ALIGNING REMEDIES IN ABUSE OF DOMINANCE CASES WITH DATA PROTECTION PRINCIPLES

In today's digital markets, data is increasingly a source of market power. This is particularly true in markets in which the amount of data that companies have access to is linked to the quality and desirability of their service. The link between market power and data brings together elements of competition law, which regulates market power, and data protection regulation, which seeks to ensure the fair, lawful and transparent processing of personal data. When it comes to preventing dominant companies from collecting and using unnecessarily excessive amounts of consumer data, the conduct could be looked at as an abuse of a dominant position under competition law, or as an unlawful data exploitation practice under data protection laws. This paper argues that when tackling anticompetitive data practices by dominant market players, data protection elements should be incorporated into the design of competition law remedies. Specifically, it will show that the EU competition law framework allows the European Commission to impose behavioural remedies concerning the way dominant companies deal with data and that doing so could represent a suitable response to data-related exclusionary and exploitative conduct. It will become apparent that by drawing on data protection principles, the Commission can design remedies that are not only more effective but also consistent with the wider regulatory framework surrounding data.[1]

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[1] *This paper was written by Alessia D'Amico, PhD student at the European University Institute, during her placement at, and in collaboration with, Privacy International.*



Introduction: data as a source of market power

It is largely accepted that in today's digital market data is a source of market power. The relationship between control over data and market power has been widely discussed by competition authorities, international organisations and academics.[2] In their 2016 joint report, the German and French competition authorities argued that:

> Provided that access to a large volume or variety of data is important in ensuring competitiveness on the market (which is a market-specific question), the collection of data may result in entry barriers when new entrants are unable either to collect the data or to buy access to the same kind of data, in terms of volume and/or variety, as established companies.[3]

The report also illustrates how the characteristics of some digital markets are inducive to market tipping and 'winner-takes-all' markets.[4] The graph below shows the circle that reinforces market concentration in data markets; the more the market is characterised by economies of scale and scope and network effects, the more the circle becomes stable.[5]

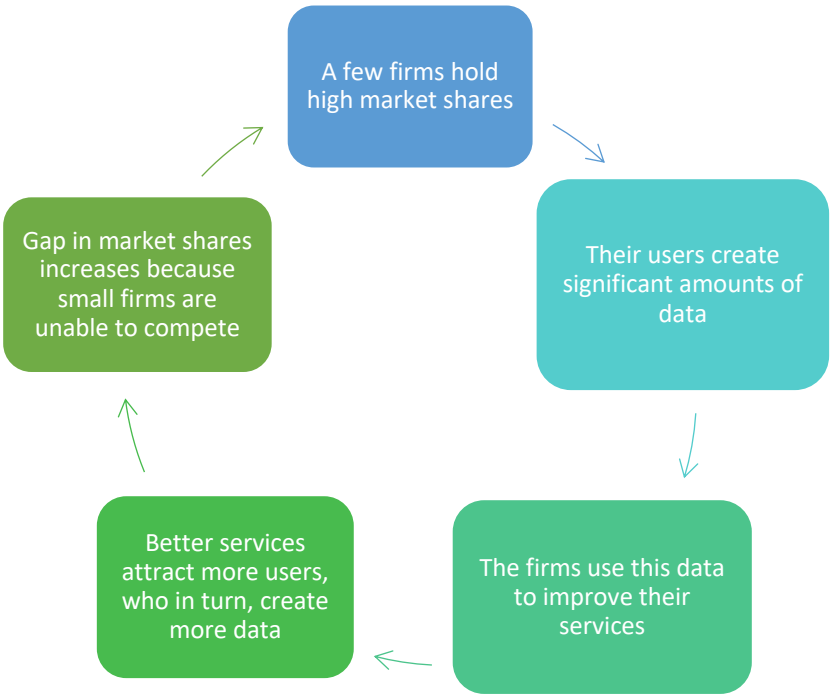
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[2] Autorité de la Concurrence and Bundeskartellamt, 'Competition law and data', Joint Report, 10 May 2016; CMA, 'The commercial use of consumer data' (2015); OECD, 'Big Data: Bringing Competition Policy to the Digital Era' DAF/COMP(2016)15; Stucke and Grunes, *Big Data and Competition Policy* (2016, OUP); Ariel Ezrachi and Maurice E. Stucke, *Virtual Competition. The Promise and Perils of the Algorithm-Driven Economy* (2016, Harvard University Press).

[3] Autorité de la Concurrence and Bundeskartellamt, 'Competition law and data', Joint Report, 10 May 2016, 11.

[4] "As it turns out, the economic sectors where the collection and use of data is often seen as particularly important, such as search engines or social networking for instance, are often particularly concentrated, with a few operators already holding very high user shares. Furthermore, the alleged existence of strong scale and network effects in these cases is also described as limiting the intensity of competition. The development of data collection and usage on those markets may thus reinforce the market power of leading companies on these markets. Also, the marginalization of smaller competitors due to differentiated data access might be self-reinforcing: access to a larger amount of data may support better services, which in turn attract more customers – and more data ("snowball effects"). By contrast, smaller companies might attract fewer consumers and as a result have less data. As the gap in market share increases, so might the gap in data collection, which could further increase the gap in the quality of services proposed to customers. Finally, the higher revenues earned by larger undertakings could fuel higher investments (such as new algorithms, new functionalities, entry on adjacent markets, etc.), thereby attracting even more customers and more data. Such a trend could harm competition by converging towards a monopolization of data-related markets.", Autorité de la Concurrence and Bundeskartellamt, 'Competition law and data', Joint Report, 10 May 2016, 13.

[5] Definition of key terms:



Economies of scale	Economies of scale occur when the higher level of production of one good creates cost advantages. For example, in the case of Google, the search engine is based on a trial-and-error approach, meaning that it improves with the number of searches it receives.
Economies of scope	Economies of scope exist when producing a complementary range of products creates cost advantage. If we take Google again, the more diverse data they gather on users through multiple services, such as email, browsers or mapping services, the more complete the profile of their users will be and the more valuable it will be for advertisers etc.
Direct and indirect network effects	Network effects occur when the increased numbers of participants improve the value of a good or service. Direct network effects typically characterise social media platforms, in which users directly benefit from other users being on the same platform. Indirect network effects exist in two-sided markets, if, for example, the number of users on a platform benefit the advertisers. In 2017, Germany amended its competition law and established that direct and indirect network effects must be taken into account when assessing a firm's market position. § 18 (3(a)) of the Act against Restraints of Competition (Competition Act – GWB) - Last amended by Article 10(9) of the Act of 30 October 2017, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/GWB.pdf?__blob=publicationFile&v=6.
Market tipping	Markets are prone to tipping when, once a firm has a competitive edge over others, it is able to progressively increase the gap in market shares between itself and other market players.



For the purpose of this paper, it is assumed that in some digital markets control over data leads to market power. What is relevant is that the connection between market power and data brings together elements of competition law, which regulates market power, and data protection regulation, which controls the processing of personal data. An overlap between these two legal frameworks arises when it comes to preventing dominant firms from unlawfully collecting and processing excessive amounts of user data. This could be tackled as an abuse of a dominant position under competition law[6] and as an infringement of relevant data protection laws.

When it comes to dominant firms, the amount of data processed and the value extracted is likely to exceed what would be achievable in a competitive market in which consumers have a real and genuine choice to agree to a service's terms and privacy policy and, thus, have a say over how their data is used. Where a company has control over a substantial amount of user information this can also make switching more difficult, effectively locking-in users, and thereby further strengthening dominance and allowing companies to foreclose market entry and expansion. This paper explores how, in these instances, competition authorities can regulate dominant firms' behaviour by imposing requirements concerning the way they are allowed to process data. The underlying argument is that, when imposing remedies to address competition concerns related to data practices, competition authorities can and should draw on data protection principles, to design remedies that are not only effective but also in line with the current regulatory framework surrounding data. This paper does not argue that competition law should step in to enforce data protection rights; the focus is on remedies that competition authorities can use to enforce their own rules and pursue their own objectives.

[6] Article 102 of the Treaty on the Functioning of the European Union (TFEU) prohibits abuse of dominant position. Abuse may consist in (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;(b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.



This paper fits within the broader discussion about how to respond to the regulatory challenges created by the digital market and reflects the growing recognition that a more complementary and cooperative approach among the relevant regulators is needed.[7] This paper will focus on EU competition law, since the EU is currently at the forefront of the discussion about how to regulate tech giants' increasing control over data. Nonetheless, given that the digital market is global and that competition law systems around the world are based on similar principles, the issues discussed are relevant for other competition law regimes as well. Furthermore, although remedies imposed by the European Commission or national European competition authorities are designed to protect consumers in European markets, due to the globalised economy, they could also benefit consumers outside the EU. Most evidently, firms that operate globally may change their conduct across-the-board, in order to comply with remedies imposed on them in the EU.

Overview of remedies in abuse of dominance cases under EU law

Most competition law systems are composed of three main pillars, i.e. the prohibition of anticompetitive agreements, the prohibition of abuses of dominant positions, and merger control. Under EU competition law, Article 101 Treaty on the Functioning of the European Union (TFEU)[8] prohibits anticompetitive agreements between undertakings, Article 102 TFEU prohibits abuses of dominant positions and Council Regulation (EC) No 139/2004 contains the provisions on merger control. This paper will focus on remedies in abuse of dominance cases within the EU competition framework; these are particularly relevant for the purpose of

[7] For example, the European Data Protection Supervisor established the Digital Clearinghouse, to bring together agencies from the areas of competition, consumer and data protection, designed to share information and discuss how best to enforce rules in the interests of the individual, see https://edps.europa.eu/data-protection/our-work/subjects/big-data-digital-clearinghouse_en.

[8] Article 101 of the TFEU prohibits agreements which prevent, restrict or distort competition within the internal market, in particular those which (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.



controlling firms' handling of data, since dominant companies are held to have a special responsibility not to undermine effective competition in the market, which gives competition authorities the power to regulate their behaviour.

There are two main types of decision that the European Commission can take as a result of an antitrust investigation under Regulation 1/2003[9] (establishing the framework for the implementation of the rules on competition laid down in Articles 101 and 102 TFEU):

1. An infringement decision pursuant to Article 7 Regulation 1/2003, which formally finds that an infringement has been committed and allows the Commission to impose fines and remedies; or
2. A commitment decision based on Article 9 Regulation 1/2003, which allows companies to offer commitments to address the competition concerns identified by the Commission, without an infringement being established.

When finding an infringement under Article 7, the Commission orders the parties to stop the contested behaviour (cease-and-desist order) and may decide to impose a fine, a traditional competition law remedy, whereby the competition authority sanctions a market behaviour considered anticompetitive. The Commission can impose a fine of up to 10% of the worldwide turnover of the undertaking. Fines are evidently not specific to data-related infringements, however, if at a substantive level data protection concerns are adequately addressed in theories of harm, fines may be effective in changing firms' data practices. Generally, authorities can create the right incentives for businesses to change their behaviour through fines, provided those fines exceed the value of persisting with the infringing behaviour. Nonetheless, when it comes to digital companies that are inherently built on data monetisation, fines alone hardly can lead to the required behavioural change.

Following infringement decisions, besides ordering undertakings to cease the infringement and imposing fines, the Commission can also "impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end".[10] This means that an infringement decision may include an order to "do certain acts or

[9] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L-1/1, 4.1.2003, Art. 23(2).
[10] Council Regulation (EC) No 1/2003, Art. 7(1).



provide certain advantages which have been wrongfully withheld as well as prohibiting the continuation of certain action, practices or situations which are contrary to the Treaty".[11] Behavioural remedies are case specific and it is up to the Commission to decide how a particular infringement should be brought to an end, as long as the remedies are proportionate to the infringement in question. For example, in the first *Microsoft* case, the Commission ordered Microsoft to provide interoperability information (in this case complete and accurate specifications for the protocols used by Windows work group servers in order to provide file, print and group administration services to Windows work group networks) to competitors and to provide a version of Windows without the Windows Media Player.[12] A preference for behavioural remedies is contained in the Regulation, which states that "structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy".[13] In particular, "changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking".[14]

Commitment decisions under Article 9 of the Regulation are different. They allow the Commission to agree on commitments with the undertakings subject to a competition law investigation, based on its preliminary assessment. The advantage is that both parties have the possibility to settle the case before it comes to a formal finding of a competition violation.[15] As the European Court of

[11] Joined Cases 6/73 and 7/73, *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission*, EU:C:1974:18, paragraph 45; Joined Cases C-241/91 P and C-242/91 P, *RTE and ITP v Commission*, EU:C:1995:98, paragraph 90.

[12] These remedies were imposed upon finding that Microsoft had infringed Article 102 by: "(a) refusing to supply the Interoperability Information and allow its use for the purpose of developing and distributing work group server operating system products…; (b) making the availability of the Windows Client PC Operating System conditional on the simultaneous acquisition of Windows Media Player…". The Commission argued that these two practices had contributed to Microsoft achieving a dominant position in the market and risked eliminating competition. Commission decision of 24 March 2004 in case 37792 *Microsoft*.

[13] Council Regulation (EC) No 1/2003, Art. 7(1). When it comes to structural remedies, the assets to be relocated "may include a shareholding, a seat on a company board, a subsidiary, an unincorporated division, intellectual property, customer contracts, or tangible assets", Cyril Ritter, 'How Far Can the Commission Go When Imposing Remedies for Antitrust Infringements?' (2016) Journal of European Competition Law & Practice.

[14] Council Regulation (EC) No 1/2003, recital 12.

[15] Niamh Dunne, 'Commitment Decisions in EU Competition Law' (2014) 10 J. Comp. L. & Econ. 399.



Justice emphasised in *Alrosa*, the commitment procedure is designed to "provide a more rapid solution to the competition problems identified".[16] Since they do not require a formal finding of an infringement, Article 9 decisions can go beyond the conventional enforcement framework of Article 7 of the Regulation, in terms of theories of competition harm and remedies applied. The Court also noted that "undertakings which offer commitments on the basis of Art. 9 of Regulation No 1/2003 consciously accept that the concessions they make may go beyond what the Commission could itself impose on them in a decision adopted under Art. 7 of the regulation after a thorough examination".[17] Commitments are offered to the Commission by the undertakings under investigation; the Commission market tests the offered commitments and then decides whether they are sufficient to address the harm identified, meaning that "there are no longer grounds for action by the Commission".[18] Commitments are then made binding upon the undertakings concerned and compliance with them is verified by an independent expert appointed by the Commission.

An example of a commitment decision is the second case against Microsoft, in which the Commission concluded that due to Microsoft's dominant position in the market for client PC operating systems, the tying of Internet Explorer with Windows infringed Article 102 TFEU. This behaviour was considered anticompetitive, among other things, because it was liable to foreclose competition between web browsers.[19] Microsoft's proposed commitments, which were accepted by the Commission, included "to make available a mechanism in Windows within the European Economic Area that enables OEMs [Original Equipment Manufacturers] and users to turn Internet Explorer off and on"[20] and guaranteed that "OEMs will be free to pre-install any web browser(s) of their choice on PCs they ship and set it as default web browser".[21]

The remedies discussed in this paper could be imposed both as a result of infringement decisions under Article 7 and of commitment decisions under Article

[16] Case C-441/07 P, *Commission v. Alrosa Co. Ltd.*, 2010 E.C.R. I-5949, para 35.
[17] Ibid, para 48.
[18] Council Regulation (EC) No 1/2003, recital 13.
[19] Commission Decision Case COMP/C-3/39.530, *Microsoft (Tying)*, 2010 O.J. (C 36) 7.
[20] Summary of Commission Decision of 16 December 2009 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case COMP/39.530 – Microsoft (Tying)) (notified under document C(2009) 10033).
[21] Ibid.



9. Nonetheless, given the greater flexibility and remedial choices when it comes to the latter (since the Commission does not have to prove the existence of an infringement and then design remedies proportionate to the finding), the remedies proposed might be more viable if imposed as part of commitment decisions. This flexibility would give competition authorities the chance to experiment with new ways to address forms of competitive harm that result from the shifting dynamics of the digital market.

A chance to intervene in firms' processing of personal data also arises in merger situations. Mergers raise important data-related concerns which are often addressed through structural rather than behavioural remedies. In its notice on remedies, the European Commission stated that "divestiture commitments are the best way to eliminate competition concerns… Commitments relating to the future behaviour of the merged entity may be acceptable only exceptionally in very specific circumstances".[22] In mergers, therefore, the focus is or should be on the substantive side of the assessment, i.e. identifying which mergers are harmful. Basically, if a merger is expected to reduce competition to the point that consumers can be harmed, whether it occurs through data-related practices or not, competition authorities would opt for blocking the merger or imposing structural remedies, such as divestiture, in order to safeguard competition in the market. Since remedies in mergers are designed to avoid erosions of competition, it will be difficult to find behavioural remedies concerning data practices that can guarantee that. Nonetheless, there can be exceptional situations in which behavioural remedies could prevent anticompetitive effects of mergers, e.g. when the impediment to competition is expected to result from the combination of the firms' databases and commitments can prevent this from happening. On the other hand, when it comes to abuse cases, the company is already dominant, and data practices that exploit consumers or distort competition can be specifically targeted. Furthermore, when the market is already concentrated, structural remedies might be unavailable or excessively burdensome and regulating the firms' behaviour is, thus, the more suitable way to tackle the anticompetitive conduct.

[22] Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Text with EEA relevance) (2008/C 267/01), para 17.



Aligning behavioural remedies with data protection principles

An abuse of dominance under Article 102 TFEU can be either exclusionary or exploitative. While the former covers conduct that is likely to lead to anti-competitive foreclosure, thereby reducing competition and its benefits for consumers, the latter covers practices that are directly exploitative of customers. In both cases, data practices might be an element of the abuse and remedies can be specifically designed to counteract the anticompetitive effects.

Exclusionary abuses

In its discussion paper on the application of Article 102 TFEU to exclusionary abuses, the Commission explained that:

> the conduct in question must in the first place have the capability, by its nature, to foreclose competitors from the market… It secondly implies that, in the specific market context, a likely market distorting foreclosure effect must be established. By foreclosure is meant that actual or potential competitors are completely or partially denied profitable access to a market. Foreclosure may discourage entry or expansion of rivals or encourage their exit. Foreclosure thus can be found even if the foreclosed rivals are not forced to exit the market: it is sufficient that the rivals are disadvantaged and consequently led to compete less aggressively.[23]

There can be instances in which dominant firms' data practices can be the factor driving exclusionary conduct.[24] One such case can arise when the amount of data that an individual has on a given platform creates lock-in effects, because the users could not recreate it on another site, or it would be too burdensome to do so. Since these markets are already characterised by high direct and indirect network effects and have a tendency to tip, lock-in effects can further strengthen dominant positions and prevent new players from entering or expanding in the

[23] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, Public consultation (December 2005), para 58.
[24] See Autorité de la concurrence and Bundeskartellamt, 'Competition Law and Data' (2016); Maurice Stucke and Allen Grunes, *Big Data and Competition Policy* (2016 OUP); Ariel Ezrachi and Maurice Stucke, *Virtual Competition* (2016 Harvard University Press); Inge Graef, 'Market Definition and Market Power in Data: The Case of Online Platforms' (2015) 38(4) World competition law and economics review.



market. In these cases, dominant firms can be found to have a responsibility to facilitate consumer switching by supporting the transfer of user datasets to other providers. Such an obligation is analogous to the data-portability right as it exists under the EU General Data Protection Regulation (GDPR),[25] but it should be tailored to particular sectors and firms, in order to address specific competition-related concerns. Under Article 20 of the GDPR, data portability gives data subjects the following rights:

> The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided…

Since data portability has a crucial competition dimension, it can be a useful tool for competition authorities when a dominant firm's control over user data prevents switching and, thus, reduces competition. In other words, imposing strict data portability obligations on dominant firms could counteract some of the lock-in effects that prevent other companies from entering the market. In a study designed to explore how competition policy should evolve to continue to promote pro-consumer innovation in the digital age, commissioned by EU Competition Commissioner Vestager, the authors argued that:

> the right to data portability should be interpreted with a view to ensuring individual control of the data subject over his or her data, in particular with a view to avoiding data-induced lock-ins. But the interpretation should keep in mind the cost imposed on the data controller. Arguably, a more stringent data portability regime can be imposed on a dominant firm in order to overcome particularly pronounced lock-in effects.[26]

In line with the underlying intention of Article 102, which places a responsibility on dominant firms as to the effect their conduct has on competition in the market, higher requirements in terms of data portability may be imposed on dominant

[25] 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).
[26] European Commission, a report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition Policy for the Digital Era', (2019) 82.



firms, compared to other market players. The shortfall of data portability requirements, nonetheless, is that they rely on consumers' choice to switch. Factors such as consumer inertia and a lack of viable alternatives in concentrated markets can, thus, reduce the effectiveness of remedies that place excessive weight on consumers' actions. In this regard, it was also argued that:

> agencies should seek to design remedies that take into account the likely tipping of markets, the role of data and networks and the effects on entry and growth. In cases involving user interfaces, agencies should incorporate behavioural insights in remedies to address control over the interface and the ability to create friction and undermine switchability.[27]

One solution to some of these issues consists in requirements for data and system interoperability, i.e. "the ability of a system, product or service to communicate and function with other (technically different) systems, products or services".[28] Interoperability requirements are particularly valuable in terms of counteracting network effects, because users switching to smaller players will still be able to benefit from the network of the dominant firm, for example when it comes to social media platforms.[29] Furthermore, interoperability can make switching easier and faster and, thus, reduce some of the behavioural barriers that data portability alone faces in terms of incentivising switching. While interoperability has the evident potential to foster competition, it has to be borne in mind that it can be problematic from a data protection point of view, if it is not designed carefully.[30] If interoperability leads to increased access to and processing of personal data from interoperable systems, it could undermine data protection principles such as data minimisation and purpose limitation. In order to be in line with data protection principles, interoperability "cannot give rise to the access or use of any data via another information system or give access to more data than is

[27] BEUC, 'The Role of Competition Policy in Protecting Consumers' Well-being in the Digital Era' (2019), available at https://www.beuc.eu/publications/beuc-x-2019-054_competition_policy_in_digital_markets.pdf, page 21.
[28] Wolfgang Kerber and Heike Schweitzer, 'Interoperability in the Digital Economy', 8 (2017) JIPITEC 39 para 1.
[29] Inge Graef, 'Mandating portability and interoperability in online social networks: Regulatory and competition law issues in the European Union' (2015) 39(6) Telecommunications policy, 510.
[30] It also raises other complex regulatory and technical issues in defining what these obligations involve in practice; in particular, "the optimal degree and design of interoperability will be context-specific and will depend on the specific economic and technological conditions in a market" (Wolfgang Kerber and Heike Schweitzer, 'Interoperability in the Digital Economy').



needed".[31] Thus, competition authorities should ensure, e.g. by working with data protection experts, that interoperable systems are designed in a way that increases individuals' choices without undermining their rights over personal data.

Another problem consists in the lack of viable alternatives for individuals. In a data-driven market, a dominant firm's accumulation of data is liable to foreclose competition, when competitors do not manage to recreate a competitive dataset. In these cases, competition authorities may want dominant firms to share their data with other market players, to enable them to compete effectively, raising a raft of privacy concerns. Competition authorities can impose data sharing as a remedy in TFEU 102 cases, if data is found to constitute an 'essential facility' and the refusal to grant access to it gives rise to an exclusionary abuse.[32] The four conditions needed to prove such an abuse are that the data is indispensable, the refusal eliminates effective competition and prevents the development of a new or improved product in the downstream market, and there is no objective justification for the refusal. The case law has set a high threshold for meeting these conditions, mainly because a data sharing requirement often constitutes a significant intrusion on firms' freedom of contract[33] and can undermine incentives to innovate.[34] Nonetheless, the 'essential facility' doctrine could be adapted to the characteristics of digital markets[35] and potentially start to play a greater role.

As with data interoperability, it may be suggested that data sharing can improve competition and lead to more choices for consumers in the long term, however, it can also have serious negative implications for the protection of personal data. If competition authorities impose a legal obligation on market players to share personal data, the sharing may have a lawful basis under data protection

[31] EDPS website, available at https://edps.europa.eu/data-protection/our-work/subjects/interoperability_en.

[32] Relevant EU cases include: Joined cases C-241/91 and C-242/91, *Telefis Eireann and Independent Television Publications Ltd v Commission of the European Communities (Magill)* [1995] ECLI:EU:C:1995:98; Case C-7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs* [1998] ECLI:EU:C:1998:569; Case C-418/01, *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* [2004] ECLI:EU:C:2004:257; Case T-201/04, *Microsoft* [2007] ECLI:EU:T:2007:289.

[33] See AG Jacobs' Opinion in Case C-7/97, *Oscar Bronner*, EU:C:1998:569, para. 56; EU Commission, Guidance Paper on enforcement priorities in applying Article 82 of the EC Treaty (2009).

[34] AG Jacobs' Opinion in Case C-7/97, *Oscar Bronner*, EU:C:1998:569, para. 57

[35] Inge Graef, 'Rethinking the Essential Facilities Doctrine for the EU Digital Economy' (2019) Revue juridique Thémis de l'Université de Montréal, *53*(1), 33-72.



regulation, according to Article 6(1)(c) GDPR[36], however, it does not mean it will satisfy all the requirements of data protection law (including principles such as transparency, fairness and purpose limitation as well as obligations such as to protect data by design and by default) and respect for the fundamental rights to privacy and data protection. Hence, competition authorities should avoid imposing data sharing as a competition remedy unless there is a full evaluation of the risks to individuals and clear evidence that such sharing will comply with data protection law and cause no harm to data subjects. As part of this consideration may be given to technical solutions and safeguards such as encryption. Again, working with data protection experts could help competition authorities to effectively weigh remedies' benefits to competition against their risks to data protection.

From a data protection point of view, in order to create a level playing field, it would be preferable to limit the processing and generation of data by online firms altogether. The German competition authority, the Bundeskartellamt (BKA), in its case against Facebook has attempted a move in this direction.[37] Among other things, the BKA argued that by processing excessive data (infringing data protection regulation) Facebook had increased entry barriers for its rivals, and it prohibited Facebook from processing data in those ways. In particular, the BKA argued that:

> The competitive edge Facebook already has owing to its excellent access to data relevant for competition will be further expanded by inappropriate and thus unlawful processing of data from other sources assigned to Facebook user accounts, thereby further raising the existing barriers to market entry as a result of direct network effects.[38]

[36] The provision says that data processing is lawful if the "processing is necessary for compliance with a legal obligation to which the controller is subject".
[37] The details of the case are discussed in the next section, since the core of the case is about an exploitative abuse; Bundeskartellamt, Decision of Facebook proceeding, 6th Decision Division, B6-22/16, administrative proceedings, decision under Section 32(1) German Competition Act (GWB) (6.2.2019), English version of the decision, available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5.
[38] Bundeskartellamt, Decision of Facebook proceeding, 6th Decision Division, B6-22/16, administrative proceedings, decision under Section 32(1) German Competition Act (GWB) (6.2.2019), English version of the decision, available at



The Düsseldorf Higher Regional Court disagreed with the BKA's conclusion, arguing that it was not manifest how the processing of more data prevented market entry by Facebook's rivals. The Court "did not rule out that Facebook's processing of additional data may secure its market position"[39] but argued that whether "a market entry barrier actually exists or is reinforced requires 'closer review and more detailed demonstration'."[40] The decision is not final yet, and its effects are limited to German law, however, it is helpful inasmuch as it reminds us that to establish an exclusionary abuse, it is not sufficient to establish that a practice undermines consumers' interests,[41] it is necessary to demonstrate that this practice is liable to distort competition. When there is not enough evidence that excessive data processing actually restricts competition, competition authorities might want to explore whether the practice can be looked at as an exploitative abuse, as discussed below.

Exploitative abuses

Competition authorities can protect consumers directly, if they find that a dominant firm's data practices constitute an exploitative abuse. The Commission clearly stated that "Article 102 can properly be applied, where appropriate, to situations in which a dominant undertaking's behaviour directly prejudices the interests of consumers, notwithstanding the absence of any effect on the structure of competition".[42] Furthermore, the Commission's enforcement priorities guidelines say that in relation to behaviour which directly exploits consumers, it

https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5, page 250.

[39] Giuseppe Colangelo, 'Facebook and the Bundeskartellamt's Winter of Discontent' (23 September 2019) Competition Policy International, available at https://www.competitionpolicyinternational.com/facebook-and-bundeskartellamts-winter-of-discontent/?utm_source=CPI+Subscribers&utm_campaign=f83149b31e-EMAIL_CAMPAIGN_2019_09_23_10_15&utm_medium=email&utm_term=0_0ea61134a5-f83149b31e-236855437.

[40] Ibid.

[41] There are other areas of law that protect consumers in these cases, such as consumer and data protection law.

[42] Commission decision of 20 July 1999 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case IV/36.888 - 1998 Football World Cup) (2000/12/EC) at 100.



may intervene, "in particular where the protection of consumers and the proper functioning of the internal market cannot otherwise be adequately ensured".[43]

The rationale for intervening against exploitative behaviour is that the undertaking is using its market position to "reap trading benefits that [it] would not have reaped if there had been normal and sufficiently effective competition".[44] Exploitation is most commonly found in form of excessive prices, which according to the ECJ, are prices that have "no reasonable relation to the economic value of the product supplied".[45] When it comes to privacy terms, authorities might be reluctant to look at the terms as excessive prices, since although the data has an economic value and consumers use it to 'pay' for services, it might be difficult to quantify potentially subjective and multidimensional factors relating to data processing in monetary terms.[46] Thus, when it comes to data, the provision against 'unfair trading conditions' may be applied, which relies on the same rationale as excessive pricing, and prevents that a dominant firm unfairly profits from its position of dominance and directly harms consumers.[47] From an economic perspective, intervention is justified because in these cases "there is an inefficient allocation of resources and consumer welfare is reduced".[48] For example, in the *DSD* case, the Commission held that "unfair commercial terms exist where an undertaking in a dominant position fails to comply with the principle of proportionality",[49] finding that the creator of the 'Green Dot' recycling trademark abused its dominant position by forcing undertakings to pay a fee in situations in which they did not use its main service, i.e. the collection and recycling of sales

[43] European Commission, 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' (2009) OJC 45/2, para 7.
[44] Case 27/76 – *United Brands Company and United Brands Continentaal v Commission* [1978] ECR 207.
[45] *United Brands,* para 250.
[46] Ariel Ezrachi and Maurice Stucke, 'The Curious Case of Competition and Quality' (2015) 3(2) Journal of Antitrust Enforcement 227-257.
[47] Pinar Akman, 'Exploitative Abuse in Article 82EC: Back to Basics?' (2009) ESRC Centre for Competition Policy and Norwich Law School, University of East Anglia Working Paper 09-1, 20.
[48] Opinion of Advocate General Wahl delivered on 6 April 2017(1) Case C-177/16 *Biedrība 'Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība' v Konkurences padome*, para 101.
[49] Commission decision D3/34493 of 20 April 2001, OJ 2001 L 166/1, Der Grüne Punkt Duales System Deutschland ("DSD") para 112, confirmed by case no T-151/01, DSD (2007) ECR II-1607, para 121 ECLI:EU:T:2007:154.



packaging.[50] Accordingly, intervention by competition authorities is justified, if dominant companies use their position of power and the lack of alternatives on the market to monetise more data than what would be possible in a competitive environment. The value that the dominant player obtains from user data would, under these circumstances, be expected to exceed the benefits that the users get from the service that is offered to them in return.

In the Facebook case mentioned above, the BKA's main argument was that Facebook used its market dominance to impose exploitative data practices on its users. In particular, Facebook was found to have abused its dominant position, by forcing users to agree to its terms and conditions, under which it could collect user data also outside of the Facebook website[51] and combine this data with users' Facebook profiles. The BKA argued that "it cannot be assumed that individuals give their consent voluntarily since users are forced to consent to data processing terms when they sign up for a service provided by a company that has a dominant position in the market".[52] Furthermore, the BKA maintained that the merging of data deprived consumers of control over their personal data and, thereby, constituted a violation of the right to informational self-determination. It claimed that under German competition law, Section 19(1) GWB (the German equivalent of Article 102 TFEU) must be applied in order to protect constitutional rights, including data protection rules, in particular "in cases where one

[50] Robert O'Donoghue and Jorge Padilla claim that the detailed treatment of abusive contract terms in *DSD* elucidates the scope of Art 102(a) TFEU in relation to unfair commercial terms cases. They explain that the Commission firstly looks at whether the terms are central to the object of the contract, and in a second stage, whether they are proportionate, taking into account the different parties' interests. Basically, "it requires a balancing between the object of the contract, the terms of the contract, and the contractor's justification for those terms". See Robert O'Donoghue and Jorge Padilla, *The Law and Economics of Article 102 TFEU* (2013, Hart), 856.

[51] The BKA talks about third party sources as services owned by Facebook, like WhatsApp and Instagram as well as third party websites that "embedded Facebook products such as the 'like' button or a 'Facebook login' option or analytical services such as 'Facebook Analytics', data"; Bundeskartellamt, 19 December 2017 'Background information on the Facebook proceeding'; http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2017/Hintergrundpapier_Facebook.html?nn=3591568.

[52] Bundeskartellamt, Decision of Facebook proceeding, 6th Decision Division, B6-22/16, administrative proceedings, decision under Section 32(1) German Competition Act (GWB) (6.2.2019), English version of the decision, available at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5, page 185.



contractual party is so powerful that it would be practically able to dictate contractual terms, thus eliminating the other party's contractual autonomy".[53]

The BKA ordered Facebook to obtain voluntary consent from users before assigning third party data to Facebook profiles. This meant that even if users had refused to give consent for the merging of their data, Facebook would have been obliged to give them access to its services. The Düsseldorf Higher Regional Court suspended the BKA's decision, holding *inter alia* that the BKA had not sufficiently demonstrated that the contested data policy gave rise to a relevant competitive harm. In order to do so, the BKA would have had to show the causal connection between Facebook's dominance and the harmful data practices and assess the counterfactual, proving that Facebook would not have been able to impose its terms, had the market been competitive.[54] The last word on this case has not been said yet, but irrespective of how it ends, the case can inspire our thinking around how to integrate data protection concerns into competition law. In regard to the link between the GDPR and competition law in this case, it was noted that:

> the recent Facebook decision by the Bundeskartellamt imposes, by way of a remedy, an 'internal unbundling' of data collected by different subsidiaries of a dominant firm… the decision may impact the preconditions for data collection and aggregation by dominant firms in the future. Namely, it might require consumers to provide consent to data processing by specific services of a dominant firm, which may help to counterbalance the self-reinforcement of dominance by way of preferential data access.[55]

It shall be noted that German national law is broader than Article 102 TFEU, inasmuch as it allows the competition authority to directly draw on constitutional rights. For this reason, it might not be possible for the Commission to bring a case following the exact reasoning of the BKA. Nonetheless, it can be argued that Article 102 TFEU is flexible enough to be applied to abusive data collection by a dominant firm, since, as discussed earlier, this conduct can have both exclusionary and exploitative effects within the meaning of EU competition law. The BKA's case is, nonetheless, valuable, inasmuch as it raises important issues that will need to

[53] Ibid, at 150.
[54] OLG Düsseldorf, August 26, 2019, Case VI-Kart 1/19 (V).
[55] European Commission, a report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition Policy for the Digital Era', (2019), 80.



be addressed when bringing cases at the intersection between competition law and data protection.

Depending on the circumstances of the case and the factors that contribute to the dominance of a firm and the exploitation of consumers, various elements related to data practices could be included in competition remedies in exploitative abuse cases:

- Competition authorities could impose limits on the amount of data collected, the length of storage and collection purposes, including data sharing and monetisation.
- Authorities could impose specific requirements for valid consent, in particular when the dominant firm is effectively coercing its users to consent to its unfair data protection terms, in order for them to the use its service. This would make sure that dominant firms cannot circumvent data protection regulation's obligations through their dominance, e.g. to obtain consent due to lack of alternatives. These requirements could include:
    - Ordering firms to obtain more explicit and active consent or ask for confirmation of consent after a period of time.
    - Requiring firms to give consumers the possibility to separately consent for different data uses and opt out of data practices that they do not agree with.
    - Ordering firms to allow consumers to use a particular service without having to consent to certain data collection terms, thereby ensuring that consent is effectively freely given.
- Where a dominant firm is collecting a significant amount of data without being fully transparent about it, ordering the firm to be more transparent about how data is used and, in particular, monetised.
- Furthermore, competition authorities can closely monitor firms' practices to secure compliance with the remedies imposed.

Although this section looked at practices concerning data from the 'exploitative abuse' angle, depending on the circumstances of the case, they could also have exclusionary elements, as has already emerged in the BKA's Facebook case. This has to do with the fact that excessive data collection, besides being exploitative, can lead to a lessening of competition and market foreclosure, due to the



competitive advantage gained by the dominant firm through control over more data.

Whether a competition authority decides to bring a case as an exploitative or exclusionary abuse will depend on the circumstances of the case. A competition authority might decide it has more elements to show that the excessive data collection excludes other players from the market and bring the case as an exclusionary abuse. Alternatively, it might find that the terms are blatantly disproportionate, and bring an exploitative abuse case instead. Due to the strict correlation between data and market power, if an excessive data collection case is brought as an exploitative abuse case it can also reduce the exclusionary effects, and vice versa. To illustrate the point, reducing the data under a dominant firm's control can facilitate entry by other players, and on the other hand, facilitating entry in the market might mean that dominant firms face more competition and can no longer afford to extract excessive amounts of data from their users.[56]

Conclusion

This paper has shed light on the possibility to align competition law remedies with data protection principles. More than providing an exhaustive analysis of what competition authorities can do, the intention was to show that there is scope for data protection principles to be included in the design of remedies under competition law, and that this could lead to a strengthening of competition, besides contributing to the protection of the rights of consumers in the digital market.

With this in mind, competition authorities are encouraged to explore to what extent anticompetitive data practices can be addressed with data-protection enhancing behavioural remedies. Depending on the circumstances, competition authorities might bring a case as an exclusionary or exploitative abuse case; the remedies below would be potentially suitable in both instances. Furthermore, the remedies can be employed in infringement decisions as well as commitment decisions.

[56] For example, commenting on the German Facebook decision, Wouter Wils claimed that "*first*, Facebook's dominance is relevant for both the interest balancing and the effectiveness of the consent under data protection principles and thus for the assessment of the unfairness of the terms of use, and *second*, Facebook's conduct has an exclusionary effect vis-à-vis competitors, reinforcing Facebook's dominant position vis-à-vis consumers". See Wouter Wils, 'The Obligation for the Competition Authorities of the EU Member States to Apply EU Antitrust Law and the Facebook Decision of the Bundeskartellamt', forthcoming in Concurrences N° 3-2019 and accessible at http://ssrn.com/author=456087, page 12.



The remedies considered in the paper are the following:

- Requirements that facilitate and increase the utility of data-portability. This remedy would give individuals greater freedom to switch providers and at the same time would increase competition, by reducing lock-in effects.
- A requirement for data-interoperability, tailored to the characteristics of the services provided. This remedy would give individuals more freedom to choose their provider, since they would not be obliged to join the network used by their contacts. It would also increase competition by reducing network effects.
- Limitations on data collection and processing, including the length of storage, collection purposes, sharing and monetisation. This remedy would provide greater protection of individuals' interests and counteract power asymmetries. It would also promote competition, by reducing the effects of the self-reinforcing loop, and facilitate entry of new players.
- Tailored requirement for valid consent, e.g. allowing for the possibility to fine-tune privacy settings, more explicit and active consent, confirmation of consent after a period of time, ensuring that consent is freely given. As with the remedy above, this remedy would provide greater protection of individuals' interests, especially in situations of power asymmetries. It would also facilitate competition, by reducing the effects of the self-reinforcing loop, and possibly increasing competition on data protection terms.
- Tailored requirements for transparency, including information about the monetisation of the data collected. This remedy would again contribute to the protection of individuals' interests. It could also lead to more competition on data protection terms, possibly making the market as a whole more competitive.

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