p.7.
[24] ibid P.7.
[25] Ibid., p 5.
[26] Maria Nääv & Mauro Zamboni, Juridisk metodlära, Second Edition, Studentlitteratur AB, 2018, p. 109.

investigated in this thesis are whether privacy concerns can fit within the process of assessing a merger or acquisition under Regulation 139/2004 [hereinafter EUMR] and if the new legal developments include any provisions that could address privacy issues in competition law. Once the research questions have been identified, the EU legal method will be applied using EU legal sources to look at the general legal issue and examine the specific research questions.

1.4.3 EU Legal Method

The EU legal system is a distinct and independent legal framework within the broader context of international law.[27] The main sources of EU law are primary law and secondary law.[28] The primary law is at the top of the hierarchy; it is legally binding and has priority in the event of conflicting norms.[29] It consists of the EU Treaties, the Charter of Fundamental Rights and the general principles of law**.** This paper will rely on Treaty on the Functioning of the European Union [hereinafter TFEU] and the Charter of Fundamental Rights as primary legal sources of the EU.

Secondary legislation is the subsequent significant source of the EU law[30] and consists of binding and non-binding materials. In terms of binding legal acts, it includes regulations, directives and decisions adopted by Union institutions in the process of exercising the authority delegated to them. Moreover, the case law established by the CJEU is legally binding and it is a crucial factor in shaping and advancing EU law. In terms of non-binding material, the list includes preparatory work, recommendations, opinions and others.[31]

This thesis will bring together both binding and non-binding secondary EU legal resources in order to address the research questions. In terms of binding legislation the EU Data Protection Regulation, EU Merger Regulation, Digital Markets Act Regulation [hereinafter DMA] will be studied primarily to uphold the legal dogmatic method, while the non-binding texts, such as communications, opinions, and doctrine, will be mentioned to enhance opposing points of view concerning the connection of data protection and competition law.

Given that this thesis looks into a controversial subject, the paper will perform a case study analysis based on the Commission decisions and CJEU law cases, which represent EU materials of great

[27] Case 26/62, Van Gend en Loos, 1963, para.3
[28] EUR-Lex, Sources of European Union law https://eur-lex.europa.eu/EN/legal-content/summary/sources-of-european-union-law.html
[29] EUR-Lex, The European Union's primary law , https://eur-lex.europa.eu/summary/EN/legissum:l14530
[30] Articles 289-290 Treaty on the Functioning of the European Union, [2012] OJ C 326/47.
[31] Article 288 TFEU.

importance. The CJEU adopts a teleological approach, which means interpreting provisions in light of their goals in order to make sure that those goals are successfully accomplished.[32] This explains the fact that CJEU often cites its past judgment when adopting new ones. By employing the case study analysis approach in this paper, using both EU legal and legal dogmatic methods, this paper identifies how privacy concerns were taken into account, if at all, during the EU competition assessment process. *Asnef-Equifax* is the first and the only case from the CJEU on the role of data protection in competition law, thus it is an influential case since it has settled a legal precedent on the intersection of these two legal fields. *Facebook/WhatsApp* and *Microsoft/LinkedIn* are among the European Commission's decisions selected for writing this thesis due to the relevant comments made by EC on the role of privacy matters in competition law that would help in answering the research questions.

The EU legal method has relevance for the most of the analysis in this thesis. Yet, German law will be helpful for answering some points of the first research question. It is important to highlight the fact that Germany, as a member of the EU, is highly active in the enforcement of EU competition legislation, particularly the EU merger control framework.[33] German law is one of the most evolved competition systems[34] and it is a significant asset to the EU competition framework. The EU law significantly influences and shapes German law through directives, regulations, principles and case law developed by the CJEU. In addition, the German Federal Cartel Office [hereinafter FCO], which is the national competition authority in Germany, is also the enforcer of EU competition law and decisions taken by it are subject to the interpretation of EU competition law. Based on the principle of supremacy, in the event of disagreement between an aspect of EU law and an aspect of law in an EU Member State (for example Germany), EU law will take precedence.[35] In addition, German legal bodies, including courts and FCO, may submit matters to the CJEU seeking clarification on the application of EU competition law based on Article 267 TFEU. Thus, there is no doubt that German law is an expression of the EU legal Method.

[32] Case 6/64 Costa v. ENEL, ECLI:EU:C:1964:66, paras. 593–594.
[33] Wolfgang Wurmnest, *German Private Enforcement: an overview of competition law*, e-Competitions Special Issue German Private Enforcement, April 2021, p. 1, Available at: <https://www.jura.uni-hamburg.de/media/die-fakultaet/personen/wurmnest-wolfgang/german-private-enforcement-an-overview-of-competition-law-wurmnest-wolfgang.pdf> Accessed 19 May 2023.
[34] Dr. Tilman Kuhn and others, *New Competition Law in Germany - 10th amendment to German Act against Restraints of Competition passed*, White & Case, 20 January 2021, *https://www.whitecase.com/insight-alert/new-competition-law-germany-10th-amendment-german-act-against-restraints-competition*, Accesses 19 May 2023
[35] Flaminio Costa v E.N.E.L Case 6/64 ECLIECLI:EU:C:1964:66.

To sum up, the materials used in this thesis will encompass a variety of legal sources common to the EU legal system. In terms of primary law, the paper mainly focused on provisions pertaining to data protection law, specifically Articles 16 TFEU, Articles 7 and 8 of the EU Charter of Fundamental Rights. The paper is also based on consumer welfare standard outlined in Articles 12 and 169 TFEU.

In terms of secondary law, the GDPR, which became effective effect on May 25, 2018, is the most important EU legislation regulating personal data protection. The paper examines its framework to evaluate its strengths while also addressing its drawbacks. The EUMR and DMA have been analyzed in order to determine how and if privacy, which is an important fundamental right, is addressed. EUMR oversees M&A that could have a major impact on competition or consumer interest within the internal market and its study is important to answer the second research question of this research. Whereas DMA focuses mainly on competitive challenges in digital markets, it indirectly helps establish more privacy-friendly conditions, thus it is used to answer the third research question.

Even soft law, such as opinions and guidelines, will be used as a source regardless of the fact that its legal significance is unclear.[36] In addition, EU academic research, which incorporates books, journal articles, speeches and other scholarly materials are used. The journals and books chosen for the current paper have been selected based on several criteria, such as their relevance to the subject and credibility. For example, Kerber provides essential insights and understanding of the interplay between data privacy and competition challenges. In addition, the citation metric[37] is one of the factors that influenced the selection of the academic materials given their wide impact, acceptance and recognition by research publishers, for instance, Ohlhausen's and Okulia's work has been used for writing this thesis because it has been cited for more than 200 times.[38]

[36] Borchardt Klaus-Dieter, and European Commission. Directorate-General Communication. *The ABC of EU law*. Publications Office of the European Union, 2017; p.108

[37] Enago Academy, *What is the Value of Citation Metrics*?, enagoacademy, 28 April 2022, Available at: https://www.enago.com/academy/what-is-value-of-citation-metrics/#:~:text=What%20are%20Citation%20Metrics%3F%20The%20extent%20to%20which,of%20research.%20These%20citation%20metrics%20or%20bibliometrics%2C%20 Accessed 05 May 2023

[38] Google Scholar, a widely used academic search engine, was referred to obtain the citation count of the paper; https://scholar.google.com, Accessed 20 May 2023.

1.5 Structure

The present thesis is divided into six chapters. The **first chapter** provides an overview of the legal problem and outlines the two predominant theories regarding the connection between data protection and competition law. Further, it introduces the research questions, establishes the scope of the paper, describes the methods and materials used, and presents the structure of the thesis.

Chapter 2 briefly discusses some aspects of data protection legislation and it contains a description of the control process of cross-border M&A, highlighting some ties and interaction between these two fields. This broad context is needed in order to fully understand the relationship between M&A transactions and data protection law.

Chapter 3 delves more into the link between protection of personal data in competition law. It presents a summary of the most important data-driven mergers where some references are made to privacy concerns. These rulings are informative in terms of the interaction of these fields, and they provide the background for future discussion.

Chapter 4 analyzes the approach launched in the German jurisdiction regarding the interplay between competition and privacy. This perspective has been considered in this paper as an interesting method of accommodating data privacy in competition law.

Chapter 5 represents the core of the thesis, and it moves on to an analysis of the possible ways to integrate privacy aspects into the merger review. It starts by providing an overview of consumer welfare under the EU merger control framework and then explores how data privacy can be included into the consumer welfare standard and how privacy aspects can constitute a relevant parameter of competition. Subsequently, it examines if data privacy can be considered as an aspect of "legitimate interests" under the EU Merger Regulation. Finally, the chapter discusses the current European Union [hereinafter EU] legal development that attempts to tackle the economic dominance of giant digital entities and explores if it directly or indirectly addresses any privacy concerns.

The thesis ends with a conclusion that highlights the key findings, provides answers to the research questions and recommendation for improving the current legislation.

2. General information on data protection and EU Merger Regulation

This chapter provides key concepts of the two main aspects of the paper, namely data protection and Merger Control in the EU. It begins with an overview of the European perspective on data protection, provides a general outline of M&A concepts, and briefly discusses the merger control process. After having described the rules separately, a final subsection will identify the importance of data in merger transactions. This is necessary in order to gain insight into the topic and establish the foundation for further discussion.

2.1 European Union Legal Framework for Data Protection

The EU data protection policy aims to maintain the free flow of personal data while protecting fundamental rights, particularly those related to privacy and data protection.[39] For the purpose of this thesis, the concepts of "privacy" and "data protection" are used interchangeably. Data protection has become the accepted term in the EU once the GDPR has entered into force, while the concept of privacy appears to have gained greater acceptance in the US.[40]

Article 8 of the European Convention on Human Rights[41] does not explicitly provide a specific right to data protection, but it states that individuals have the right to respect their private life. However, the European Court of Human Rights in Strasbourg has interpreted the right to privacy enshrined in Article 8 broadly, in a way to encompass the protection of personal data.[42] This provision acts as insurance against any kind of invasion by authorities that might harm individuals' privacy and data protection rights in Europe.

The EU data protection law is comprised of a mix of primary and secondary laws. The EU Charter of Fundamental Rights recognizes the right to data protection as a fundamental right within the

[39] Article 1(2) GDPR
[40] Bratman Ben, *Brandeis and Warren's The Right to Privacy and the Birth of the Right to Privacy*. Tennessee Law Review, 69, 2001, p. 623-652
[41] Article 8 of the Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended, 4 November 1950
[42] *private life includes the protection of personal data*, ECHR 16 February 2000, Amann v. Switzerland, No. 27798/95, ECLI:CE:ECHR:2000:0216JUD002779895, para. 65; See also CJEU, Joined Cases C–92/09 and C–93/09 Volker und Markus Schecke and Eifert, 2010, ECR I-11063, para. 52.

legal framework of the EU.[43] This was established with the enactment of the Lisbon Treaty in December 2009, which made the Charter legally binding as a primary source of EU law.

Article 16 TFEU protects personal data and stipulates that such data should be used properly for particular purposes and with the consent of the subject. In addition, this provision states that "Parliament and the Council must establish rules to protect individuals in relation to the processing of personal data by Union institutions, bodies, offices, and agencies, as well as by Member States when carrying out activities covered by Union law". Therefore, it serves as a legal basis for the development of secondary legislation aimed at promoting uniform and effective personal data legislation among EU Member States. GDPR serves as an example of such a regulation, seeking to guarantee individuals' privacy and data protection rights in the EU.

GDPR replaced the 1995 Data Protection Directive[44] in May 2018. When interpreting this legislation, the Charter's rights to privacy and data protection must be taken into account.[45] The EU data protection legislation has a broad field of applicability because it covers the processing of personal information by natural and legal persons, as well as public and private entities, with some exemptions.[46] GDPR defines personal data as any data that belongs to an "identified or identifiable individual",[47] whereas processing is "any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automatic means".[48] Personal data includes information about individuals as they relate to them as citizens and consumers. It consists of name, address, date of birth, email address, phone number, social security number, passport number, IP address, and other identifiers can be included.[49] Personal data may also contain sensitive information such as a person's ethnic background, faith, gender, health information, and criminal records. Furthermore, content created by users, data about online activity or behavior, as well as data on location and demographics are considered to be part of personal data.[50]

[43] Charter of Fundamental Rights of the European Union, 2012, OJ C 326/391; Article 7,8
[44] Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, O.J. 1995, L 281/23
[45] Case C-73/07, Satamedia, EU:C:2008:727; Case C-362/14, Schrems, EU:C:2015:650
[46] Recital 18; Article 2(2)GDPR it does not apply to the processing of personal data "*by a natural person in the course of a purely personal or household activity*, common foreign and security policy, competent authorities for law enforcement".
[47] Article 4(1) GDPR
[48] Article 4(2) GDPR
[49] Article 4(1)
[50] Kemp Katherinem, *Concealed Data Practices and Competition Law: Why Privacy Matters*, University of New South Wales Law Research Series, Vol. 53/Research Paper No. 19-53, p.16

Processing of personal data is allowed as long as it has a legal justification.[51] Article 6(1) of the GDPR states that processing of personal data is only considered lawful if it satisfies one of the six conditions outlined in Article 6(1)(a) to (f). Although the individual's consent is the most commonly known legal basis for the processing of personal data, there is no ranking or preference among them. One of the most essential protections is the principle of "purpose limitation," which states that personal data should be appropriate, relevant, and not excessive with regard to the reasons for which it was acquired and/or processed.[52]

The territorial scope of the GDPR is not limited to the EU and it may apply to the processing of personal data by a controller[53] or processor[54] outside the EU if they offer goods or services to the EU citizens or residents,[55] or if the processing activities involve monitoring the behavior of individuals located within the EU.[56]

Despite the fact that GDPR is directly applicable in all EU Member States without being necessary to be transposed into national laws,[57] the enforcement is carried out by national supervisory authorities.[58] One-stop-shop principle is applicable, suggesting the fact that the competent national data protection authority is the one in which the controller or processor have their main establishment.[59] According to Article 4(3) of the Treaty on the European Union the EU and its Member States must collaborate on duties involving the implementation of the EU laws and policies. The European Data Protection Board is responsible for guaranteeing that national data authorities apply EU data protection law consistently and promote cooperation among the EU's data protection authorities. [60]

The European Data Protection Supervisor[61] [hereinafter EDPS] is an independent institution of the EU, thus is not an EU entity. Its main responsibility is to safeguard the privacy and personal data

[51] Article 5, 6 GDPR
[52] Art. 5(1)(b)-(c) GDPR
[53] Article 4(7) GDPR defines controller "a natural or legal person, public authority, agency, or other body that decides the objectives, guidelines, and methods for processing personal data".
[54] Article 4(8) GDPR states that processor "handles personal information on behalf of the controller".
[55] Art. 3(2)(a) GDPR. See also Recital 23.
[56] Art. 3(2)(b) GDPR. See also Recital 24.
[57] European Commission, *Types of EU law,* <https://commission.europa.eu/law/law-making-process/types-eu-law_en> Accessed 17 May 2023.
[58] Article 51 GDPR.
[59] Recital 127 GDPR.
[60] Article 68 GDPR.
[61] European Data Protection Supervisor (n.d.). *About EDPS*. Available at from <https://edps.europa.eu/about-edps_en#:~:text=The%20European%20Data%20Protection%20Supervisor%20%28EDPS%29%20is%20the,institutions%20and%20bodiesprocess%20the%20personal%20information%20of%20individuals%3B> Accessed 17 May 2023.

of individuals in the EU, and it provides data protection guidance to EU bodies, conducts investigations and monitors EU institutions, and cooperates with national data protection agencies in the EU. Thus, EDPS is responsible for ensuring that EU institutions and bodies comply with EU data protection regulations. Article 13 TEU also implies that EU institutions shall collaborate to "ensure the consistency, effectiveness and continuity of its policies and actions". EDPS launched the Digital Clearing House[62] project to improve communication across EU bodies and organizations in addressing concerns linked to competition, consumer protection, and data protection laws. Thus, when feasible, the Commission, which is responsible for enforcing the EUMR, could collaborate with the authorities in the Member States responsible for applying GDPR within their countries.

2.2 An Overview of Merger and Acquisition Control in the EU

A merger is the process in which two or more companies combine to create a single unit, while a company buying the assets, stock, or other interests of another company is known as acquisition.[63] Merger control is an in-depth process that examines a wide range of criteria to decide whether a proposed merger or acquisition will have anticompetitive effects or will harm consumers.

European Commission [hereinafter EC] is the EU competition authority whose objective is to ensure that competition remains fair and efficient in the market. According to EUMR, the merging parties must notify the EC of the intended transaction, and then the EC will launch an investigation to determine if the merger would have an adverse effect on competition in the relevant markets. The regulation only applies to those M&As that have an EU dimension. Article 1 establishes if an M&A has an EU dimension based on two sets of thresholds: the global and EU turnover of the companies involved.[64]

On the other hand, data has become highly important in the digital economy,[65] offering companies that control it huge influence. However, some entities and start-ups, despite their substantial strength in online market, may fail to achieve the necessary threshold conditions. The EU merger

[62] Digital Clearinghouse, Available at: https://www.digitalclearinghouse.org/#:~:text=The%20Digital%20Clearinghouse%20aims%20to%20create%20a%20platform,an%20era%20of%20big%20data%20and%20artificial%20intelligence. Accessed 29 April 2023.
[63] Gerber (n 6) p.77.
[64] "(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million."
[65] Hoffmann Jörg and Johannsen Germán, *EU-Merger Control & Big Data On Data-specific Theories of Harm and Remedie,* EU Competition Law Remedies in Data Economy, Springer, 2019, p. 8.

review procedure has been restructured, so that it now applies even to those mergers that do not satisfy the required thresholds. In this sense, the EC published[66] instructions on the use of Article 22 EUMR. This article empowers the Commission to investigate mergers that do not meet EU requirements if they (1) have substantial effects on international trade and (2) threaten to significantly affect competition within the territory of the Member State or States making the request.[67]

The EC investigation is typically divided into two phases: Phase I and Phase II. Following the notification phase of a merger, the EC will conduct an investigation to assess if the merger can be approved immediately or if additional investigation is needed. During Phase I of the merger investigation, the EC may declare one of the following: a) the merger does not fall under EUMR; b) it is in line with the internal market; c) it approves the merger but imposes certain commitments for the parties, or d) there are serious doubts about the merger's compatibility with the internal market.[68]

If the EC determines that a merger raises significant concerns regarding effective competition during the Phase I investigation, it is required to open the Phase II investigation.[69] This stage is a more in-depth examination undertaken by competition authorities, during which several tests and theories of harm may be applicable in order to establish the anticompetitive nature of the merger. This process is very complex and it might be taken into account a variety of factors such as market definition, market concentration, entry barriers, innovation, consumer welfare, and efficiency.[70] Therefore, it is assessed whether the transaction is likely to harm competition and, ultimately, consumers.

When reviewing a merger, one of the tests applicable in the broad analysis conducted by competition authorities is *Small but Significant Non-transitory Increase in Price*.[71] Price is seen as a reliable indicator of market competitiveness according to which consumers benefit when paying

[66] Communication from the Commission, Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases. *OJ C 113, 31.3*, 2021.
[67] Article 22 EUMR.
[68] Article 6(1) EUMR.
[69] Craig Paul and Gráinne De Búrca. *EU Law: Text, Cases, and Materials UK Version*. Oxford University Press, USA, 2020. p.1056
[70] Kaczorowska-Ireland Alina, *European Union Law.* Routledge, 2016, p.980-999
[71] Mandrescu Daniel, *The SSNIP Test and Zero-Pricing Strategies*. European Competition & Reg. L. Rev., 2018, p. 253

lower prices. The test supposes to assess consumers' behavior if the merged entity would raise price above the competition level by 5 or 10% and to establish if they would be harmed.

However, this approach may not be suitable in the zero-price market, where products and services are often provided for free in exchange for user's data. The test may fail to reflect the real impact of a merger on competition and consumer welfare, fact acknowledged by the Commission authorities in the settings of the Facebook/WhatsApp merger.[72] Hence, the relevant factors that should be considered during the review of a data-driven merger may differ from the traditional approach. In this context, the quality of the online services or goods would be more appropriate to be taken into account. Mandrescu claims that elements such as data privacy, potential harm to consumers and user choice may be among the factors of quality.[73] Chapter 5 will explain how a data-driven merger could be assessed in terms of quality.

Another test that might be applied by the Commission is *Significant Impede to Effective Competition Test*, enriched in Article 2 EUMR, to determine whether the merger would be harmful to competition. Effective competition, which is the objective of the EUMR, should result in tangible benefits for consumers such as fair pricing, high-quality products and services, innovation, and a range of options.[74] In other words, after the merger, consumers should still have the ability to make a real choice based on factors such as price, quality, and innovation.

Merger review is intended to be an *ex-ante* control that mainly prevents merging undertakings from strengthening or maintaining a dominating position that allows them to exercise market power that could be harmful to the process of effective competition. Thus, it focuses on the potential negative effects of certain practices before they even occur.[75] EUMR permits the European competition authority to block[76] a merger or make it subject to specific conditions[77] if it considerably restricts effective competition. The EC is only authorized to intervene in a merger if it has concrete or reliable evidence indicating that the merged entity has gained a market position which is disruptive

[72] Wasastjerna (n 17) p. 356
[73] Mandrescu (n 71).
[74] See also: Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2004/C 31/03) para 8.
[75] Lorenz Moritz. *Merger Control*. In *An introduction to EU competition law*. Cambridge University Press, 2013, p. 242-44.
[76] Article 8(3) EUMR
[77] Article 8(4) EUMR

enough to negatively impact competition.[78] This means that any concerns that cannot be supported with proof should not be taken into consideration.

2.3 The Role of Data in Merger and Acquisition Analysis

One might assume that goods and services are offered for free in the online economy; yet, users "pay" for these advantages with their personal data. As a result, personal information acts as a type of currency in the online market,[79] allowing businesses to make use of it in order to target individuals more precisely, for but not limited to, advertisement purposes.

A rise in personal data collection by online entities can be equated to a rise in prices.[80] Thus, when it comes to competition in the digital market, data is a powerful weapon. It is important to highlight that data is a broad concept that encompasses any type of information, including personal data.[81] Non-personal data contains any information that does not fall under the GDPR's umbrella term of "personal data".[82] One example may serve big data, which is collected and processed anonymously, whereas personal data is used to identify individuals. Companies might claim that the vast majority of data they collect and use is non-personal; yet, the line between big data and personal data is not always well-defined, given that users' activity data is hardly completely anonymous.[83]

On one hand, data is a crucial asset in today's digital economy that may bring about considerable advantages to companies that hold it in terms of market power, competitive advantage, and innovation. Data can be processed or exchanged in order to obtain information on customer habits, preferences, and needs, which can then be employed to provide better services and improve advertising strategies, thus, ultimately benefiting consumers.[84]

On the other hand, when companies merge, there is a possibility that the transaction could undermine not only competition, but may also raise privacy risks and concerns irrespective of whether they are in the same industry (horizontal), at different stages of their operation (vertical),

[78] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2008] OJ C 265/07, para 52; Guidelines on Horizontal Mergers (n 74) para 77.
[79] Speech Vice Commissioner Viviane Reding, *The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age*, Innovation Conference Digital, Life, Design, Munich, January 22, 2012. Available at: <https://www.youtube.com/watch?v=DbmPZljo-Jg&ab_channel=DLDConference>. Furthermore, data is considered as the oil of the digital economy.
[80] OECD, *Big Data: Bringing Competition Policy to the Digital Era 17*, 29-30 November 2016, p.18
[81] EDPS Preliminary opinion 2014 (n 2), p.9.
[82] Article 3(1) of Regulation 2018/1807 of 14 Nov. 2018 on a framework for the free flow of non-personal data in the European Union [2018] O.J. L303/59
[83] Article 29 Working Party, *Opinion 4/2007 on the concept of personal data*, WP 136, 20.06.2007.
[84] Hoffmann and Johannsen (n 65), p.19.

or in unrelated fields (conglomerate). Merging data can result in (a) loss of competition between two previous effective rivals,[85] (b) exclusion of other market players,[86] (c) higher barriers for new entrants to compete,[87] and (d) diminished privacy rights.[88]

Therefore, the Commission ought to assess theories of harm related to the aggregation of data, which can give the merged entity an unfair advantage in the markets in which it operates**.** Because of these benefits, competitors may find it difficult to compete with the new entity or might be discouraged to enter a market in which the merged company is dominant, leading to foreclosure or barriers to entry.[89] In addition to this, in the short and long run, the options available to consumers may be diminished, facilitating the abusive behavior of the dominant firm. Nevertheless, in all scenarios consumers welfare, expressed in diminished consumer privacy, lesser choice and innovation could be impeded.

The CJEU ruled in the *Tetra Laval v Commission* judgment that the Commission is required to analyze whether a merger could result in increased market dominance and investigate if it might lead to situations that facilitate abusive conduct in the market and harm consumers.[90] Pursuant to this decision, it might be argued that the EC should have reviewed the potential misuse of personal data in the post-merger context of the *Facebook/WhatsApp* merger.[91] This is especially important because the WhatsApp privacy policy was dramatically altered following the merger, leading to enhanced market power and a greater risk of abusive behavior. According to Costa-Cabral and Lynskey, it is more difficult to establish the potential harm to data protection in the pre-merger stage than after the merger has already taken place and any negative effects have occurred.[92]

The EC has the authority to ban or make a merger subject to certain conditions if it is deemed to strengthen or create a dominant position in the market, leading to a significant reduction in competition or having any other adverse effect. For example, the merging parties may be required to keep their databases separate due to concerns related to economic efficiency. However, would a

[85] Guidelines on Horizontal Mergers (n 74) para. 24; Guidelines on Non-Horizontal Mergers (n 78) para. 12, including the footnote.
[86] Guidelines on Horizontal Mergers (n 74) para. 22; Guidelines on Non-Horizontal Mergers (n 78) para 18.
[87] Guidelines on Horizontal Mergers (n 74) para 70; Guidelines on Non-Horizontal Mergers (n 78) para. 49.
[88] Guidelines on Horizontal Mergers (n 74) para. 61; Guidelines on Non-Horizontal Mergers (n 78) para 15; (consumer harm).
[89] Hoffmann and Johannsen (n 65), p. 16.
[90] Case C-12/03 P *Tetra Laval BV v Commission* [15 February 2005] ECLI:EU:C:2005:87, paras. 39, 41.
[91] Costa-Cabral Francisco and Orla Lynskey. *Family ties: the intersection between data protection and competition in EU Law*. Common Market L. Rev. 54, 2017, p. 38.
[92] ibid p. 37.

merger be prevented from happening if the combination of databases resulted in infringements of privacy legislation? This shall be discussed in Chapter 5.

2.4 Summary and Conclusion

Data protection is a fundamental right within the EU framework. According to GDPR, the controller/processor must have a legal reason to process personal information. The enforcement takes place at the national level; however, at the EU level, there are legal institutions that ensure the uniform application of data protection rules. Merger control is a complex process that consists of assessing several tests and theories of harm employed to determine the compatibility of the transaction with the competition standards. This chapter determined that data plays a crucial role in the context of competition law, as it can be a significant parameter companies compete for, and it can also pose competition and privacy concerns.

3. Data Protection Consideration in the EU Competition Enforcement: Two Steps Back, One Step Forward

This chapter explores the views of the CJEU and the EC, which is the enforcer of the EU competition law, on the incorporation of privacy considerations into competition law cases. It first presents the Court's and Commission's reluctance to include personal data protection in the competition examination, but it then illustrates how the EC has recognized the importance of personal data protection in the merger process. Hence, the name of the chapter "two steps back, one step forward" implies a slower but consistent pattern of development.

3.1 Asnef-Equifax Case

To trace the development of the relationship between competition law and data protection law in the EU, it is useful to examine the CJEU decision from 2006 in the *Asnef-Equifax*[93] case. This case marked the first time when the Court delivered some insights concerning the role of data privacy in EU competition enforcement. While this case was not directly related to merger control, it is

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

worth highlighting that competition objectives are similar across all areas of competition law.[94] As a result, it would be useful to examine the Court's approach in this instance.

The case involved the violation of Article 81 of EC [to be read as Article 101 TFEU] by two financial organizations that were in competition with one another but entered into an alleged anticompetitive agreement by establishing a shared credit history registry for their customers.[95] Regarding the potential privacy concerns associated with the sharing of sensitive personal data, the CJEU argued: "any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, thus, they may be resolved on the basis of the relevant provisions governing data protection".[96] The Court paid no consideration to whether the financial institutions, acting as controllers, had lawfully processed the personal data that was intended to be made accessible to each other. The CJEU treated competition law and data protection law as distinct legal fields, declaring that matters that involved possible violations of privacy "as such" cannot be an aspect of competition law; and it has since been issued key decisions reflecting this approach.[97]

Additionally, the Advocate General, in its non-binding opinion, acknowledged that the lawfulness and fairness of processing personal data under the agreement (to establish the proposed register) might have some relevance to the case analysis.[98] However, he did not incorporate this analysis into the competition law assessment directly but rather considered it as a separate issue.[99]

3.2 Google/DoubleClick

The Commission adopted a similar position in *Google/DoubleClick*[100] merger refusing to assess how combining the parties' separate databases could have a negative impact on data protection. Following the merger, Google was able to combine its user's search pattern dataset with DoubleClick's user's web-browsing behavior dataset, providing Google with an advantage in online advertising services, which might have resulted in becoming the leading provider in the ad market where it competes. Given that the merging parties were operating in different markets, the

[94] Gerber (n 6) p. 18-29.
[95] Case C-238/05 *Asnef-Equifax*, paras 6-7.
[96] ibid para 63.
[97] See below Google/DoubleClick, Facebook/WhatsApp, Microsoft/LinkedIn mergers.
[98] Opinion of Advocate General Geelhoed in Case C-238/05 Asnef-Equifax et al v. Asociación de Usuarios de Servicios Bancarios, 2016, paras 41-54.
[99] Ibid, para 56
[100] Case No. COMP/M.4731, Google/DoubleClick, of 11 March 2008.

merger did not seem to significantly impede effective competition with regard to the elimination of actual competition, thus, it could have non-horizontal effects.

By approving the merger and enabling the datasets to be combined under competition law, a concern about the lawfulness of the combination under data protection legislation emerged. At that point, the Commission stated that its assessment was based solely on competition rules, and its ruling applies without regard to existing data privacy regulations.[101] Similarly, the FTC stated that while privacy is an important issue, it does not have the legal power to impose remedies that are not related to antitrust matters.[102] Thus, the adjudicators deliberately excluded data protection from the scope of their investigation, just like in the *Asnef-Equifax* case. The Commission emphasized that the newly formed entity has the responsibility in its day-to-day management of the businesses for upholding the fundamental rights of its users, including, but not limited to, privacy and data protection.[103] Thus, the concern here expanded, to a limited extent, to the idea of whether or not competition enforcement may be used to promote a greater form of data protection. However, the most important aspect of this case is that it suggested for the first time that personal data shall be treated as the *quality* of the goods or services provided online.[104]

Even though the Commission failed to tackle data protection considerations, it examined data-related competition concerns. It noted that the combination of datasets could raise competition concerns only if the information acquired is impossible to be replicated by the competitors, giving Google an irreversible competitive advantage and forcing competitors out of the market. [105] The Commission considered that such a combination of data was already available to a number of Google's competitors, thus it did not raise any competition issues.[106]

At that time, the former EU Competition Commissioner Almunia expressed his opinion on the *Google/DoubleClick* merger arguing that EC had not yet faced with merger where it is believed that personal data could be used to violate EU competition law. However, he also noted that this

[101] Ibid, para 368.
[102] Google/DoubleClick; FTC Statement, Google/DoubleClick, FTC File No. 071-0170, para 2-3.
[103] Google/DoubleClick (n 100) para. 368.
[104] ibid paras. 273, 289, as a result of a merger … *degrading DoubleClick tools' quality.*
[105] ibid para 359.
[106] Ibid para 362-366.

did not mean that such a case could not arise in the future: "in the future, personal data might turn into a competitive concern".[107]

3.3 Facebook/WhatsApp

The issue of data protection in competition law received increased attention in the 2014 in *Facebook/WhatsApp* merger.[108] The EC investigated the potential impact of Facebook's acquisition of WhatsApp on competition, specifically if it could improve Facebook's (now called Meta Platforms) market position. The analysis concentrated on two scenarios: (i) placing advertisements on WhatsApp and (ii) using WhatsApp data to improve Facebook's advertising features,[109] thus data was seen as a competitive parameter. Both scenarios would include the processing of personal data, raising concerns regarding the validity of such operations under data protection law. However, the Commission once again determined that concerns solely about privacy do not fall under the authority of EU competition law norms, but rather fall under the jurisdiction of EU data protection regulations.[110] Thus, it was unable to impose any conditions on the approval of the merger concerning privacy.

Even if officially, it adopted "parallel pathways", the EC actually made a few substantive conclusions concerning privacy. It analyzed the potential of Facebook to access the personal data of WhatsApp users for targeted advertising on and outside the platform. This was a new approach taken by the Commission, as it considered, for the first time, not only the impact on the advertising market but also on consumers, who exchanged their data to obtain free services. The Commission suggested that if Facebook were to start showing targeted ads on WhatsApp, some users might switch to ad-free alternatives, leading to dissatisfaction among privacy-conscious users.[111] Despite being aware of the importance of privacy to WhatsApp's users, the Commission did not analyze the potential harm to consumers if Facebook were to collect and use data from WhatsApp users and it did not utilize privacy as a criterion for making any further assessments.

Some critics claimed that the EC ought to have assessed the potential worsening of WhatsApp's data protection conditions post-merger, as well as the privacy issues connected with data

[107] Joaquín Almunia, *Competition and Personal Data Protection*, at Privacy Platform Event: Competition and Privacy in Markets of Data (Brussels, 26 November 2012). Available at: <Link>; Accessed 28 April 2023.
[108] European Commission, Case COMP/M.7217, Facebook/WhatsApp, 3 October 2014.
[109] ibid 168.
[110] ibid para 164.
[111] Wasastjerna (n 17) p.349

concentration.[112] In addition, it is argued that the Commission's justification in the *Facebook/WhatsApp* case, which held that the parties' activities did not intersect on a relevant market, was not accepted as pertinent. Even though, data-protection issues were rejected as non-economic, the merger may have pointed at the real competitive issue. While Facebook purchased a highly valuable asset, it may have also hindered WhatsApp's ability to make improvements in relation to data protection conditions.[113]

EDPS pointed to this merger as an example of when collaboration between data protection and competition authorities may be beneficial in order to foresee negative events. The Opinion also proposes the creation of a Digital Clearing House in the EU online market, which is a voluntary network of enforcement agencies that could share information about potential violations in the digital ecosystem and collaborate in the most effective ways to address them.[114] In 2017, the European Parliament supported the creation of a collaborative network to improve the communication of policies in those areas. Despite this positive development, the efforts towards increased cooperation are still in their early stages, and there is currently very little collaboration between competition authorities and data protection authorities on privacy concerns.[115]

Although the EC acknowledged the importance of data as a competition parameter in the *Facebook/WhatsApp* merger case, it did not include data protection considerations as a factor in its assessment.[116] This approach could be seen as a political rather than legal stance, given the potential risks of including such considerations without a clear basis for doing so.[117] This cautious approach was likely taken to avoid judicial challenges that could have lasted for a long period and potentially could have delayed investigations.

3.4 Microsoft/LinkedIn

The EC conducted an analysis to determine if data protection regulations would prevent Microsoft from accessing the personal data of LinkedIn's users after the acquisition. The Commission

[112] Kimmel Lisa and Kestenbaum Janis, *What's up with WhatsApp: a transatlantic view on privacy and merger enforcement in digital markets.* Antitrust, 2014, p.52; Costa-Cabral and Lynskey (n 91), p.38.
[113] Newman argues: "a monopolist in a zero-price market could place a naked constraint on competitor innovation," pointing to Microsoft's antitrust lawsuit of Netscape: Newman John. *Antitrust in zero-price markets: Foundations.* University of Pennsylvania law review, 2015, p.190.
[114] EDPS Opinion 8/2016 (n 16) page 16.
[115] Kerber *Taming Tech Giants* (n 15) p. 300.
[116] *Facebook/ WhatsApp* para. 87.
[117] Zanfir Gabriela and Ianc Sinziana, *Data protection and competition law: The dawn of uberprotection*. In*: Research Handbook on Privacy and Data Protection Law*. Edward Elgar Publishing, 2022, p. 254

identified two potential horizontal issues if the two datasets were combined. First, the combination of two datasets post-merger may increase the merged entity's market power in the hypothetical market for data supply, thereby raising barriers to entry for potential competitors seeking to provide professional social network services.[118] Second, if the two companies had previously competed with each other based on their respective datasets, then the merger could eliminate such competition. However, the EC concluded that neither of these conditions applied in this case.[119]

In the *hypothetical situation* where the acquisition of LinkedIn granted Microsoft exclusive access to data and created an unfair advantage over competitors, the EC would only authorize the acquisition after Microsoft was subject to some limitations,[120] such as restricting parties' access to certain data. To put it simpler, if the Commission had banned the merging entities from combining their datasets, it would not only address economic efficiency concerns in terms of foreclosure effects, but it indirectly would have a positive impact on the protection of personal data, by preventing the misuse of it. This is the easiest way to include EU data protection laws into traditional competition law assessments.[121]

It is worth mentioning that in this acquisition, the EC showed more willingness to consider data privacy issues in competition law assessment: "any such data combination could only be implemented by the merged entity to the extent it is allowed by applicable data protection rules".[122] Moreover, the Commission stated that privacy concerns are not included under the umbrella of EU competition law, but can be an important parameter of competition and a driver of customer choice.[123] In light of this, privacy can be considered in the competition assessment to the degree that consumers view it as a critical *quality* aspect, and the merging entities compete on this basis.

Hence, the Commission explicitly recognized data privacy as a crucial element of competition in this particular merger case. Moreover, the Commission stated in a footnote that privacy was an essential competition characteristic and motivator of customer preference in the professional social networks sector. In addition, according to Graef, the *Microsoft/LinkedIn* acquisition offered a

[118] Case COMP/M.8124 – Microsoft/LinkedIn, para 179
[119] Ibid 180-181
[120] Microsoft/LinkedIn acquisition was subject to some limitation, others than those of keeping the datasets separated, this would be discussed in the chapter 5.
[121] Kerber *Taming Tech Giants* (n 15) p.7.
[122] Microsoft/LinkedIn Para 177-178.
[123] ibid para 350.

silver-lining to the debate surrounding competition and data protection.[124] The Commission, therefore, adopts a more proactive, yet superficial in nature, attitude, and explicitly encourages the inclusion of privacy considerations in competition analyses when appropriate.

3.5 Summary and Conclusion

The CJEU has only issued a judgement on the intersection of data protection and completion laws, in which it stated that privacy concerns are not a matter of competition. Through it, the Court has established a pathway that has influenced EC's decisions.

In line with the CJEU's reasoning, the Commission adopted a similar position in its decisions, claiming that its rulings were based solely on the analysis of the transactions under the EU competition rules. However, from the *Google/DoubleClick* in 2008 to the *Microsoft/LinkedIn* in 2016, the examination of data and privacy implications in mergers has relatively advanced and it ought to develop further. The EC suggested in *Google/DoubleClick* and *Facebook/WhatsApp* mergers that privacy should be treated as an essential aspect of the quality of the services provided by the merged entity. In *Facebook/WhatsApp* merger, the EC highlighted that personal data is a valuable asset in the digital economy and recognized its significance as a competitive parameter. This view was strengthened by the *Microsoft/LinkedIn* merger that raised concerns about the accumulation of data and its potential impact on competition and privacy.

4. The German Facebook Case

This chapter discusses the German perspective on the Facebook case and highlights if any insights can be taken from it and applicable to the EU merger control. It is important to note that the German perspective in this case primarily centers on the concept of abuse of dominance rather than merger review. However, the findings could serve as a foundation for conducting a more in-depth investigation into comparable actions occurring after a merger. It explores how data and market dominance are linked, and whether Facebook has used its market power to violate data protection regulations.

[124] Graef Inge. *When Data Evolves into Market Power—Data Concentration and Data Abuse under Competition Law.* Digital Dominance: The Power of Google, Amazon, Facebook, and Apple, 2018, p.77.

4.1 Federal Cartel Office's position

Although early suggestions were made about the importance of taking into account the collection of personal data in the context of competition law,[125] it was only recently that significant attention has been drawn to this issue, largely due to the high-profile German Facebook case. This is a well-known case regarding the intersection of competition and privacy, in which Germany's National Competition Authority FCO investigated Facebook's data processing policies.[126] The intervention of the FCO is legally authorized under Article 3(2) EUMR. The decision regarding Facebook is solely grounded on the abuse of dominant position provisions outlined in Article 19(1) of the German Act Against Restraints of Competition (GWB).[127] It is clarified that Article 102 TFEU does not encompass safeguarding fundamental rights or values that are protected by other laws.[128]

FCO[129] attempted to include an infringement of data protection principles under its jurisdiction. Facebook holds a dominant market position with a 95% market share in the social network market when looking at the number of daily active users. Given that, it was found that Facebook was engaging in abusive behavior by requiring users to accept its terms and conditions. These conditions facilitated Facebook's anticompetitive practices such as gathering and utilizing users' personal information from websites other than Facebook, such as WhatsApp and Instagram, as well as from their online activity, including websites they visit, products they purchase, and ads they view.[130] The question being examined was whether users had been given enough information, as required by Articles 4(11), 6(1)(a) and 9(2)(a) GDPR, to understand what they are consenting to when agreeing to Facebook's data collection and processing policy.

The German competition authority argued that users were practically forced to accept Facebook's terms and conditions. Because of the company's huge market share, users had no other alternative but to agree to the terms in order to use Facebook's service, leading to a "take-it-or-leave-it"

[125] Stucke Maurice and Allen Grunes, *Introduction: big data and competition policy*. Big Data and Competition Policy, Oxford University Press, *2016, p. 1-11.*
[126] FCO, Case B-6–22/16, Facebook, 6 February 2019.
[127] The general clause in Art. 19 para. 1 GWB reads as follows: "Abuse of a dominant position by one or more companies is prohibited."
[128] Decision of the Federal Cartel Office-22/16 of 6 February 2019, para 914
[129] Federal Cartel Office press release, Federal Cartel Office Prohibits Facebook from Combining User Data from Different Sources, 7 February 2019, Available at:
https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html
[130] FCO Case B-6–22/16, Facebook, 6 February 201, para 523.

situation. [131] This action is in violation of Section 19(1) GWB,[132] as it cannot be assumed that users had provided their valid consent to Facebook's data collection and processing practices.

FCO explained the relationship between GDPR and competition law, pointing to the fact that data privacy, as a fundamental right, should be evaluated in conjunction with competition laws.[133] It established that the presence of data protection regulation does not prevent competition authorities from investigating whether companies are violating GDPR requirements by abusing their dominant market position.[134] Moreover, in its Opinion issued on 22 September 2022, Antos AG stated[135] that while competition bodies may not have explicit powers to determine GDPR violations, the latter does not preclude other authorities from considering the compliance of an act with GDPR provisions as an incidental matter when exercising their own powers. This suggests that regulators can evaluate GDPR violations as a secondary issue when examining alleged anticompetitive conduct under Article 102 TFEU (primary issue).

Consequently, it was decided that Facebook engaged in abusive behaviors toward consumers, infringing personal data protection norms laid down in Article 6(1) GDPR.[136] FCO prohibited certain Facebook privacy terms argued that users lost control over their personal data; and that their right to determine how their personal information is used and shared was violated.[137] By adopting its controversial decision, the FCO connected competition law with EU data privacy law and imposed an extra consent necessary to be obtained by the merging parties. This was the first time a competition regulatory agency prohibited specific clauses related to gathering and utilization of personal data as an act of abuse of a dominant position.

4.2 German Regional and Federal Court of Justice's positions

Facebook appealed against the FCO decision to *the Düsseldorf Higher Regional Court*, which did not agree with the approach taken by the FCO. The fundamental objection raised in the German Facebook case was that privacy concerns were outside the jurisdiction of competition law.[138]

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[131] Organisation for Economic Co-operation and Development, *Consumer Data Rights and Competition—Background Note,* 2020, p.30.
[132] Bundeskartellamt, Case Summary – Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing, 2019, p. 7
[133] Ibid p.8.
[134] Ibid p.9.
[135] Opinion of Advocate General Rantos delivered on 20 September 2022 on Case C-252/21, Meta Platforms v. Bundeskartellamt.
[136] Bundeskartellamt, Case Summary (n 132) p. 9.
[137] Ibid p.10.
[138] Oberlandesgericht Düsseldorf, DHRC Order, FCO, Case VI-Kart 1/19 (V), 26 Aug. 2019, para. 31

The Court ruled that the FCO did not successfully demonstrate that the consent obtained from users was not based on an autonomous decision and it did not adequately investigate whether users only agreed to Facebook's terms and conditions due to the absence of alternative service providers.[139]

Furthermore, FCO was also criticized for not demonstrating the anti-competitive effects of Facebook's actions. Although the Court acknowledged that harmful to consumer protection can be deemed as harm to competition, it concluded that it had not been established in the Facebook case. It was argued that a dominant firm's violation of data protection rules cannot be considered a violation of competition law if there is no direct causal link between the firm's unlawful data processing and its market power.[140]

This ruling, however, has been appealed, and the *German Federal Court of Justice* overruled the judgment of the Regional Court in its interim decision. The Facebook case has not yet reached a final conclusion and it is still ongoing, indicating that a definitive ruling will take some time. In April 2021, following the interim decision of the German Federal Court of Justice in the Facebook case, the Higher Regional Court of Düsseldorf sought further legal guidance from the European Court of Justice. It temporarily suspended the proceedings in the Facebook case and asked CJEU for a preliminary ruling.[141]

Undoubtedly, this case blurs the boundary between competition law and data protection.[142] It highlights the complex and interconnected nature of these two legal fields as well as how they can overlap and affect one another. Although the dispute is currently in court, its consequences have already been felt widely and significantly. This case not only triggered a worldwide debate on whether and how privacy should be incorporated into competition law, but it also proposed a novel concept of establishing a minimum level of choice for consumers in the merger process, in order to provide them with control over the collection and use of their personal information under competition law. [143] The Facebook remedy of requiring additional consent for combining personal

[139] ibid. para 29; See also: Buiten Miriam Caroline. *Exploitative abuses in digital markets: between competition law and data protection law.* Journal of Antitrust Enforcement 9.2, 2021, 279.
[140] DHRC Order (n 138); D'Amico Alessia Sophia, *Conceptualizing the interrelation between data protection regulation and competition law*. Research Handbook on EU Data Protection Law. Edward Elgar Publishing, 2022. P.161.
[141] Case C-252/21: Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany) lodged on 22 April 2021 - Facebook Inc. and Others v Bundeskartellamt; Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62021CN0252> .
[142] Wasastjerna (n 17) p. 343.
[143] Kerber Wolfgang and Louisa Specht, *Synergies Between Data Protection Law and Competition Law*. 2021, p. 58.

data has already been introduced in one of the EU legal instruments, as it will be shown in the next chapter.

This case can be used as an analogy in the merger review. If, during the merger control process, the competition authority anticipates that the new entity will create a dominant position[144] or abuse it by violating data protection regulations, it must be able to impose commitments, such as keeping their databases separate or even blocking the merger.

Furthermore, UNCTAD specified that the relationship between competition law, data protection, and market power has become increasingly complex in the digital economy, where consumer data gives significant market power to digital platforms. Therefore, it is crucial to integrate the interface between these areas and adopt a more flexible approach to evaluating the abuse of dominance in the data-driven digital economy.[145]

4. 3 Summary and Conclusion

This chapter referred to as *German perspective* because in terms of data protection in competition assessment, not just the FCO but also German Federal Court adopted a similar perspective. The case identified issues related to Facebook's market power and its ability to exploit its position. The case focuses on the abuse of dominance, but it offers guidance and insights that can be applicable in the merger control regime. Thus, when reviewing mergers involving dominant companies, competition authorities may need to consider the risk of abuse of market power, such as the negative effect it may have on competition, innovation, and data protection.

5. Data Protection Considerations in Competition Law

Chapter 5 explores ways to integrate data protection into competition law, with a focus on merger regulation. Section 5.1 examines how privacy and data protection can fit under the umbrella of consumer welfare, which is one of the cornerstones of the EU merger control framework. Section 5.2 describes how Member States may consider data protection as a matter of public interest and

[144] Guidelines on Horizontal Mergers (n 74) p.4.
[145] United Nations Conference on Trade and Development secretariat *Competition issues in the digital economy 18 session*, Geneva, 10–12 July 2019 para 23.

investigates whether they can intervene in the EU Merger Control on that basis. Section 5.3 looks into alternative methods for including privacy and data protection in merger review, with an emphasis on the new legal development in the EU designed to address the challenges posed by the big tech firms in the digital market.

5.1 Data Protection: a Component of Consumer Welfare?

5.1.1 Consumer Welfare Standard in the EU Merger Regulation

Consumer welfare is a significant objective of contemporary competition law, which is often addressed in legislation, such as EUMR. First of all, merger regulation is intended to protect the interests of EU consumers set out in Articles 12 and 169 TFEU.[146] Secondly, the regulation makes some explicit references to consumer welfare both in the recital[147] as well as in the main text. Recital 29 of EUMR addresses any foreseeable efficiency resulting from a merger that may outweigh the potential harm to consumers. Subsequently, Article 2 outlines the EUMR's objectives, which include improving consumer welfare by guaranteeing that competition is not excessively affected and the Commission should consider "the interests [...] of consumers" in merger reviews, and that the technical and economic progress brought about by a merger benefits consumers.[148]

In other words, the primary concern of merger regulation is to ensure that consumers are not harmed by anti-competitive practices and that it protects their interests by promoting competition in the market. This can include lower prices, better quality products and services, increased choice, and innovation.[149] Traditionally, price and quality are considered as components of a single measure - *value for money*.[150] However, price and quality can be seen as separate factors that contribute to consumer satisfaction. For example, when a good or service is provided free of charge, price is no longer relevant and other aspects, like quality, become essential.[151] Thus, offering better quality could be considered a crucial competitive parameter for which businesses compete.

[146] Article 12 of the TFEU establishes the EU's goal of achieving a high level of consumer protection, while Article 169 of the TFEU gives the EU the authority to take measures to safeguard the health, safety, and economic interests of consumers. In the context of the EUMR, this means that the EU can intervene and block mergers and acquisitions that may have negative impacts on consumers or competition in the market.
[147] EU recitals are not legally binding, but they can provide important context and guidance for interpreting and applying the provisions of the legislation. See: Case C-136/04 Deutsches Milch-Kontor [24 November 2005] ECLI:EU:C:2005:716, para 32.
[148] Article 2(1)(b) EUMR
[149] Case C-209/10 Post Danmark A/S v Konkurrencerådet (Post Danmark I) [27 March 2012] ECLI:EU:C:2012:172, para 22.
[150] Besanko David, and others. *Economics of strategy*. John Wiley & Sons, 2009, p. 365-367.
[151] Case No COMP/M.5727 – Microsoft/Yahoo! Search, [2010] para 101

5.1.2 Privacy as a Quality Parameter

The issue is whether consumer welfare incorporates data protection concerns as an aspect of quality in the process of assessing a merger. Supporters of including privacy concerns in the merger control claim[152] that the major goal of EU competition law is to protect customers, which strengthens their position that data protection should be part of the large consumer welfare standard that competition law should strive to achieve.

In its preliminary opinion, EDSP recognizes the fact that quality, which is a component of consumer welfare, encompasses privacy protection, which means that privacy can be seen as an element of non-monetary competition. [153] In addition, as was mentioned in the previous chapter, in *Facebook/WhatsApp* and *Microsoft/LinkedIn* privacy was considered a key competitive feature.[154] Currently, the "privacy as quality" theory is the most widely accepted approach for considering the impact of privacy on competition cases.[155] This is one method for incorporating at least some privacy aspects into a conventional competition law examination.

In recent years, there has been a growing awareness and concern about privacy and data protection among individuals, making it a valuable factor in the competitive process.[156] The quality of private policy can serve as incentive for individuals to switch from one provider to another. For example, the acquisition of WhatsApp by Facebook resulted in the loss of millions of users for WhatsApp due to changes in their privacy policy,[157] which allowed the exchange of data with Facebook. This acted as a competitive constraint on privacy, thereby reducing the quality of WhatsApp and thus decreasing the consumer's welfare.

Similarly, the level of data protection offered by companies can serve as a competitive parameter. In today's digital age, businesses that promote higher standards of personal information protection

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[152] Kuner Christopher and others. *When two worlds collide: the interface between competition law and data protection.* International Data Privacy Law 4.4, 2014, pages 247-248.

[153] EDPS, Preliminary Opinion 2014 (n 2) p.17; EC, Director-General for Competition, Johannes Laitenberger, *EU Competition Law in Innovation and Digital markets: Fairness and the Consumer Welfare Perspective*, speech, Brussels, 10 October 2017, [*we see data protection as an element of the quality of the product]* <https://ec.europa.eu/competition/speeches/text/sp2017_15_en.pdf>

[154] Case M.8124 – Microsoft/LinkedIn, para 350; Case No COMP/M.7217 – Facebook/WhatsApp para 87

[155] Douglas Erika. *Digital Crossroads: The Intersection of Competition Law and Data Privacy*. Temple University Legal Studies Research Paper, 2021. P. 67–74.

[156] European Commission, *Special Eurobarometer 431 on Data Protection*, 2015, Available at: <http://ec.europa.eu/commfrontoffice/publicopinion/archives/ebs/ebs_431_en.pdf> Accessed 17 May 2023

[157] Hern Alex, *WhatsApp loses millions of users after terms update*, The Guardian, 24 January 2021; Available at: https://www.theguardian.com/technology/2021/jan/24/whatsapp-loses-millions-of-users-after-terms-update Accessed 9 May 2023

can build trust and loyalty among their customers. In this way, they can differentiate themselves from other competitors and attract more people who value privacy.

5.1.3 The Two Sides of Data Protection: Efficiency and Concern

Mergers and acquisitions can increase or decrease the quality, choice or innovation of their services or products. Mergers can be a way for companies to achieve growth in the industry they operate and bring about efficiencies for consumers. *Efficiency* considerations are important as they reflect any potential advantages that a proposed M&A may have. A merger may occasionally produce efficiencies that exceed any possible anticompetitive impacts, giving consumers a net benefit.

From the Guidelines on the Assessment of Horizontal Mergers, it is evident that a consumer welfare test is applicable. Guidelines specify that a merger ought not to raise prices, limit production, choice or quality of products and services, restrict innovation, or change competition characteristics.[158] In addition to this, it claims: "the relevant benchmark for assessing efficiency claims is that consumers will not be worse off as a result of the merger." [159] Thus, efficiencies that are either beneficial or neutral to consumers are generally viewed as positive under the consumer welfare standard. Regarding non-horizontal mergers, the Guidelines specify that major obstacles to competition occur when the merger results in "foreclosure", allowing the merging firms to increase the price paid by consumers, reduce competition, quality, consumer choice and innovation.[160]

To put it differently, when it comes to assessing a merger, the guidelines focus on any negative or positive impact they may have on consumer welfare resulting from either horizontal or non-horizontal mergers. The decrease in consumer welfare is viewed as one of the primary criteria for establishing the anticompetitive nature of mergers. If a *merger is beneficial* for consumers, then it is less likely to be considered anticompetitive.

For example, the potential merger between *Microsoft and Yahoo* could have combined their datasets in order to develop a better search engine with broader user reach and features that are more advanced. This could result in increased competition for Google, which has dominated the search and online advertising market for years.[161] Thus, claims of efficiency established by mixing databases post-merger can be evaluated as a matter of quality. Combining databases could

[158] Guidelines on Horizontal Mergers (n 74) para 8
[159] ibid para. 79.
[160] Guidelines on Non-Horizontal Mergers (n 78) para. 18
[161] Case No COMP/M.5727 – Microsoft/Yahoo! Search Business paras 219-226;

ultimately lead to a more reliable and accurate dataset; it can help address gaps, errors, and inconsistencies in the data, which in turn can enhance the quality of consumers.[162]

Subsequently, using the "privacy as quality" theory, the EU Commission might primarily examine whether the merger would have any *adverse impacts* on privacy as a competition parameter. Mergers may result in limited options for consumers in terms of data protection levels. This, however, involves the premise that competition on privacy existed prior to the merger and it must be reviewed as part of the assessment process.[163]

For instance, in *Microsoft/LinkedIn* acquisition the EC examined two scenarios in which the transaction could have harmed consumer welfare. Regarding the first concern, it was assessed if the transaction would increase LinkedIn's market share in the professional social network space, potentially reducing XING's market position.[164] Reduced competition could potentially harm consumer welfare in a few ways such as reduced quality and innovation. The second concern was whether embodying LinkedIn in Microsoft Office would restrict users' choices relating to the different quality levels of privacy given the limited number of market participants.[165] The Commission specifically indicated during its investigation of the *Microsoft/LinkedIn* transaction that consumer choice regarding privacy protection was an important competitive factor among professional social networks, which the merger could potentially threaten. The transaction was subject to some limitations by the Commission.[166] The EU Competition Commissioner remarked that by obtaining commitments from Microsoft, the market was kept open, and the Commission helped companies to compete more effectively to protect privacy aspects.[167]

At the same time, the merging of datasets could potentially give rise to concerns under data protection legislation. This could be especially true if, after the combination, data is used for purposes that exceed the limits for which it was originally collected, thereby contravening the GDPR's principle of purpose limitation.

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[162] Case No Comp/M.4854 –TomTom/TeleAtlas case para 245.
[163] Kerber *Taming Tech Giants* (n 15) p.6 .
[164] Case M.8124 – Microsoft/LinkedIn paras 343-349, XING is one of the strongest LinkedIn's competitors.
[165] ibid 350-51
[166] Ibid 407-470
[167] Margrethe Vestager, *What Competition Can Do – And What It Can't at Chilling Competition Conference*, 25 October 2017. Available at: https://arfonconsulting.co.uk/blog/2017/10/26/what-competition-can-do-and-what-it-cant-margrethe-vestager Accessed 26 April 2023.

The new entity must have a legitimate ground to process personal data, such as consent of the data subject, performance of a contract, legal obligation or legitimate interests of the controller.[168] In order to adhere to the principle of purpose limitation, personal data must be acquired for a particular, clear, and lawful reason and should not be handled in any way that contradicts those reasons. [169] If companies intend to use data for purposes other than those for which the user initially consented, they must seek valid consent from each person in the EU whose personal data they have in order to comply with EU data protection legislation.[170]

If additional consent is not obtained and privacy is infringed, it will result in a decrease in consumer welfare, which is a typical form of harm caused by market dominance. Swire argues that violations of privacy can negatively affect consumer welfare, which is a crucial objective of contemporary antitrust analysis.[171] Where such negative consequences occur, analyzing and attempting to reduce them should be a regular component of competition law assessment.

5.1.4 Challenges in Assessing Potential Consumer Harm

It is widely accepted[172] that assessing the potential harm with regard to non-price parameters such as consumer privacy, is challenging compared to evaluating traditional theories of harm as the current competition authorities might not have the appropriate instruments to deal with it. To fill this gap, some have proposed the use of the SSNDQ test, which stands for Small, but Significant, Non-transitory Decline in Quality.[173] In order for the SSNDQ to be effective, the quality element must be measurable, objective, transparent, and widely recognized.[174] Even though simulating a quality decline comparable to a 5% to 10% price rise could be difficult due to the subjective nature of quality,[175] "privacy paradox"[176], and the difficulty to quantify when the discloser of personal

[168] Articles 6(1), 5(1)(b) GDPR
[169] Article 5(1)(b) GDPR
[170] Graef,Inge. *Blurring boundaries of consumer welfare: how to create synergies between competition, consumer and data protection law in digital markets*. In *Personal Data in Competition, Consumer Protection and Intellectual Property Law: Towards a Holistic Approach?*, 2018, p. 132
[171] Swire Peter, *Protecting Consumers: Privacy matters in antitrust analysis.* Center for American Progress, 2007, https://www.americanprogress.org/article/protecting-consumers-privacy-matters-in-antitrust-analysis/ Accessed 09 April 2023.
[172] Wasastjerna (n 17) p. 352.
[173] OECD, The Role and Measurement of Quality in Competition Analysis, 5, 28 October 2013, p. 60. Available at: < <https://www.oecd.org/daf/competition/Quality-in-competition-analysis-2013.pdf>
[174] Ezrachi Ariel, *Virtual Competition: The Promise and Perils of the Algorithm*, Driven Economy, 2016 p. 15.
[175] Just like quality, privacy is subjective as consumers may have different opinions. While some may be willing to share their personal details in exchange for personalized services, others may be worried about misuse of their information.
[176] According to which consumers claim to value privacy but not acting in accordance with their expressed preferences for high privacy standards. Kemp (n 50) p. 353; See also: Kokolakis Spyros. *Privacy attitudes and privacy behaviour: A review of current research on the privacy paradox phenomenon.* Computers & security 64, 2017, 122-134.

details became anticompetitive,[177] the significance of the harm should not be disregarded. Some of the ways to address these challenges are setting a price on personal data that businesses must pay, conducting surveys to determine how much people are prepared to pay to preserve their privacy, or estimating the financial impact of data breaches.[178]

To the extent that a decrease in quality has to be assessed, stronger cooperation among data protection and competition regulators is required. This collaboration is acknowledged in the research conducted by the Catalan Competition Authority,[179] according to which data protection institutions are the experts in this area, therefore, competition authorities will have to seek guidance and work together with data protection authorities in order to assess a potential reduction in the quality of privacy terms and conditions. The EPDS has established Digital Clearing House that could be used to enhance the communication between the enforcement bodies of each legal field.

The EU's guidelines on horizontal mergers explicitly specify[180] that the impact on quality should be evaluated in the merger control process. EPDS stated that as online services continue to expand rapidly, it might become necessary to establish a notion of *consumer harm*, specifically related to breaches of data privacy rights, to enforce competition in the digital sectors of the economy.[181] These could potentially result in the EUMR being interpreted in light of data protection legislation.

On the other hand, critics have claimed that advances in other competitive features can offset the reduction of quality, rising doubt that competition authorities should examine such breaches.[182] Thus, consumers may be deprived of the advantages that could arise from a combination of databases if the EUMR is applied too rigidly. Moreover, it is argued that it is difficult to establish the precise threshold at which a decline in privacy protection should prompt action, particularly if the product or service being offered remains superior overall.[183] Therefore, the potential economic benefits against data protection concerns must be assessed on a case-by-case basis.[184]

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[177] Gal Michal and Daniel Rubinfeld. *The hidden costs of free goods: Implications for antitrust enforcement*. Antitrust Law Journal, 80(3), 2016, p. 556.
[178] OECD Roundtable on the Role and Measurement of Quality in Competition Analysis, 2013, p. 105;
[179] Autoritat Catalana de la Competència, *The Data-Driven Economy Challenges for Competition*, Barcelona, 2016, p. 42. Available at: <https://www.linkedin.com/pulse/catalan-competition-authority-issues-study-economy-xavier-puig-soler>
[180] Guidelines on Horizontal Mergers (n 74) para 8.
[181] EDPS Preliminary Opinion 2014 (n 2) para. 71.
[182] Manne Geoffrey and Ben Sperry. *The problems and perils of bootstrapping privacy and data into an antitrust framework*. CPI Antitrust Chronicle, 2015, p.6-8.
[183] Ohlhausen and Alexander Okuliar (n 7) p.40.
[184] European Union Agency for Fundamental Rights, Council of Europe and European Data Protection Supervisor (eds), *Handbook on European Data Protection Law*, Publications Office of the EU 2018, p.79.

5.2 Article 21(4) EUMR

While national competition authorities are prohibited from reviewing mergers that meet the community dimension test, Member States have the jurisdiction over such mergers and are entitled to take appropriate measures in order to protect their legitimate interests and specific public interests, as stated in Article 21(4) of the EU Merger Regulation. Under EUMR legitimate interests comprise public safety, media plurality, and prudential regulations. These are deemed *prima facie* meaning that actions undertaken by Member States to protect these general interests may be adopted and enter into force without advance notification to, and approval from, the Commission.[185] It is important to highlight that the list is not exhaustive and Member States might submit any other public interest to the Commission for an evaluation on a case-by-case basis. The Commission will approve or dismiss it after assessing its compliance with the fundamental principles and regulations that govern the community.[186]

Protection of personal data is not expressly provided in Article 21(4) EUMR, however, given that it is a fundamental right and a concrete issue of public interest, it can be construed as under the umbrella of other "legitimate interests". According to Jones and Davies, "Member States have the inherent authority to create impediments […] or impose additional terms and limitations on a merger, based on reasons related to public interest."[187] While it is uncommon for "other legitimate public interest" grounds to be raised, [188] the high-tech industry may be considered as a crucial one because certain companies have collected large amounts of personal data that can be employed for monitoring and surveillance of their users.

Businesses may follow users' online behaviors, preferences, and activities in order to target adverts or even influence people's thoughts and choices. As a result, it has become vital to safeguard individuals from the power and influence of large companies, which frequently act for personal gain rather than public interest. Moreover, it is widely accepted that merger decisions are often driven by economic and/or political reasons.[189] In this way, the interest of these corporations is

[185] Case T-417/05, Endesa v Commission, 2006, para 25.
[186] Ibid, see also: Kigwiru, Vellah Kedogo. *The European Union's Jurisdiction in Merger Regulation*. 2020, p. 12
[187] Jones Alison and John Davies, *Merger control and the public interest: Balancing EU and national law in the protectionist debate*, European Competition Journal 10, 2014, page 453, 489; *See also*: Whish Richard and David Bailey. *Competition law*. Oxford
University Press, 2021, p.473
[188] Rose Vivien and others, *European community law of competition*. Oxford: Oxford University Press, 2013, p. 568-569
[189] Chirita Anca, *Data-driven mergers under EU competition law. The Future of Commercial Law: Ways Forward for Harmonisation*, (eds) J Linarelli & O Akseli, 1st ed Oxford, H art Publishing, 2019, p. 184

balanced with the interest of the public. Based on the aforementioned, the Commission does not have much leeway in refusing data protection as a legitimate interest.

It is crucial to acknowledge that aspects of a legitimate interest such as data protection operate as an outside limit on competition law, and thus constitute a non-competitive evaluation. If the Commission identifies a new public interest, for instance, consumer or data protection as a valid justification for taking actions to protect non-economic matters at the national level, a Member State may impose supplementary merger conditions and requirements according to its national legislation.[190] In extreme cases where it is proportionate to protect the public interest in question, the Member State may even prevent the merger from happening. Blocking a merger due to public interest reasons is a measure that should only be taken when all other options have been exhausted. This is because such a decision might be criticized for being politically motivated rather than based on economic factors.[191]

However, there is legal uncertainty if national data protection authorities are able to take proactive steps to prevent harm or address systemic issues related to data protection.[192] It is claimed that they can only take action against businesses that have already violated data protection laws, rather than being able to take proactive measures to prevent such violations from occurring in the first place.[193] On the other hand, the introduction in GDPR of Data Protection Impact Assessments[194] for risky processing operations might allow data protection authorities to employ more proactive, regardless of whether a specific breach of EU privacy legislation cannot yet be determined. Hence, data supervisory authorities have the powers to intervene even if there is no infringement and can at least issue a warning based on Article 58(2)(a) GDPR.

It is certain however that a data protection authority can impose conditions on a merger based on Article 21(4) EUMR if the merger itself, at the time of its notification to the Commission, violates data protection regulations. Alternatively, if the authority has concerns about potential infringements of data protection that may arise after the merger, there are able to monitor the

[190] *Costa-Cabral and Lynskey* (n 91) p.46.
[191] Chirita (n 189) p.182
[191] ibid, p. 181.
[192] Yeung Karen and Lee A. Bygrave. *Demystifying the modernized European data protection regime: Cross-disciplinary insights from legal and regulatory governance scholarship*. Regulation & Governance 16.1, 2022, p.143.
[193] Inge Graef , *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility, International Competition Law* Series, Volume 68, Kluwer Law International; Kluwer Law International, 2016, p. 191.
[194] Article 35 GDPR.

merged entity's compliance with its obligations.[195] National authority may open an independent investigation, without relying on Article 21(4) of the EU Merger Regulation, if there are signs that the newly formed entity is infringing the relevant laws.[196]

5.3 Is the Digital Markets Act a New Way to Tackle Privacy Concerns within Competition Context?

The DMA is the EU's most recent attempt to regulate large technological platforms. The regulation establishes a procedure for identifying gatekeepers, which are dominant intermediary online platforms, and specifies *ex-ante* do's (i.e. obligations) and don'ts (i.e. prohibitions) that these gatekeepers must comply with.[197] Therefore, gatekeepers are required to adhere *per se* to rules without the necessity of investigations or rulings by the EC. The goal is to provide clear and direct provisions that can be enforced quickly and efficiently, reducing the need for long-term and resourceful investigations.[198] The European Parliament Resolution stressed the importance of creating fair and effective competition among companies in the digital economy,[199] which will lead to significant growth in the market, consumer access and choice, and long-term competitiveness. In addition, the resolution highlighted that consumers should be entitled to the same level of protection in digital markets as they enjoy in traditional markets.[200]

The DMA is distinct from the regulations governing M&A as well as GDPR, but it links the dots between competition law with data protection law and specifically focuses on major data-centered platforms. Its goal is to monitor the regulatory gap in which online platforms operate, which conventional competition law cannot successfully monitor. In its Opinion, the EDPS stated that the regulation not only aims to encourage fair and open digital markets but also promotes the fair processing of personal data.[201]

The DMA now incorporates specific regulations linked to the GDPR's consent norms, granting individuals the option to decide if they want their personal data to be combined across various

[195] Graef *Blurring boundaries* (n 170) p. 145.
[196] Ibid.
[197] European Commission, *Digital Markets Act*, Competition Policy, Available at: <https://digital-markets-act.ec.europa.eu/about-dma_en> Accessed 13 April 2023.
[198] Joint Research Centre of the European Commission *EU Digital Markets Act*, JRC122910, 2021, p.3 Available at: https://doi.org/10.2760/139337 Accessed 13 May 2023.
[199] European Parliament resolution of 27 November 2014 on supporting consumer rights in the digital single market, 2014/2973, para. 1, Available at: <https://www.europarl.europa.eu/doceo/document/TA-8-2014-0071_EN.html> Accessed 13 May 2023.
[200] Ibid para 10.
[201] EDPS Opinion 2/2021 on the Proposal for a Digital Markets Act 10 February 2021, p. 7.

platform services. According to Article 5(2)(b) DMA, gatekeepers are not allowed to merge personal data from various sources without valid consent.[202] DMA's requirements to obtain valid consent from the end-users (i.e. consumers) aim to ensure that individuals have control over their personal data and that they are fully informed about how their data will be processed. These requirements are similar to those set out in Article 6 GDPR and reinforce the importance of obtaining *freely given, specific, informed and unambiguous consent* for the processing of personal data. However, the GDPR has drawn criticism for being confusing and difficult to understand, especially when there is uncertainty concerning ex-ante data controller obligations.[203] Given that, it is implied that GDPR relies on an ex-post control approach rather than an ex-ante approach.[204] Therefore, the ex-ante strategy of control provided in DMA is a valuable addition to data protection regulations as it undoubtedly focuses on preventing violations before they occur.

According to Recital 36 DMA, the further consent is intended to reduce the potential advantages of gatekeepers obtained as a result of data aggregation and emphasizes the potential advantages for competition, namely in terms of lowering barriers to entry. Hence, DMA is not seen as a solution to violations of end-users data protection, rather it addresses competition challenges. Yet, it indirectly safeguards the data protection and privacy of individuals.

While the DMA's provisions to tackle the problem of data combination were generally well-received, some significant issues were highlighted.[205] One of the concerns raised is regarding the choices available to end-users in order to control their personal data.[206] The question is whether having only the possibility to agree or not to the combination of data, is sufficient, or if end-users should have access to more extensive options. Recital 36 DMA highlights the need of providing at least two choices. Kerber & Specht offer one potential solution for this problem, requiring gatekeepers to provide a payment option for using their services. They suggest that consumers

[202] Article 5 (2)(b) DMA

[203] It is claimed that Articles 25, 35, 36 are ex-ante provisions. However, these are confusing. Among these ambiguities is the question of how to determine if a proposed processing constitutes a "high risk" to basic rights as stated in Article 36.

[204] Yeung and Bygrave (n 192) p.143. To clarify the nature of GDPR, I have sought the assistance of Jonas Ledendal, Senior lecturer at the Lund University Department of Business Law. He confirmed the dual nature of this regulation, arguing that: " there is some legal uncertainty [regarding the ex-ante nature of GDPR] . It is mostly assumed that corrective powers can only be used (ex post), however data protection authority can at least issue a warning (ex-ante)." Jonas Ledendal email to Cristina Timofti, 17 May 2023.

[205] Podszun Rupprecht. *Should gatekeepers be allowed to combine data? Ideas for Art. 5 (a) of the draft Digital Markets Act.* GRUR International 71.3 (2022), p. 198; See also: Position paper of the Federation of German Consumer Organisations on the European Commission's proposal for a regulation on contestable and fair markets in the digital sector, *Empower consumers and lift contestability*, 2021, p.10.

[206] Kerber Wolfgang and Karsten Zolna, *The German Facebook case: The law and economics of the relationship between competition and data protection law.* European Journal of Law and Economics 54.2, 2022, p.242.

should be able to use online services by making monetary payments instead of being forced to disclose their personal data as payment.[207] There are concerns that some consumers may not be able to afford the fees associated with using core platform services without exchanging their personal data.[208] However, if appropriately regulated, these fees are expected to be reasonable and affordable to most consumers.

To sum up, the importance of obtaining valid and informed consent from individuals whose personal data is being merged brought about advantages both for competition law as well as for data protection law. First, if a large number of consumers reject the consent it would be a useful solution for addressing competition issues, such as raising entry barriers through data combination or elimination of competitors. Second, if most of the users opt for monetary payment instead of providing personal data, this will tackle not only competition concerns but also will contribute to strengthening the protection of personal details. It is very difficult to predict how effective DMA will be in the future and to what degree it will achieve its objectives and contribute to enforcing data protection in the merger process, however it is a welcome development.

5.4 Summary and Conclusion

Data-driven mergers can influence the quality of goods or services provided to customers, may raise data protection issues, lead to market dominance and create entrance obstacles for their rivals. Hence, data has become an important factor in the digital economy. However, in traditional merger control, the most valuable parameters taken into account are price and bigger market share. Thus, existing applicable tests and theories may no longer be relevant and they need to be revised in order to effectively address the new issues facing the digital economy. Additionally, data protection can be invoked as a public interest under Article 21(4) EUMR, and given the importance of data, the EC can successfully recognize privacy as a legitimate interest. Theoretically, privacy concerns in competition law can be tackled through DMA, however, the practical application is yet to be seen.

[207] Kerber and Specht (n 143) p. 10.
[208] Ibid p. 78; Additionally, Member States could potentially subsidize such data protection-friendly solutions for consumers who may have affordability issues

6. Summary and Conclusion

6.1 General findings

The research started by questioning the need for EUMR to consider privacy matters given that there is already a regulation protecting privacy at the EU level. Throughout the thesis, it was demonstrated that GDPR proves to be insufficient in addressing some privacy aspects such as, the reduction in data privacy protection resulting from a merger or potential abuse of market power arising from the aggregation of personal data. In these scenarios, the merger review can intervene and solve the problem at hand. Thus, the traditional method of segregation of both legal systems may no longer work in the digital economy.

Personal data protection can be invoked in the EU merger control when it is considered as competitive parameters for which companies compete; is viewed as a component of consumer welfare; or if Member States see privacy as a matter of legitimate interest under Article 21(4) EUMR. The *extent* to which personal data concerns are integrated into a merger assessment can be expressed in a decrease in the quality of online products and services such as a reduction in the level of protection and/or limitation in consumers' options. In addition, it can fit into the assessment of a merger to the extent that Member States see privacy issues as a matter of public interest.

This thesis suggests that data protection considerations might be taken into account when applying competition law. However, there is not a straightforward answer regarding if and how privacy matters can be assessed during a merger review given that data protection as an element of quality, a component of legitimate interest, and data privacy regulated under DMA have their shortcomings. In order for the integrationist view to be fully operational, there is a need to improve the current legislation. This paper attempted to demonstrate that, despite significant advances in our policy debates in recent years, we continue to be a long way from properly recognizing and integrating privacy concerns into the merger control.

6.2 Conclusion Research Question (1)

The EC and the Court of Justice have both provided opinions on the potential role of data protection concerns in the EU competition law. The *Asnef-Equifax* was the earliest case in which the CJEU provided some guidance on this topic. It stated that matters concerning personal information do not fall under the purview of competition law. However, it is important to mention that the Court issued this judgement in 2006, and much has changed since then, particularly in the digital market, where firms seek to acquire significant personal data.

A gradual shift can be observed in how the EU competition authority handled privacy in the competition context. At first, the EC did not recognize privacy issues in competition assessment, throughout the cases, however, it acknowledged the importance of data protection in the merger process. The current study supports the idea that the *Google/DoubleClick, Microsoft/LinkedIn and Facebook/WhatsApp* decisions have given an unambiguous, clear and unequivocal position regarding privacy as a valuable asset in the digital economy, a significant competitive parameter and an element of quality. In addition, the Court has yet to rule on any kind of merger and acknowledge privacy role in the merger process. However, given the growing significance of data protection, the Court is likely to take an analogous stance.

The prediction made by former EU Competition Commissioner Almunia that a merger could potentially breach EU competition law by using personal data, has become a reality, at least conceptually. It is important to mention that the practical application of privacy matter as a factor that influences competition is yet to be seen.

In Germany, the Facebook case was seen as a significant victory for data protection in the context of competition law. The case was innovative as it prohibited certain terms that sought to combine data from various sources. These terms were considered to be abusive and in violation of EU data protection regulations. As seen in Chapter 4, the Facebook case established an important precedent for protecting personal data where a dominating market power of a digital platform is involved by acknowledging that privacy is a key issue in the competition analysis. The case is still ongoing, as the CJEU has been asked for a preliminary ruling regarding this interaction. The present paper argues that the reasoning of the FCO could serve as an example and analogy for the merger control process. Thus, if competition authorities anticipate an abuse of a dominant position that can violate data protection after a merger, they must impose commitment or prevent the merger altogether.

6.3 Conclusion Research Question (2)

This paper has explored the role of data and privacy in the EU competition law and investigated the interaction between these two legal systems, with a focus on merger control. The goal was to determine in what situations privacy concerns can fit into the merger review.

The paper identified at least two methods that could be used to integrate data privacy issues into competition evaluations. First, despite the fact that competition and data protection laws are distinct systems with distinct rules and remedies, they overlap in some situations. For instance, they have common purposes, such as the protection of consumer welfare in the digital market as it was outlined in Chapter 5. Given that consumer welfare includes not just cheaper goods but also choice, better privacy protection and innovation, one of the methods is based on the justification that data privacy is a factor of quality in merger control enforcement. This approach has been strengthened by the Commission's decisions in *Facebook/WhatsApp* and *Microsoft/LinkedIn*. Privacy harms such as a decrease in the quality of products or services and a reduction in consumer options must be considered in the competition assessment process. If there is a risk that, after the merger, individuals may have fewer privacy options or their level of privacy will be compromised, the Commission must assess it. Therefore, consumer welfare standard should be broadened to include non-economic elements such as privacy harms as part of the competition examination, just like any other type of harm to customers.

Despite some increasing consensus on how to integrate privacy into merger review, there is considerable ambiguity and skepticism about what represents a decrease in privacy and how it can be measured. Given that price has been substituted with data in online markets, existing tests must be revised and updated to meet the needs and peculiarities of digital markets. The paper suggests exploring the SSNDQ test in order to determine the reduction in the protection of data. However, since EU competition law lacks the necessary tools for evaluating deterioration in privacy, legislation on data protection might offer normative direction in such analysis. This will require greater communication between data protection and competition law bodies.

The second approach regarding how privacy can fit into merger control is based on Article 21(4) EUMR, which provides a legal foundation for Member States to examine potential concentrations and their effect on data protection. National supervisory entities have the authority to block mergers or apply conditions based on data protection concerns. There is legal uncertainty if GDPR grants

supervisory authorities the power to implement structural measures aimed at preventing potential data protection breaches. If data bodies lack the ability to impose prospective measures, they would be unable to prevent or impose commitments on mergers that endanger public interest. This doubt, however, can be addressed by data protection impact assessment, which can tackle potential violations before they even occur.

6.4 Conclusion Research Question (3)

Digital Markets Act is the new attempt to link competition and data protection law. While the DMA is generally viewed as a mere competition policy tool that does not seek to solve the negative impacts of the giant tech entities on data protection, its regulations indirectly contributed to mitigating privacy challenges in the digital sector. It provides ex-ante rules for gatekeepers to address market abuses and anti-competitive practices and acknowledges that conventional ex-post control (for example, Art. 102 TFEU) deals with problems after they arise and may be unsustainable in the fast-developing digital economy.

This legal development is welcomed especially in this time of legal uncertainty concerning the nature of GDPR. DMA seeks to prevent and reduce the violations before they occur by imposing norms and obligations beforehand, such as obtaining valid consent before a merger. Users will have control over their private information while also fostering competition by lowering the barriers to entry.

On the other hand, DMA is criticized for the fact that users have no option but to agree to the standard terms and accept warnings of privacy modifications. That would be because DMA aims to address competition issues, rather than resolving data protection concerns as discussed in Chapter 5. This paper recommends a more comprehensive approach to the DMA that would be would tackle both competition and data protection concerns. It suggests that gatekeepers should provide at least two options to their users. Thus, in addition to the option to give or not consent for the combination of datasets during a merger, the tech giants would have to provide, for example, a monetary fee in exchange for keeping their data protected. As a result, if a large number of users would rather pay money to use an online service rather than exchange their personal data, there is no risk in creating a dominant firm after the merger or in raising the entry barriers. Moreover, from a data protection perspective, individuals would be able to keep their personal information private.

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