COMPETITION AND PRIVACY IN THE DIGITAL AGE: THE LEGAL IMPLICATIONS OF THE GERMAN ANTITRUST OFFICE’S FACEBOOK DECISION

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ABSTRACT

This thesis aims to study in depth the the German Antitrust Office's (Bundeskartellamt) decision that was published in February 2019 in order to answer the main research questions, which are; could the case be a template for the rest of the Europe too? What implications the case has for the future of privacy/data and competition law?

Bundeskartellamt released an initial press release in 2016 regarding the investigation on whether Facebook has abused its dominant position in the market of social networking platforms by infringing data protection rules with its terms and conditions. In February 2019 the Bundeskartellamt prohibited Facebook Inc., Menlo Park, USA, Facebook Ireland Ltd., Dublin, and Facebook Germany GmbH, Hamburg, Germany from making the use of Facebook social network conditional on the collection of user and device-related data and combining that information with the Facebook.com user account without users' consent. Furthermore, the consent given was not effective according to the General Data Protection Regulation (GDPR). The decision applied German law and the GDPR but in order to answer the research questions, also the Treaty on the Functioning of the European Union (TFEU) rules will be applied.

The conclusion of the research is that the rest of the EU could apply TFEU in order to establish that Facebook has indeed a dominant position in the EU too regarding the social network market and it has abused its market position with the terms and conditions it has imposed to its consumers. These terms and conditions can be found abusive based on the argument that they are exploitative regarding the excessive price (data) they impose for the use of the social network platform and because the users were not fully informed by this price.

As a dominant company, Facebook has a special obligation not to violate competition regulations and therefore it should have paid special attention to make sure that the terms and conditions are fair and not exploitative but also readable and understandable for the user. Moreover, as the user has difficulties to understand what he or she is consenting to, the consent cannot be regarded as given voluntarily pursuant to the GDPR. As this research involves several fields of law, this thesis will also examine the interplay between data protection provision, consumer protection and competition law generally. Finally, the future of Facebook and the relationship between big data, privacy, data protection and competition law will be assessed.

The German case has implications on the future because it was the first time competition authority decided of an abuse of dominant position applying the GDPR. The link between competition law application on data/privacy matters is established and therefore the future will require clear guidelines on how cases like these are divided between the data protection and competition authorities. Companies will have to pay more attention to their terms and conditions and more awareness must be raised amongst consumers.

Table of Contents

1. From research question to conclusions 1
   1.1 Outline 1
   1.2 Methodology 2
2. Introduction 4
   2.1 Big data 5
3. Facebook case 10
   3.1 The facts of the case 10
   3.2 Business model of Facebook 11
   3.3 The legislation 14
   3.4 Relevant market 16
      3.4.1 The SSNIP and SSNDQ tests 19
   3.5 Does Facebook have a dominant position in the relevant market? 21
   3.7 What constitutes as an abuse of dominant position? 25
   3.6 Special obligations of a dominant company 28
   3.7.1 The violation of the GDPR 30
   3.8 What are the consequences of an abuse of dominant position? 33
   3.9 The outcome 35
4. The interplay between consumer protection, data protection and competition law 40
   4.1. Big data, competition law and mergers 45
5. Future 51
   5.1 Future for Facebook 53
      5.1.1 More regulation? 55
6. Conclusion 58

1. From research questions to conclusions

1.1 Outline

The year 2018 was truly an *invasion of privacy* on many levels. Some won Grammies[1] over it and some faced heavy fines.[2] Some of the reasons why privacy and other fashionable topics, such as big data, have become the center of attention of many competition law and data protection professionals and academics, are the new General Data Protection Regulation (GDPR) in the European Union (EU), which commenced into force last May and the large scale investigations in recent years regarding the big technology companies, such as Google[3] and Facebook.

The grounds of these investigations vary from abuse of dominant market position to violation of the GDPR provisions. However, most of the investigations refer to the same dilemma; Can and should current competition laws tackle problems regarding big data, data protection and privacy issues that have a competition aspect?[4] What happens if companies with significant market power misuses big data?[5] How far competition law can go to protect consumers (users) from themselves? How does consumer protection work in relation to big technology companies? The second half of the thesis will explore these questions.

This thesis focuses on the latest investigation regarding Facebook concluded by the German Antitrust Office (Bundeskartellamt). The investigation provides valuable information about the dominant position of Facebook in the social media networking market and whether Facebook can be found abusing dominant position based on the TFEU as well and therefore could it serve as a template for the rest of the EU. Even though the EU Competition Commissioner Margrethe

[1] Best rap album/Cardi B for Invasion of Privacy.
[2] Facebook is currently waiting for approximately 5bn dollar fine for Cambridge Analytica scandal.
[3] European Commission press release, 'Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shoping service (27 June 2017). See also Alec Burnside, 'No Such Thing as a Free Search: Antitrust and the Pursuit of Privacy Goals (May 2015) CPI Antitrust Chronicle 4.
[4] Ivana Rakic, Ivana Dragic, 'Big data –between the competition policy and privacy and data protection' (2018) Conference paper in the International Scientific Conference EKOB p.14.
[5] ibid.

Vestager believes it cannot.[6] In order to create template that could work in rest of the EU too, this thesis will consider TFEU and other Community law provisions.

The research questions are;

1) Could the decision by the Bundeskartellamt be a template for the rest of the Europe too?

2) What implications the case has for the future of privacy/data and competition law?

In order to reach the answers, this work will first state the facts of the case, examine the applicable law and apply the law to the facts in order to establish whether Facebook has abused its dominant position and whether it could be applied in the rest of the EU too. Next, the thesis will discuss about the outcome and sanctions. Afterwards this thesis will explore the implications of the case for now and for the future. The key themes throughout this work are competition law, GDPR, consumer protection and big data. These are global issues, however, with limited amount of time and resource, this work will focus on the issues and developments in the European Union.

1.2 Methodology

The legal dogmatic method aims to study, interpret and systemize the current existing legal system and legislation. [7] This method is the basis of this thesis, more specifically practical dogmatics, whereas the current case law is been analyzed and the conclusions are drawn from the case law and opinions of academics. Moreover, also civil law legal dogmatics method will be used to interpret and argue how the law should be understood specifically regarding EU competition law and the GDPR. The aim of the thesis is also to put legal phenomenons such as big data and privacy in the context regarding competition law. With systematization this thesis will introduce broad and more systematic perspective regarding the legal issues explained above in the outline.

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[6] Aoife White, Lenka Ponikelska, ‘Germany’s Facebook Order Will Be Studied by EU, Vesatager Says (Bloomberg.com, 8th February 2019) https://www.bloomberg.com/news/articles/2019-02-08/germany-s-facebook-order-will-be-studied-by-eu-vestager-says <accessed 9th May 2019.

[7] Ari Hirvonen, *Mitkä metodit? Opas oikeustieteen metodologiaan* (2011) p.24-25.

This thesis is mainly based on articles and other opinions, such as blog posts by the competition law and data communities, as the German antitrust office's decision is so recent that published books are not available on this topic.

2. Introduction

New technologies and innovations are great opportunities to create jobs, bring efficiency to the day-to-day life and introduce exciting products and services to the market. These new business models change the relationship between businesses, consumers and the regulators as the role of data keep increasing. Thereby, the new digital markets not only bring great benefits and advantages but also pose serious risks to consumer welfare, right to privacy and data protection for example through mergers and acquisitions. Moreover, through mergers and the conduct of dominant companies in data industry, the main objective seems to be collection of additional information about consumers.[8] Therefore the position of Facebook and other big technology giants in the market has been interesting from the very beginning, as these issues may not only lead to competition problems but also with regard to data protection concerns.[9] To enhance the problematic situation that concerns the data industry, the companies do not know their own legal position, and how could they, when even the regulators and academics disagree on how the new data industry should be regulated. This brings uncertainty and breaks the growth of the industry. At the same time companies continue to develop and grow outside of the reach of the current legal framework, so the discussion regarding this topic will constantly be delayed. Often, the new legislation is regulated too late and thereby considered dated when it is first published. This is a problem when the legislation is put forward to regulate an industry that is fast growing. For example Facebook has already faced several fines on how they operate and recently the CEO of Facebook, Mark Zuckerberg wrote to the Washington Times and requested that the social network platforms were regulated more so Facebook would avoid making (costly) mistakes.[10]

Despite this, the new era of Internet has been regarded as a good thing for consumers bringing more choices, better service and making it easier to compare and purchase goods. This improves the position of consumers in relation to businesses.[11] However, Internet is very different from any physical shop where are plenty of opportunities to familiarize with company's return policy, quality of the product and so forth. Making purchases online requires the consumer to have computing skills and patience to search and read the terms and conditions of the transaction,

[8] Inge Graef, 'Data as Essential Facility –Competition and Innovation on Online Platforms' (2016) KU Leuven.
[9] Ibid.
[10] Mike Isaac, "Mark Zuckerberg's Call to Regulate Facebook, Explained" (The New York Times, 2019) available at: https://www.nytimes.com/2019/03/30/technology/mark-zuckerberg-facebook-regulation-explained.html) <accessed 1st April 2019.
[11] KKV, 'Alustat Kilpailu- ja Kuluttajaoikeudellisessa tarkastelussa' (2017).

delivery and return policy. Difficulty with the latter is that terms and conditions are not usually *meant to be read*, because, it is likely that an average consumer does not understand the clauses on user data and privacy even if they attempt to read it.[12] However, majority of people will never read the terms and conditions of the products, services or for example apps they purchase.[13] A study has calculated that it would take on average each internet user 244 hours per year to read the privacy policy belonging to each website they view.[14]

It follows, therefore, that the Internet companies have significant responsibility here. However, it appears that the big technology giants such as Google and Facebook have been able to hide behind the complex terms and conditions, which are presented in multiple documents and use difficult language, which without a legal education it is not possible to read or understand. The recent decisions and developments in the EU indicate that big technology companies must adapt more user- orientated approach on terms and conditions in order to treat consumers fairly.[15] This equals introducing fair terms and conditions, making them available and introducing a choice. As even though different Internet based platforms and social networks are relatively new, the same principles apply to them; they cannot exploit consumers (users).

2.1 Big data

The main contributor to the fast growing and innovative technology-driven industry is data, more specifically big data.[16] "Big data" can be explained in the simplest way as vast amounts of different types of data collected from high number of different sources.[17] It has also been referred as the "four V's", which stands for volume, velocity, variety and the value of the data.[18] Data can either be created by people or generated by machines.[19] It covers multiple business

[12] Alex Hern, 'I Read All the Small Print on the Internet and it made me Want to Die' (guardian.com, 15th June 2015) available at https://www.theguardian.com/technology/2015/jun/15/i-read-all-the-small-print-on-the-internet <accessed 28th March 2019.
[13] Ibid.
[14] Aleecia M McDonald, Lorrie Faith Cranor, 'The Cost of Reading Privacy Policies' [2008] A Journal of Law and Policy for the Information Society, Privacy Year in Review, p.17.
[15] European Commission press release, (n3). 'Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shoping service (27 June 2017).
[16] European Commission, 'Big Data' (2018) available at: https://ec.europa.eu/digital-single-market/en/big-data <accessed 31st March 2019.
[17] Ibid.
[18] Maurice E. Stucke, Allen P. Grunes, 'Big Data and Competition Policy' [2016] OUP, p.16.
[19] European Commission, (n16).

sectors from healthcare to transport and energy.[20] The value of the EU data economy was more than 285€ billion in 2015, representing over 1.94% of the EU GDP.[21] Due to the yearly growing rate of 5.03%, this value increased 300€ billion representing 1.99% of the GDP in 2016.[22] Therefore further favorable legislative conditions and general policy could increase the European data economy to 739€ billion by 2020, representing 4% of the overall EU GDP.[23]

Possessing data itself are not a problem but processing it and they way it is used, could be.[24] Processing big data with algorithms and software we can reach results faster and more accurately. For example decoding human genome took 10 years in 2003 but today it takes less than a week with the help of big data.[25]Algorithms can process vast amounts of data quickly, which then can be used with artificial intelligences and for example with almost any industry in the world. Data, algorithms and artificial intelligence could potentially tackle some of the major problems in the world and therefore bring huge benefits to consumers, companies and governments. On the other hand, if data are misused as we evidenced in the Cambridge Analytica scandal,[26] it is a huge risk to the entire world. In the Cambridge Analytica scandal, Donald Trump's 2016 presidential campaign acquired access to private information on more than 50 million Facebook users.[27] Through this information the campaign could influence American voters in a very targeted and personal way that of course influenced the outcome of the election. There is "no such thing as free search (lunch)"[28] has a whole new meaning after the Cambridge Analytica scandal.

It is clear that there needs to be clear guidelines and regulations in place for big data and privacy, bearing in mind that the right to privacy (or private life) in mentioned in the Universal

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[20] European Commission, (n16).
[21] European Commission, 'Building a European data economy' (2019) available at: https://ec.europa.eu/digital-single-market/en/policies/building-european-data-economy <accessed 31st March 2019.
[22] ibid.
[23] ibid.
[24] Ivana Rakic, Ivana Dragic, 'Big data –between the competition policy and privacy and data protection' (n4).
[25] European Commission, (n16).
[26] Kevin Granville, 'Facebook and Cambridge Analytica: What You Need to Know as Fallout Widens' (The New York Times, 2018) available at: https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html <accessed 2nd May 2019.
[27] ibid.
[28] Alec J. Burnside, 'No Such Thing as a Free Search: Antitrust and the Pursuit of Privacy Goals' [2015] Competition Policy International 2.

Declaration on Human Rights,[29] the European Convention of Human Rights[30] and the European Charter of Fundamental Rights.[31] Not to mention the EU General Data Protection Directive (GDPR).[32] The GDPR replaced the old data protection framework in the EU and extended it to concern all the businesses worldwide that process the personal data of people of the European Union. Moreover, it ensures greater protection of personal data with detailed requirements for processing and heavy fines. However, as long as the relationship between EU competition law and the GDPR is unclear, the efforts that have been put forward by the abovementioned Treaties or by the GDPR are fruitless.

Facebook has been one of the key companies on forming the new data industry that regulators and other companies are trying to figure out. One might say that the current legal framework was not made for companies such as Facebook or for the data industry it operates in. The basic logic of Facebook's business model is that it offers free networking services for the price of the users data. Facebook then sells this data onwards to advertising companies who can then target their marketing to individuals even better. Therefore the data is hugely important; in other words, it is the cornerstone of Facebook's business. Last year Facebook made 22 billion dollars in profit. This is where the statement " data is the new oil" comes from.

As Facebook's business model is based on data, it has been responsible for the Cambridge Analytica scandal to happen in the first place. Therefore it is not a surprise that conduct of big technology giants like Facebook group and Google shares academics on how far these giants can take data processing. As in recent years these companies have been under the scrutinizing eye of the European Commission regarding the use of big data, users privacy and competition issues and especially the mixture of all of these. Facebook and many other companies who provide free-access networking platforms use big data for advertising as it funds solely the functioning

[29] Universal Declaration of Human Rights, the United Nations General Assembly in Paris on 10 December 1948, Article 12.
[30] European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950 ETS 5, Article 8.
[31] Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, Article 7 (Article 8 contains the explicit right for the protection of personal data).
[32] Regulation (EU) 2016/679 of the European Parliament and of the Council 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), 27 April 2016, OJ L119/1.

and growth of the company and this could potentially raise competition concerns.[33] The European Commission's study on data sharing by companies in Europe highlights that amongst the surveyed companies 39% supply data to other companies and 42% of companies use data from other companies.[34] Furthermore, 20% of the companies consider data sharing as their main economic activity within the company.[35] These companies also expect data sharing to become even more important in the future: 46% of the surveyed companies expect that data sharing will become a main economic activity in five years from now.[36]

As mentioned above, solely possessing data are not an issue. Just like being a dominant company is not an issue, only abusing this position is. Furthermore, using data to abuse your dominant position is definitely a concern to competition regulators and data protection and privacy regulators. In many cases data are a strong factor why a company has gained a position of market power. Collection and exploitation of data are been already recognized as raising entry barriers to the market and being the source of market power.[37] Lamadrid and Villiers point out that the arguments on whether data can be barrier to the market, it is irrelevant if one does not consider how the data are been processed and used.[38]

The EU Competition Commissioner Margrethe Vestager has discussed about the issues with big data and competition law for years and she has stated in one of her speeches in 2016 that companies must ensure that they do not use big data in a way that hinders other companies from competing. She warned about the competition risks posed by dominant tech platforms that have vast amounts of personal data.[39] She said in the DLD conference that if the "company's use of data is so bad for competition that it outweighs the benefits, we may have to step in to restore a

[33] Federico Marini Balestra, Riccardo Tremolada, 'Digital Markets and Merger Control: Balancing Big Data and Privacy Against Competition Law [2017] 37 (7) E.C.L.R, p. 337-345.
[34] European Commission, 'Findings of a Commission-funded study on data sharing by companies in Europe' (2018) available at: https://ec.europa.eu/digital-single-market/en/news/findings-commission-funded-study-data-sharing-companies-europe <accessed 31st March 2019.
[35] Ibid.
[36] ibid.
[37] Autorite de la Concurrence and Bundeskartellamt (Franco-German report) Competition Law and Data –report (2016) p.11.
[38] Alfonso Lamadrid, Sam Villiers, 'Big Data, Privacy and Competition Law: Do Competition Authorities Know How to Do it?' [2017] Competition Policy International p.1-4.
[39] Natasha Lomas, 'European Antitrust Chief Eyeing Tech Giants' Hold On Data' (techcrunch.com, 2016) available at:https://techcrunch.com/2016/01/18/european-antitrust-chief-eyeing-tech-giants-hold-on-data/ <accessed 27th March 2019.

level playing field."[40] In 2015 she stated that big data are something she wants to focus on and thoroughly analyze and debate and to fully understand the consequences of it.[41] In the DLD conference she described in her speech how personal data are being handed over by users of free services as a business transaction and therefore these consumers (users) must be treated fairly.[42] Therefore the center of this thesis is competition law, big data, data protection and consumer protection. The Facebook case concerns all these four areas of law.

[40] Natalia Drozdiak, 'European Union to Scrutinize Usage of Big Data by Large Internet Companies' (The Wall Street Journal, 2016) available at: https://www.wsj.com/articles/european-union-to-scrutinize-usage-of-big-data-by-large-internet-companies-1453036139 <accessed 5th March 2019.

[41] Natasha Lomas, 'European Antitrust Chief Eyeing Tech Giants' Hold On Data' (n39).

[42] Natasha Lomas, 'European Antitrust Chief Eyeing Tech Giants' Hold On Data' (n39).

3. Facebook case

3.1 The facts of the case

In 2018 not long after the General Data Protection Regulation (GDPR) commenced into force, Facebook, Google, Instagram and WhatsApp faced the first GDPR complaints over forced consent.[43] These complaints were filed by privacy critic Max Schrems and his non-profit organisation "None of Your Business".[44] The complaints were based on the fact that users are not given a free choice of whether and how they would like their personal data processed. The abovementioned tech companies only provide the options "agree and use the service" or "don't agree and don't use the service".

These complaints sparked the investigation against Facebook in Germany by the Bundeskartellamt. Bundeskartellamt announced on the 2nd March 2016 that it has initiated proceedings against Facebook Inc., USA, the Irish subsidiary of the company and Facebook Germany GmbH, Hamburg on suspicions that with its specific terms of service on the use of user data, Facebook has abused its possibly dominant position in the market for social networks.[45] Furthermore, Facebook's conditions of use could be regarded as infringing data protection provisions.[46]

The case is been handled by Bundeskartellamt instead of the country's privacy agency because "the antitrust is seen as having a broader impact on privacy issues."[47] Futhermore, in the preliminary assessment on Facebook, the Bundeskartellamt pointed out that privacy concerns and how the company handles its data are relevant issues to the competition authorities if access to the personal data of users is essential for the company and has affected to the market power of that company.[48] Therefore, the President of the Bundeskartellamt regarded that it is essential for the competition authority to examine under the aspect of abuse of market power whether the

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[43] None of Your Business, 'GDPR:*noyb.eu* filed first complaints over "forced consent against Google, Instagram, WhatsApp and Facebook' (noyb.eu, 2018).
[44] ibid.
[45] Bundeskartellamt Press Release, 'Bundeskartellamt initiates proceedings against Facebook on suspicion of having abused its market power by infringing data protection rules' (2016).
[46] ibid.
[47] Bundeskartellamt, 'Case Summary –Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing' (Germany, 15th February 2019) B6-22/16.
[48] ibid.

consumers (users) are sufficiently informed on the type and extent of data collected.[49] Moreover, because the investigation concerns dominant company, it is essential for the competition authority to monitor data processing activities of such companies and therefore issues like dominant companies abusing their market power with infringing data protection regulations cannot be left solely to data protection authority.[50]

The investigation aimed at user and device-related data, which Facebook collects when other corporate services or third-party websites and apps are used and which it then combined with user data from Facebook.[51] The proceeding did not examine "the issue of information processed on the use of the social network that is generated after users have registered".[52] Moreover, "the Bundeskartellamt saw no reason to intervene on the grounds of the prohibition of abusive practices under competition law."[53] Therefore academics have concluded that the decision was mostly based on the application of GDPR.

It was concluded that even though advertising-funded social network generally needs to process a large amount of personal data, the efficiencies in a business model based on personalized advertising do not outweigh the interests of users when it comes to processing data from sources outside of the social network.[54] This applies especially when users have unsufficient control over the processing of their data and its allocation to their Facebook accounts.[55] Therefore, it was necessary for competition law to step in because the data protection set forth in the GDPR were clearly overstepped, also in view of Facebook's dominant position.[56]

3.2 Business model of Facebook

Facebook and its subsidiaries develop and operate various digital products, online services and application for smartphones (apps).[57] The core product is however Facebook.com, which has

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[49] Bundeskartellamt Press Release, (n45).
[50] Bundeskartellamt, 'Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing' (n47).
[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] Ibid.

been offered in Germany since 2008.[58] In Facebook.com users create profiles by entering their names, pictures, friends, relationships, location and more. Facebook.com has also Messenger service, which you can use to contact your friends, family and unknown people. Messenger provides real-time bilateral or group communication.[59] It is possible that majority of users in Facebook use Messenger instead of traditional text messages or email and therefore the users use Messenger for even the most sensitive information. This is because the Messenger service is free; the users need only Internet for it to work, as the messages will not go through the operator. The users range from private individuals to businesses and associations.[60]

Facebook has exclaimed many times that “it is free and always will be free” but at what price? German Consumer Associations have argued that this is misleading advertising.[61] Consumers are also data subjects, whose welfare might be at risk where freedom of choice and control over one’s own personal data is managed by a dominant company.[62] Therefore presenting products or services to consumers as ‘free’ is deceptive and it blinds consumers regarding the actual price of cost of the product of service and therefore it distorts the decision making and therefore harm consumers and competition.[63]

Facebook funds its ‘free services’ through online advertising offered to publishers, advertising companies and other businesses.[64] These advertisements are targeted to individuals via the information that Facebook has collected from them, therefore the advertisements will match the profile and so, are more likely to generate a sale, rather than advertisement to a random group of people through traditional advertisement channels, such as newspapers. The “match” will be created through the users actions regarding his/her interests, purchasing power and living conditions.[65]

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[58] Ibid.
[59] Ibid.
[60] Ibid.
[61] Christina Etteldorf, ’Consumer Association Succeeds in First Round of Dispute Concerning Facebook’s Terms of Service and Privacy Settings’ [2018] 114 EDPL Rev.
[62] European Data Protection Supervisor, Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy (2014) pp.31.
[63] ibid pp.31-32.
[64] Bundeskartellamt, ‘Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing’ (n47).
[65] Ibid.

In addition, the Facebook group offers "Facebook Business Tools", a selection of free tools and products for website operators, developers, advertisers and other businesses to integrate into their own websites, apps and online offers via programming interfaces (Application Programming Interfaces, API) pre-defined by Facebook.[66] The selection includes social plugins ("Like" or "Share" buttons), Facebook login and other analytics services (Facebook Analytics) implemented through "Facebook Pixel" or mobile "software development kits" (SDKs).[67] These tools enables data collection even if there is no Facebook symbol visible for the users in these websites, the user data can still flow from many websites to Facebook.[68] This happens if the website operator uses Facebook Analytics to carry out user analyses. [69] Andreas Mundt, the President of the German cartel office explains that Facebook obtains very detailed profiles of its users and knows exactly what they are doing online because of the analysis of third party websites combined with data from its own website and company-owned services.[70]

Furthermore, Instagram, WhatsApp Inc., Masquerade and Oculus are also part of the Facebook group. In Instagram users create a similar profile as in Facebook, which includes user name, email address, optional information such as phone number.[71] Instagram is solely based on pictures, videos and messages. WhatsApp is a free service which was originally developed as a free internet-based alternative to short message services (SMS).[72] Via WhatsApp users can send and receive text messages, photos, videos, documents, locations, voice messages and voice calls.[73] Furthermore, some users use WhatsApp calls as a substitute to traditional phone calls as the calls are free, the only thing user needs is internet. Masquerade is used for editing and sharing pictures with filters and masks.[74] Oculus offers virtual reality headsets and software.[75]

[66] Ibid.
[67] Ibid.
[68] Silvia Martinelli, 'Bundeskartellamt prohibits Facebook from Combining User Data from Different Sources' (silviamartinelli.com, 7th February 2019) available at: https://silviamartinellilaw.com/2019/02/08/bundeskartellamt-prohibits-facebook-from-combining-user-data-from-different-sources/ < accessed 30th March.
[69] Ibid.
[70] Bundeskartellamt, 'Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing' (n47).
[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Ibid.
[75] Ibid.

In order to use Facebook or other services provided by the Facebook group, the user must agree to the terms of service to conclude the contract.[76] These terms and conditions allow Facebook to collect and process users personal data through Facebook, WhatsApp, Instagram and also via third-party website who have integrated Facebook Business Tools.[77] The legal basis for data processing, Facebook claims that the data are required to provide the service to fulfill Facebook's legitimate interests.[78]

3.3 The legislation

The regulators in Germany amended the national Competition Act (Gesetz gegen Wettbewerbsbeschränkungen) in 2017 when it acknowledged that in the digital economy the collection and processing of personal data have great relevance for the competitive performance of a company.[79] The amendment aims to adjust the national competition law for the challenges that come with big data and the technology-driven data industry in general.[80] The Act provides now a criteria to be taken into account when assessing market power of a company that operated in the digital markets including direct and indirect network effects, access to competitively relevant data and the role of innovation in digital markets.[81] Moreover, the German Competition Act introduced the personal data as a criterion for assessing market power, especially in the case of online platforms and networks.[82] This offers a great tool for Bundeskartellamt to examine market powers when dealing with big data and the data industry.[83]

Even though the case is been decided under the German law, it is important to assess also the Community law so it can be determined whether the case can be applied to other EU countries as well. Moreover, EU law has primacy over national law.[84] Therefore the thesis makes sure that the conclusion is aligned with EU law because national laws should interpreted in a way that gives direct effect to EU law even if the law in question is a Directive which is not regarded as

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[76] Ibid.
[77] Ibid.
[78] Ibid.
[79] Ivana Rakic, Ivana Dragic, 'Big data –between the competition policy and privacy and data protection' (n4) pp19.
[80] Ibid.
[81] Ibid.
[82] Article 18 (3a) German Competition Act.
[83] Ivana Rakic, Ivana Dragic, 'Big data –between the competition policy and privacy and data protection' (n4) pp19.
[84] C-6/64 *Costa v Enel* [1964] ECR 585.

directly effective.[85] Moreover, the case law has established that EU Treaty provisions have direct effect, which means that individuals within the Member States can rely on EU provisions directly.[86]

Article 102 of the Treaty on the Functioning of the European Union sets out the principle of abuse of dominant position.

> *Article 102*
>
> *Any abuse by one or more undertakings of a* ***dominant position*** *within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.*
>
> *Such abuse may, in particular, 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.*

The future investigations in the EU against Facebook should especially examine the Article 102 (a), where it can be assessed whether Facebook's conduct and terms and conditions constitute as *"other unfair trading conditions".* The law seems clear on this; if Facebook has a dominant

[85] C-14/83 *Von Colson and Kamann v Land Nordhein-westfalen* [1984] ECR 1891.
[86] C-26/62 *Van Gen den Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

position and abuses it by introducing unfair trading terms, it is illegal and should be sanctioned according to the competition law provisions. Moreover, competition law allows rather heavy sanctions, such as heavy fines. No company should be above law even if the field it operates does not have a clear legal framework. Funnily, in the statement Facebook provided it regards that they are been targeted with these investigations especially in Europe.[87] This is where the importance of competition law provisions comes forwards as competition law functions across all fields of business.

3.4 Relevant market

The definition of the relevant market is the first step in the legal analysis of cases of anti-competitive behavior, such as abuse of dominant market position.[88] The right product market will allow competition regulators to identify the market operators, such as suppliers, customers and consumers, and to calculate the total market size and the market share of each supplier in regards to the relevant product or service in the relevant area.[89]

There are three aspects that help defining the relevant market; the first is the product market, including products and services, which are considered by consumers to be interchangeable and therefore substitute for each other due to their characteristics, their prices and their intended use.[90] Secondly, the geographic market should be determined. Geographic market is the area, whereas the conditions of competition for a given product are homogenous.[91] Finally and thirdly, time horizon, which is reflecting the changes in consumer habits and technological developments.[92] Time horizon is the one variable from all of the aspects that is changing in a very fast rate and therefore it is the most difficult to determine. The Bundeskartellamt did not regard this aspect at all according to the Case Summary. It could be because the data industry is

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[87] Yvonne Cunnane, Nikhil Shanbhag, 'Why We Disagree With the Bundeskartellamt' (newsroom.fb.com, 7th February 2019) available at: https://newsroom.fb.com/news/2019/02/bundeskartellamt-order/ <accessed 10Th February 2019
[88] European Data Protection Supervisor, (n62) pp.18.
[89] Ibid.
[90] European Commission, Antitrust Procedures in Abuse of Dominance (Article 102 TFEU cases), available at: http://ec.europa.eu/competition/antitrust/procedures_102_en.html <accessed 1st April 2019.
[91] Ibid.
[92] Commission Notice on the definition of relevant markets for the purposes of Community competition law, 97/C 372/03, OJ C372/5;
Commission Decision of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV/31043 –Tetra Pak II) 92/163/EEC, OJ L 072, 18.03.1992.

growing so fast that it could be impossible to define. For this reason, this thesis argues that the same applies to the rest of the EU too and therefore this aspect will not be considered when determining the relevant market.

In other words, in order to define the market one must identify the effect of alternative sources of supply for the customers of the companies' involved, in terms of products/services and geographic location of suppliers.[93] This is done with the help of the SSNIP test, which stands for small but significant, non-transitory increase in price. The SSNIP test was brought by the 1982 Merger Guidelines (USA),[94] whereas it will be tested whether customers would likely shift to using other products if the company made a small (5-10%) but significant and non-transitory increase in price. Previously ad hoc determination was also used but some argued that it "did not provide a rigorous way to determine the relevant benchmarks for how much interchangeability was reasonable or how high the cross elasticity had to be to define a market"[95], in other words, this approach failed to explain where to draw the line separating those products in the market from those outside.[96] Therefore in recent years, the SNNIP test has been more popular.

Relevant product markets are delineated according to the criterion of demand substitutability, i.e., the interchangeability of products from the perspective of the other market side.[97] The Bundeskartellamt defined the product market as a private social network market with private users as the relevant opposite market side.[98]

In the decision, Bundeskartellamt explained that it defined the market by examining Facebook's business model and its special characteristics as a multi-sided network market with free services.[99] According to the investigation, Facebook.com offers an intermediary product, which according to the content of its services, is a combination of a network and a multi-sided market pursuant to Section 18 (3a) of the German Competition Act.

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[93] Stephen Weatherill, *Cases & Materials on EU Law* (6th edn, OUP 2003) 552.
[94] Joseph J Simons, Malcolm B Coate, 'United States v H&R Block: An Illustration of the DOJ's New but Controversial Approach to Market Definition' [2014] 10 (3) p.546.
[95] Ibid.
[96] Ibid.
[97] Richard Whish, *Competition Law* (6th edn, OUP 2009) 28-61
[98] Bundeskartellamt, 'Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing' (n47).
[99] Ibid.

According to Bundeskartellamt Facebook is a network financed through targeted advertising, which forms multi-sided market on the basis of its financing.[100] A user can create a profile on Facebook, contact others, share and receive content and messages. Therefore the first "side" is regarding the users and their ability to connect one another and share thoughts for example.[101] The second "side" is the fact that Facebook serves also as a point of contact between its private users and other users, usually professional, who advertise their products or services targeting specific groups.[102] The third market side is publishers using Facebook to promote their businesses or other goals by publishing editorial content and connect with users.[103] Developers represent another side of the market. Developers integrate Facebook into their own websites using APIs, Facebook Login or Facebook Analytics.[104] As none of the above groups of Facebook users have demands similar to the group of private users, they have to be attributed to other markets.[105] Therefore, the Bundeskartellamt concluded that the network has to be considered a market service pursuant to Section 18 (2a) of the German Competition Act, despite the fact it does not impose a monetary price for private users.[106] This same analogy can be used in the rest of the EU too as the mutli-sided business model is not only in Germany. After looking at the nature of the markets whereas Facebook operates in, the next step is to look at the precise definition of what the said markets cover, including effects of the platforms on the users lives, choices and attitudes.[107]

The geographic market can be determined country-by-country basis, however in terms of the investigation in Germany the relevant geographic market is Germany.[108] This is due to the fact that Facebook was found to be used predominantly to connect with people in the users' own country and for the special national user habits.[109] However, Facebook stated that when the Bundeskartellamt were investigating Facebook and the market, Bundeskartellamt found that over

[100] Ibid.
[101] Aleksandra Gebicka, Andreas Heinemann, 'Social Media & Competition Law' World Competition law and economics review 37 (2) p.154.
[102] Ibid.
[103] Bundeskartellamt, 'Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing' (n47).
[104] Ibid.
[105] Ibid.
[106] Ibid.
[107] Aleksandra Gebicka, Andreas Heinemann, 'Social Media & Competition Law' (n.101) p.154-156.
[108] Bundeskartellamt, 'Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing' (n47).
[109] Ibid.

40% of social media users in Germany do not use Facebook. Facebook continued in the statement:

"We face fierce competition in Germany, yet the Bundeskartellamt finds it irrelevant that our apps compete directly with Youtube, Snapchat, Twitter and others."

Using the word "fierce" is rather bold considering Facebook has been described being "the company responsible for the largest and most brazen data-collection project in human history".[110] Nevertheless, Facebook considers its main competition in Germany to be Snapchat and Youtube.[111] Therefore it is likely that Facebook would consider these two companies as its main competitors in most of the countries in the EU too.

3.4.1 The SSNIP and SSNDQ tests

The SSNIP test in one of many different ways to determine demand substitutability.[112] The traditional SSNIP test is designed for conventional markets, whereas monetary charges apply so the test must be modified to fit to data industry as for example Facebook is a "free" service and therefore the remuneration takes another form, for example data.[113] As a result, a proper definition of relevant markets in the context of social networking platforms will be possible.[114]

When defining the relevant market, demand substitutability constitutes the most immediate and effective disciplinary force on the suppliers of a given product/service.[115] For example, a company cannot have a significant impact on the prevailing conditions of sale, such as terms and conditions, if its customers are in the position to switch easily to available substitute product/service elsewhere.[116] Therefore the assessment of demand substitution entails a determination of the range of products/services, which are viewed as substitutes by the consumer.

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[110] Jake Bittle, 'A Mark Zuckerberg Presidency Isn't Ridiculous –It's Terrifying' (thenation.com, 18th August 2017) available at: https://www.thenation.com/article/a-mark-zuckerberg-presidency-isnt-ridiculous-its-terrifying/ <accessed 7th May 2019.
[111] Bundeskartellamt, 'Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing' (n47).
[112] Aleksandra Gebicka, Andreas Heinemann, 'Social Media & Competition Law' (n.101) p.157.
[113] Ibid.
[114] Ibid. p.153.
[115] Stephen Weatherill, *Cases & Materials on EU Law* (6th edn, OUP 2003), 552.
[116] Ibid.

The question is: would the users of Facebook group (in Germany or elsewhere in the EU) switch to another platforms if Facebook changed their prices for example 5-10%? This is of course impossible to determinate as Facebook's service is "free" and therefore we must consider what else consumers could consider as a factor than monetary price? It has been suggested that consumers might take quality of a product in relation to its price into consideration.[117] Therefore we could modify the SSNIP test into SSNDQ, what stands for small but significant non-transitory decrease in the quality of the service/product.[118] SSNDQ is not without problems either as quality is subjective in so far as different consumers' value different dimensions or features differently.[119] However, it is likely that major leak of personal data is viewed by most users as a considerable decrease in quality. Therefore privacy is attracting attention as a non-price (quality) parameter when services are offered 'free' in exchange for personal data.[120]

For example, Facebook's source of pride is its reliability, i.e accumulation of small certainties, which makes it use easy: the servers rarely crash, there are no login problems and everything is straightforward. However, as we know from the Cambridge Analytica scandal, the privacy is not high or of good quality. Therefore, the question according to SSNDQ is: would a consumer switch to Snapchat or Youtube if there would be decrease in quality? Did user switch to Snapchat or Youtube after the Cambridge Analytica scandal whereas there was a massive breach into the privacy of Facebook.

Facebook being an internet website and internet market being as particularly broad and heterogenous, the special characteristics of Facebook as a website must be distinguished.[121] In 2015 Google ordered a research from Oxera regarding different platforms and the opinions surrounding them.[122] 1500 users (consumers) from Spain, France, Poland and Germany answered.[123] One of the most popular platforms were social networking platforms and 77-82%

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[117] Aleksandra Gebicka, Andreas Heinemann, 'Social Media & Competition Law' (n.101) p.158.
[118] Ibid.
[119] Samson Esayas, 'Privacy as a Non-Price Competition Parameter: Theories of Harm in Mergers' (presented in the International Conference on Competition, Digital Platforms and Big Data, Valencia 4-5).
[120] Ibid.
[121] Aleksandra Gebicka, Andreas Heinemann, 'Social Media & Competition Law' (n.101) p.154.
[122] Oxera study, 'Benefits of online platforms' (2015) available at: https://www.oxera.com/publications/what-are-the-benefits-of-online-platforms/<accessed 1st May 2019.
[123] Ibid.

from the people answering the research question used Facebook.[124] Moreover, two thirds from the users used multiple platforms at the same time.[125] When users use multiple platforms at the same time, each of the platforms has a certain angle that differs from all the other platforms. Therefore, the platforms are slightly different and serve a slightly different purpose. Silvia Martinelli shares this same view as she argues that services like Snapchat, Youtube and Twitter only offer parts of the services of a social network and therefore are not included in the relevant market.[126] Also for example WhatsApp belongs to separate market due to the technical characteristics and applications, according to the Bundeskartellamt.[127] This echoes the fact that Facebook satisfies majority of the users and because users use different platforms for slightly different purposes, for example Youtube and Facebook are not in the same product market. Facebook is for socializing through writing, pictures, comments and Youtube is for watching videos, commenting them, making your own video portfolio. Therefore it is clear that the relevant product market is social networking platforms excluding platforms that offer networking amongst other things (such as Snapchat, Youtube and Twitter). Also, Bundeskartellamt shares the same view, they concluded that the product market is private social network market.[128]

The answer to the question, whether the users of Facebook switched to for example Snapchat in the awake of Cambridge Analytica scandal, is of course that no as Youtube, Twitter or Snapchat are not substitutes to Facebook. In conclusion, Facebook does not have *any* substitute in the market. Therefore this thesis concludes that it is more likely that Facebook does not face *fierce* competition in Germany nor anywhere in the EU.

3.5 Does Facebook have a dominant position in the relevant market?

Having defined the relevant product market, the next stage would be to assess the market power.[129] The actual power in the data industry is mainly driven by which companies can

[124] Ibid.
[125] Ibid.
[126] Silvia Martinelli, 'Bundeskartellamt prohibits Facebook from Combining User Data from Different Sources' (n68).
[127] Bundeskartellamt, 'Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing' (n47).
[128] Ibid.
[129] European Data Protection Supervisor, (n62) p.28.

actually, potentially or hypothetically collect, process and diffuse personal information.[130] Measuring this control over personal data can be challenging, as ordinary data on sales for example might not work.[131]

The European Court has defined a dominant market position in the following way:

"..a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."[132] This definition, which is called the formalistic approach, has attracted several criticisms, which is based on the view that no company can ever truly act independently.[133] Others have criticized the causal correlation between power to exclude or hinder and the ability to exploit.[134] The Commission also gives value to market shares.

The Commission views market shares in the following way: the higher the market share, and the longer the period of time over, which it is held, indicates dominance.[135] Ground rule is that if the market share is less than 40%, it is unlikely to be dominant undertaking in that market.[136] When assessing the market share, the Bundeskartellamt suggested that the amount of time spent intensively using the network is an important indicator of the company's actual market position.[137] Other factors are also considered, such as the barriers on entering the market and overall size and strength of the company.[138]

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[130] Ibid.
[131] Ibid.
[132] Case 27/76 United Brands v Commission [1978] ECR 207.
[133] Oliver, The Concept of 'Abuse' of a Dominant Position Under Article 82 EC: Recent Developments in Relation to Pricing' [2005] 26 European Competition Journal 315.
[134] Eilmanberger, 'Dominance –The Lost Child? How Effects-Based Rules Could and Should Change Dominance Analysis' [2006] 2 European Competition Journal 15, 19.
[135] European Commission, Antitrust Procedures in Abuse of Dominance (Article 102 TFEU cases) (n90).
[136] Ibid.
[137] Bundeskartellamt, 'Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing' (n47).
[138] European Commission, Antitrust Procedures in Abuse of Dominance (Article 102 TFEU cases) (n90).

Further criticism is pointed towards the use of SSNIP test in the definition of dominance because of the unduly broad market definition because of the cellophane fallacy.[139]

In December 2018, Facebook had 1.52 billion daily active users and 2.32 billion monthly active users.[140] With 23 million daily active users and 32 million monthly active users Facebook has a market share of more than 95% worldwide (daily active users) and more than 80% (monthly active users) in Germany.[141] These market shares are thought to increase closer to 100% as Google+ has announced that it was going to shut down its social network by April 2019.[142] This of course leaves even fewer competitors in the market for Facebook.

The numbers stated above tells that from the earlier research done by Oxera, Facebook has been growing its market share significantly whilst others (competitors) have disappeared from the market. The Bundeskartellamt came to the same conclusion that “Facebook is the dominant company in the national market for social networks for private users pursuant to Section 18 (1) in conjunction with (3) and (3a) of the German Competition Act, based on an overall assessment of all factors of market power, the company has a scope of action in this market that is not sufficiently controlled by competition.”[143] The Bundeskartellamt have not released the full investigation so academia and this thesis rely on the background paper and case summary, which the Bundeskartellamt has already released. However, it seems that the Bundeskartellamt used the Commission’s formalistic approach where they considered market shares but also effects-based approach where they considered the effects on consumers and therefore the difficulties associated with switching to another social network.[144]

Emanuela Arezzo exaplains that in order to avoid the evils of the formalistic approach, in the effects-based approach, it is no longer sufficient to infer the anticompetitive conduct to match the Article 102 TFEU but to identify the actual harm to the competition by the conduct of the company.[145] Secondly, they should identify any efficiency gains the conduct is capable of

[139] United States v E.I. du Pont de Nemours & Co. 351 U.S. 377 (1956).
[140] Silvia Martinelli, ‘Bundeskartellamt prohibits Facebook from Combining User Data from Different Sources’ (n68).
[141] Ibid.
[142] Ibid.
[143] Bundeskartellamt, ‘Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing’ (n47).
[144] Ibid.
[145] Emmanuela Arezzo, *Is there a Role for Market Definition and Dominance in an effects-based Approach?* MPI Studies on Intellectual Property, Competition and Tax Law (Abuse of Dominant

producing and then see whether the latter might offset the former.[146] Thereby, the practice would be only punishable if it is found to bring more negative than positive effects to the competition.[147]

With this approach, the effects on competition are to be assessed regarding consumer welfare, which is the prominent goal of competition regulation.[148] This means that assessment will be dependent on whether consumers are better or worse off as a result of the conduct.[149] Accordingly, the overall unilateral practice will be deemed anticompetitive and hence abusive, only if its effects clearly bring harm to the consumers.[150] Moreover, in this approach anticompetitive harm from a unilateral conduct (abuse) is only possible if the company holds a position of dominance and thus, once conduct has been proved to be abusive there should be no need of a separate analysis of dominance.[151]

However, even the effects-based approach must be modified to fit the fast-growing data industry. The direct network effects test is essential what comes to examining market dominance of Facebook's business model and the difficulties associated with switching to another social network?[152] This thesis puts forward that the nature of the social networking service is at itself a barrier to the market, as users do not switch easily from one platform to another. Bundeskartellamt's findings have come to a similar conclusion as they found that competitors in the area of social networks have been experiencing a continuous decrease and some have already left the market, such as StudiVZ and SchülerVZ.[153] However, the Finnish Competition Authority is not convinced as in the report the Authority released, it explained how the market is uncertain and some other platform might come and challenge Facebook and therefore the market positions might change rapidly.[154] This thesis argues that even if we recognize that the data industry grows fast but in order for few companies to emerge the data industry, we need clear guidelines and for example, data would have to be determined to be "essential facility", which Facebook would

Position: New Interpretation, New Enforcement Mechanisms?) 5 (edited by Josef Drexl, Reto M. Hilty, Wolfgang Schön, Joseph Straus 2008 Springer) p.25-29.
[146] Ibid.
[147] Ibid.
[148] Ibid.
[149] Ibid.
[150] Ibid.
[151] Ibid 29.
[152] Bundeskartellamt, 'Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing' (n47).
[153] Ibid.
[154] KKV, 'Alustat Kilpailu- ja Kuluttajaoikeudellisessa tarkastelussa' (n11).

have to be forced to share with competitors. Only then it is even possible for some other social networking platforms to emerge the market as a real competitor for Facebook. Also, even if there would be any real competitors in the market, Facebook would probably attempt to acquire them in order to gain more market power or at least keep its market power. This is called the "killer acquisition", where huge companies acquire smaller but very innovative companies with the purpose of preventing any future competition. Therefore there would have to be regulations or guidelines in place for mergers regarding big data.

Therefore it must be concluded that Facebook has no other real competitors in the relevant market of social networking platforms (in Germany or in the EU). Furthermore, because there are no options, users cannot be forced to agree on the terms that could be regarded as exploitative and unfair or leave the platform. "As it stands, it is difficult for users to switch between platforms", noted the MIT Digital Currency Initiative and the Center for Civic Media, "and most mega-platforms do not interoperate."[155] Therefore, absolutely, Facebook has a dominant position in the relevant market of social networking platforms.

3.7 What constitutes as an abuse of dominant position?

Abusive conduct should be approached by what is the effect of it, not so much what specific form it takes.[156] "Conduct may be abusive when, through the effects of conduct on the competitive process, it adversely affects consumers directly (for example, through prices) or indirectly (for example, conduct which reduces the intensity of existing competition or potential competition).[157]

The article 102 of TFEU states what constitutes as abusing behavior and as mentioned above, from all the different abusive actions stated in the article 102, the first one regarding unfair trading terms is the most applicable to Facebook. It appears that the Bundeskartellamt relies on the rule by Germany's top court, which is that "a dominant company misuses its position if it

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[155] Chris Baraniuk, 'Should Google, Amazon and Facebook fear this woman?' (bbc.com, 29th March 2019), available at: https://www.bbc.com/news/business-47711500 <accessed 4th April 2019.
[156] UK Office of Fair Trading, 'Abuse of a dominant position –understanding competition law' (2004) available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284422/oft402.pdf <accessed 1st May 2019.
[157] Ibid.

forces customers to accept unfair terms."[158] More examples on unfair purchase or selling prices or other unfair trading conditions are for example, setting prices at a loss-making level in order to pressure any competitors out of business (and then lift the prices when it happens), charging excessive prices and for example requiring that buyers purchase all units of a particular product only from the dominant company (exclusive purchasing).[159]

In consumer contracts, companies are able to define terms and conditions, which are not separately negotiated with each customer.[160] Therefore companies must use plain and intelligible language, as any doubt about the meaning of the term will be interpreted in favor of the consumer[161] as defined in the Directive on Unfair Contract Terms.[162] Furthermore, under the Price Indication Directive[163] companies are required to state the selling price in a way that is easily identifiable and clearly legible.[164] Moreover, the Consumer Rights Directive[165] goes even further in order to eliminate hidden charges and costs in 'off-premises' transactions, especially those over the internet, such as where consumers are trigged into paying for services presented as free but actually come with a heavy price.[166] Finally, the Unfair Commercial Practices Directive[167] defines misleading commercial practices.[168] Misleading commercial practices is defined as omitting information (including price) that the average consumer needs to take an informed decision and, which therefore causes, or is likely to cause, the average consumer to

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[158] Karin Matussek, 'Facebook's Business Model Faces Its Toughest Test Yet' (Bloomberg.com, 6th February 2019) available at: https://www.bloomberg.com/news/articles/2019-02-06/facebook-set-for-german-antitrust-attack-on-its-business-model <accessed 1st March 2019.
[159] European Commission, Antitrust Procedures in Abuse of Dominance (Article 102 TFEU cases) (n90).
[160] European Data Protection Supervisor, (n62) p.24.
[161] Ibid.
[162] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.
[163] Council Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers.
[164] European Data Protection Supervisor, (n62) p.24.
[165] Council Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance.
[166] European Data Protection Supervisor, (n62) p.24.
[167] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 304, 22.11.2011.
[168] European Data Protection Supervisor, (n62) p.24.

take a transactional decision that he would not have taken otherwise.[169] For example, the company might hide or provides unclear and ambiguous information that can be considered crucial.[170] In conclusion, under the relevant EU law, companies must follow the obligations of fairness and accurate information in the terms and conditions they impose on consumers, especially if they are in dominant position.

Bundeskartellamt concluded that using and actually implementing Facebook's data policy, which allows Facebook to collect user and device-related data from Facebook.com and from third-party sources, constitutes as an abuse of dominant position in the form of exploitative business terms[171] due to the extent, which it collects, merges and uses data.[172] According to the President of Bundeskartellamt, Andreas Mundt, combining data from different sources created the substantive database, which contributed to the fact that Facebook was able to gain market power.[173] Moreover, the bundling of the data from different sources into one was done as a response to able to serve advertisers better and gain better profits and this of course contributed to the fact that Facebook is now investigated for the abuse of dominant position. This bundling up was possible because of the inappropriate terms and conditions of Facebook regarding data processing and these unfair contractual terms constitute as exploitative abuse (exploitative business terms).

Furthermore, the Bundeskartellamt holds the view that Facebook is abusing its dominant position by making the use of its social network conditional on its being allowed to gather information on the user not only on the Facebook page (user info, what the user "likes", his/her location and so on) but also amass every kind of data generated by using third-party websites and merge it with the Facebook user's account.[174]

In conclusion, the Bundeskartellamt found that Facebook abused its dominant position through the extent to which it collects, uses and merges data regarding user accounts and this conduct

[169] Ibid.
[170] Ibid.
[171] Section 19 (1) German Competition Act.
[172] Bundeskartellamt, 'Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing' (n47).
[173] Bundeskartellamt, 'Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing' (n47).
[174] Ivana Rakic, Ivana Dragic, 'Big data –between the competition policy and privacy and data protection' (n4) p.19.

amounts to an exploitative abuse akin to excessive prices, with the twist that in this digital market, it is excessive data that is being collected.[175]

This thesis argues that Facebook's terms and conditions were not only abusive in regards to third-party data collection but also in general as there are indications that Facebook's terms of service, data policy and privacy settings are considered at least partly inadmissible under German data protection and consumer law.[176] The reasoning for this is the facts that they lack transparency, as they are too difficult for average consumer to read and understand. They are misleading as users consider that they are getting the service for free and they do not realize that Facebook has turned their personal data into currency. They are also exploitative in a sense that consumers do not have any other option but to consent because there are no alternatives. Thereby, the consent cannot be considered given freely and so, Facebook's terms and conditions are found inappropriate also pursuant to the GDPR.

3.6 Special obligations of a dominant company

As we have now concluded that Facebook group (Facebook, WhatsApp, Instagram, Oculus, Masquerade) has a dominant position in the relevant market and in fact high chance it could be considered as monopolies. Actually instead of monopolies, these so-called tech giants should be described as data-opolies as the market power is based on data.[177]

A dominant company is entitled to compete on its own merits as any other company and being a dominant company is not anti-competitive as such but abusing this position is. Therefore, Facebook, like any other dominant company is subject to special obligation under the competition law. This special obligation is there to ensure that the company's conduct does not distort competition."[178] The special obligation includes the responsibility not to abuse the

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[175] Viktoria H.S.E Robertson, The Theory of Harm in the Bundeskartellamt's Facebook Decision' [2019] Compeition policy international p.2.
[176] Christina Etteldorf, 'Consumer Association Succeeds in First Round of Dispute Concerning Facebook's Terms of Service and Privacy Settings' (n61).
[177] Maurice E Stucke, 'Should We Be Concerned About Data-Opolies?' [2018] 2 Georgetown Law Technology Review 275.
[178] European Commission, Antitrust Procedures in Abuse of Dominance (Article 102 TFEU cases) (n90).

dominant position by unfairly protecting, extending or exploiting it.[179] This confers as for companies having a some sort of negative responsibility *not to allow* its conduct to be abusive.[180]

"Therefore, this special responsibility justified in order to prevent a distortion of competition can be explained in terms of countervailing power limiting the dominant firm's power in order to prevent a cumulative causation process leading to monopolization."[181]

The dominant companies cannot obtain exemption from Article 102.[182] However, Article 102 does recognize that potentially abusive conduct may be objectively justified and therefore not an abuse of Article 102.[183] Exemptions to special obligation could be for example; objective justification, common practice and right of defence. In this case, the only exception worth examining is the objective justification.

In order for the dominant company to establish objective justification, it would need to show that the company's conduct has a legitimate objective, for example protecting or enhancing public interest, defending the dominant company's commercial interests and/or generating efficiencies that would otherwise not be realized but for the conduct in question.[184] The issue for objective justification goes to the question whether scrutinized unilateral conduct is an abuse and so if there is no objective justification, the conduct can be legally defined as an "abuse".[185]

Bundeskartellamt did not found any of Facebook's suggested justifications convincible and therefore the objective justification cannot be regarded. There is no reason believe why this would be different from the rest of the EU. Next the thesis will examine Facebook's terms and conditions and exactly how they can be seen as abusive. This thesis will conclude that Facebook has violated the special responsibility laid upon it as being dominant it its relevant product

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[179] UK Government , 'Independent report:Unlocking digital competition, Report of the Digital Competition Expert Panel' (2019) available at: https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel <accessed 22th April 2019.
[180] Massimiliano Vatiero, 'Power in the Market: on the dominant position' available at: http://ec.europa.eu/competition/antitrust/art82/005.pdf <accessed 8th May 2019.
[181] Ibid.
[182] https://www.bristows.com/news-and-publications/articles/cfi-clarifies-obligations-on-dominant-companies <accessed 4th April 2019, Joined Cases T-191/98 and T-212/98 to T-214/98: *Atlantic Container Line & Others v Commission (TACA)*, Judgment of 30 September.
[183] Ibid.
[184] https://www.lexisnexis.com/uk/lexispsl/competition/document/391329/55KB-7MM1-F187-5110-00000-00/Abusing_a_dominant_position_overview <accessed 8th May 2019.
[185] Ibid.

market, and dominant companies should not use exploitative practices to the detriment of the market and consumers, which are the users in this case.[186]

3.7.1 The violation of the GDPR

The Bundeskartellamt examined the link between the competition law[187] and the harmonized European data protection principles of the GDPR, which for obvious reason are mainly enforced by data protection authorities.[188] As mentioned before, when dominant company's position in the market has emerged because of the collection and processing of data of the users, which is detrimental for the company, it becomes a competition issue. Therefore examining the GDPR is important in order to outline whether Facebook is abusing its dominant market position. The GDPR does not rule out civil law enforcement nor it is definite leaving no further scope for examination by other authorities such as competition authorities.[189]

After the close examination regarding whether Facebook's data policy is appropriate based on data protection assessments of the GDPR, the Bundeskartellamt concluded that Facebook's elaborate data processing from other corporate services and from Facebook Business Tools violates the provisions of the GDPR.[190] Facebook could not provide hardly any justifications in regards the extent of data collected, processed and merged and therefore it must be concluded that there are no sufficient legal justification for it.[191]

The lawful basis' under the GDPR for the processing of personal data are; data subject has given consent; processing is necessary for the performance of a contract to which the data subject is party to; processing in necessary for compliance of legal obligation; processing is necessary in order to protect the vital interests of data subject; processing is necessary for the performance of a task carried out in the public interest and finally; processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests

[186] Bundeskartellamt, 'Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing' (n47).
[187] Section 19 (1) German Competition Act.
[188] Bundeskartellamt, 'Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing' (n47).
[189] Ibid.
[190] Ibid.
[191] Ibid.

are overridden by the interests of fundamental rights and freedoms of the data subject which require protection of personal data, in particular where data subject is a child.[192]

Facebook has argued that they process the users personal data based on the Article 6 (1a) whereby the users have given consent to Facebook. According to the GDPR the conditions for consent are;

> 1. *Where processing is based on consent, the controller shall be able to demonstrate that the data subject has consented to processing of his or her personal data.*
>
> 2. *If the data subject's consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language. Any part of such a declaration which constitutes an infringement of this Regulation shall not be binding.*
>
> 3. *The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. It shall be as easy to withdraw as to give consent.*
>
> 4. *When assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.*[193]

Facebook has argued that users consent is given for the purposes of concluding the contract.[194] However, the Bundeskartellamt puts forward that there are no effective consents pursuant to Article 6 (1a) of the GDPR because of what Facebook told regarding the consent, "users consent to Facebook's terms and conditions for the sole purpose of concluding the contract cannot be

[192] Article 6 (1) GDPR
[193] Article 7 GDPR.
[194] Bundeskartellamt, 'Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing' (n47) p.10.

assessed as a free consent given within the meaning of the GDPR.[195] This is because Facebook does not have to process data to fulfill its contract pursuant to Article 6 (1b) of the GDPR.[196] The reason for fulfilling a contract must be interpreted more narrowly than that.[197] Bundeskartellamt concluded that when interpreting Article 6 (1b) of the GDPR, it has to be considered whether the unilateral determination of the contract details has to be taken into account.[198] Therefore it cannot be that the business model is the basis for if and if not the company can process data for fulfilling the contract. This way any company could change their business models so that they too get the "access" to processing its customers' data unlimitedly solely on the grounds of the business model.[199] Furthermore, processing data from third-party sources to the extent determined solely by Facebook's terms and condition is neither "required" for fulfilling the contract.[200] In conclusion, none of the justification set out in Article 6 (1c-e) of the GDPR apply for data processing for special purposes.[201] Therefore even after comprehensive assessment of the legitimate interests that Facebook put forward regarding third-party interests and the user interests neither one of them constitute as applicable to Article 6 of the GDPR.[202] The conclusion was made based on consequences for the affected users, Facebook's bargaining power and the fact that users cannot negotiate the terms neither they can choose the option of not to agree, which is important aspect as Facebook is a dominant company.[203] If users choose not to agree with the terms and conditions Facebook asks them to, they cannot use the service and they cannot swap to a different service either. Despite the fact that GDPR allows consumer to require their personal data to be removed from one company to another, in reality once you bought into these networking platforms, such as Facebook, you are stuck. There are no alternatives that you could change your personal data over to. On the other hand, even if there would be an alternative platform, it is problematic, as consumers do not have the negotiating power over the terms and conditions of a small or medium sized firms and all these terms and conditions would be very

[195] Ibid.
[196] Ibid.
[197] Ibid.
[198] Ibid.
[199] Ibid.
[200] Ibid.
[201] Ibid.
[202] Ibid.
[203] Ibid. p.10-11.

similar anyway and therefore there are not better terms one could choose.[204] Alex Hirn points out that this is very depressing and very common in all B2C-relationships.[205]

Therefore to the extent Facebook processes users data cannot be justified without the users' voluntary consent, which cannot be regarded as given if their consent is a prerequisite for using Facebook in the first place.[206] When concluding this, Bundeskartellamt also took into account the data type and the way it was processed, the extent it was processed and reasonable expectation of users and the respective positions of Facebook.[207]

Therefore, in conclusion this thesis argues that Facebook was abusing its dominant position based on the unfair terms and conditions it put forward to its users. Moreover, the terms and conditions were in violation of the GDPR as the consent of the users could not be regarded as voluntary. Orla Lynskey suggests that German antitrust office's investigation on Facebook indicates that data protection law can be used as a normative benchmark to establish whether the conduct of a dominant firm is abusive.[208]

3.8 What are the consequences of an abuse of dominant position?

The national authorities of each EU Member State are responsible for enforcement of competition law and consumer protection regulations. Each national authority has the competence on investigating anti-competitive behavior and alleged breaches on consumer law. These national authorities work closely with other authorities across the EU. In many countries competition authorities and consumer protection authorities work closely together because the strong links they have through legislation and the common goal of these legislations.

If the dominant company has found to be engaged in anti-competitive practices, the relevant authority in each country will impose financial penalty and/or directions to bring the infringement to an end.[209] These fines are most likely based on the Commission guidelines under

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[204] Alex Hern, 'I Read All the Small Print on the Internet and it made me Want to Die' (n12).
[205] Ibid.
[206] Bundeskartellamt, 'Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing' (n47) p.11.
[207] Ibid p.10-11.
[208] Orla Lynskey, 'At the Crossroads of Data Protection and Competition Law: time to take stock' [2018] 8 (3) IDPL 179-180.
[209] UK Office of Fair Trading, 'Abuse of a dominant position –understanding competition law' (n156).

the Regulation 1/2003. The Commission's fining policy is based on punishment and deterrence.[210] The fines based on this policy will reflect the gravity and duration of the infringement.[211] "The starting point for the fine is the percentage of the company's annual sales of the product concerned in the infringement (up to 30%)."[212] This sum is then multiplied by the number of years and months the infringement lasted.[213] However the maximum level of fine is capped at 10% of the overall annual turnover of the company.[214]

Addition to the fine imposed by the authority, individuals or businesses that suffer harm as a result of the anti-competitive practices and the breach of law are entitled to claim damages from the party who caused it.[215] This essentially means that these individuals or business can bring an action in the national courts claiming damages.

Interestingly and surprisingly, the head of German Bundeskartellamt, Andreas Mundt stated that Facebook would not face a fine over probe of privacy terms.[216] Mundt also called it important for antitrust authorities to deal with cases like these, even though some policymakers call for more regulation through legislation regarding online platforms.[217] Mundt thinks that lawmaking is not an efficient option has regulations can become quickly outdated.[218] Therefore, the Bundeskartellamt handled the issue of Facebook collecting data excessively from different sources into one database through prohibiting it from further bundling.[219]

Fines are not the only remedy that a company may face due to anti-competitive behavior. For example, it is possible for national authorities to require that the company agrees to stop the anti-competitive behavior and also to demand the company to provide some of its key assets to others

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[210] D.G Goyder, *EC Competition Law* (4th edn OUP 2003).
[211] Ibid.
[212] European Commission, Antitrust Procedures in Abuse of Dominance (Article 102 TFEU cases) (n90).
[213] Ibid.
[214] D.G Goyder, *EC Competition Law* (n210).
[215] Ibid.
[216] Bundeskartellamt, 'Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing' (n47).
[217] Bundeskartellamt, Facebook FAQ's (bundeskartellamt.de, 7th February 2019).
[218] Matthew Newman, 'Facebook won't face a fine in German antitrust probe of privacy terms' (mlexmarketinsight.com, 3rd February 2017) available at: https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/europe/facebook-wont-face-a-fine-in-german-antitrust-probe-of-privacy-terms <accessed 20th April 2019.
[219] Yvonne Cunnane, Nikhil Shanbhag, 'Why We Disagree With the Bundeskartellamt' (n87).

in order to stop for example entry barriers to the market.[220] The latter should be subjected to strict conditions and safeguards in line with the principle of data minimization (where the collected personal information is strictly necessary to the function it was collected).[221] However, this is a dilemma, how can company pass on personal data to other rival companies when following the orders of national authority if the data has not been collected for this purpose? This question is outside the scope of this thesis but in order to avoid this question, alternative remedy for anti-competitive behavior could just be a heavy fine and order to stop the anti-competitive behavior. However, for now Facebook is not facing a fine nor will it correct its terms and conditions as it has appealed the decision of the Bundeskartellamt to the Düsseldorf Higher Regional Court.[222]

This thesis argues that as Facebook could have found abusing its dominant position by imposing unfair terms and conditions, it should have faced sanctions according to the Commission guidelines under the Regulation 1/2003, whereas the fining policy is based on punishment and deterrence and reflect the gravity and duration of the infringement.[223] Therefore, as Facebook had purposefully collected and processed personal data of millions of individuals in order to gain market dominance, the implication should have been a fine, at least 10% of the annual sales multiplied by the number of years and months the infringement lasted[224] on top of the restrictions and prohibitions to bundle the data in the future. This case was an example of the application of competition law within the field of privacy and data protection and therefore groundbreaking, thereby the implication should have been more than a slap on the wrist.

3.9 The outcome

On February 6th 2019, the German Federal Cartel Office (Bundeskartellamt) ruled that Facebook abused its dominance by improperly combining user data that it had collected from various different sources. Bundeskartellamt also imposed restrictions on Facebook's processing of user

[220] Commission Decision of 19/02/2008 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement Brussels, 19.02.2008, C (2008) 654 final (Case No COMP/M.4726 –Thomson Corporation/Reuters Group.
[221] European Data Protection Supervisor, (n62) p.32.
[222] No Author, 'Facebook to appeal German data decision' (out-law.com, 8th February 2019) available at: https://www.out-law.com/en/articles/2019/february/facebook-to-appeal-german-data-decision/ <accessed 8th May 2019.
[223] European Commission, Antitrust Procedures in Abuse of Dominance (Article 102 TFEU cases) (n90).
[224] Ibid.

data in the future with requiring Facebook to obtain an actual “voluntary consent” from the users before processing and using their data. Moreover, the German antitrust office prohibited the data processing policy Facebook imposes on its users and its corresponding implementation pursuant to Section 19 (1), 32 of the German Competition Act (leaving Article 102 TFEU aside), and prohibited Facebook from combining user data from different sources into one, such as from WhatsApp and Instagram.[225] Usually Article 102 is relied in in parallel to national law, however perhaps Bundeskartellamt chose to rely on national law because they wanted to avoid setting controversial precedent based on EU law[226] Moreover, German law on unilateral conduct may be stricter than EU law.

The prohibition refers to the processing of personal data based on the terms and conditions and detailed in the data and cookie policy as far as they involve the collection of user and device-related data from Facebook.com and the other corporate services and Facebook Business Tools without the users’ consent and their combination with Facebook data for purposes related to the social network.[227] Therefore, according to the decision Facebook has forced (with its dominant position) its users to agree on terms that allowed “unrestricted collection and assigning of non-Facebook data to their Facebook user accounts.”[228] Moreover these terms and conditions led to the fact that Facebook was able to build such a massive and unique database and thus to gain market power.[229] One of the most striking aspects of the decision was that not only the Bundeskartellamt applied German competition law but also the European data protection rules from the GDPR, therefore for the first time, European competition authority applied GDPR in a case concerning violation of competition law. The Bundeskartellamt made the decision whilst maintaining regular contact with the German data protection authorities.

[225] Bundeskartellamt, ‘Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing’ (n47).
[226] Silke Heinz, ’Bundeskartellamt sends preliminary assessment to Facebook’ (Kluwer Competition Law Blog, 9 January 2018) available at: http://competitionlawblog.kluwercompetitionlaw.com/2018/01/09/bundeskartellamt-sends-preliminary-assessment-facebook/ <accessed 18th February 2019;
Robert McLeod, ’Novel But a Long Time Coming: The Bundeskartellamt Takes on Facebook’ [2016] 7 Journal of European Competition Law & Practice 367;
Inge Graef, Brendan Van Alsenoy, ’Data Protection Through the Lens of Competition Law: Will Germany Lead the Way?’ (LSE Media Policy Project blog, 23 March 2016) available at: https://www.law.kuleuven.be/citip/blog/data-protection-through-the-lens-of-competition-law-will-germany-lead-the-way/ <accessed 20th April 2019.
[227] Bundeskartellamt, ‘Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing’ (n47).
[228] Ibid.
[229] Bundeskartellamt, Facebook FAQ’s (bundeskartellamt.de, 7th February 2019) (n217).

In the press release Andreas Mundt described that dominant companies are subject to special obligations and that regarding advertising-financed internet services such as Facebook, user data are hugely important and for this reason it is essential to examine under the aspect of abuse of market power whether the consumers are sufficiently informed about the type and extent of data collected.[230]

According to the theory of harm, Facebook's position allows it to impose terms and conditions that its users would not accept unless it was for Facebook's market power. It can also be regarded that Facebook did not inform its users sufficiently as the information is hidden in many sources and for an ordinary person, the terms were difficult to read and understand. This and the fact that the consent of the users was not voluntary as users had to agree to the terms if they wanted to use the services, constituted as violation of the GDPR. Moreover, GDPR also prohibits bundling data from different sources.[231] According to the decision, Facebook-owned services (WhatsApp, Instagram..) can continue to collect data but to combining the data to the Facebook user account will only be possible if the user gives voluntary consent regarding this matter.[232] The same applies to any third party websites.

The decision is controversial regarding the merger decision the European Commission gave in 2014. In the merger decision, the European Commission excluded data protection considerations from the application of competition law, stating that any privacy related concerns as a result of the transaction do not fall within the scope of EU competition law.[233] The Bundeskartellamt's decision takes another approach and it will be interesting to see what the European Commission takes from the decision and will they change their approach from the 2014 decision. The European Data Protection Supervisor supports the Bundeskartellamt stating that the German decision is the tip of the iceberg as all companies in the digital information ecosystem that rely on tracking, profiling and targeting ads should be on notice.[234]

The decision has no legal force yet as Facebook has appealed this decision, which is not suprising, if they had not, the company would have had to provide a road map to compliance

[230] Bundeskartellamt, Press Release (bundeskartellamt.de, 7th February 2019).
[231] Article 7 (4) GDPR.
[232] Bundeskartellamt Press Release, (n45).
[233] Case COMP/M.7217 Facebook/WhatsApp, C (2014) 7239.
[234] Giovanni Buttarelli, 'Big Step Towards Coherent Enforcement in the Digital Economy' (EDPS Blog, 7 February 2019) available at:https://edps.europa.eu/press-publications/press-news/blog/big-step-towards-coherent-enforcement-digital-economy_fr >accessed 12th May 2019.

within 4 months and to develop and adapt technical solution and make sure it complies with the decision within 12 months. If it would have failed to do so, Facebook could have been fined up to 10% of its annual revenues.[235] The ruling will only apply in Germany but it is likely that it will affect other regulators across the European Union if not further.[236]

In the appeal, Facebook argues that the German regulator had confused the company's "popularity" with being a dominant company in the market.[237] The company also exclaimed that the Bundeskartellamt had misinterpreted its compliance with the EU data protection laws and that it was acting beyond the scope of its powers by interfering in data protection matters as a competition authority.[238] The head of data protection at Facebook, Yvonne Cunnane and Nikhil Shanbhag, the director and associate general counsel, explains that the GDPR is designed to empower data protection regulators and not competition authorities in order to determine whether companies are living up to their responsibilities.[239] Furthermore, Yvonne and Nikhil argues that the GDPR harmonises data protection law across the EU and therefore regulators should consistently apply the law from country to country.[240]

If the decision is withheld in the Düsseldorf Higher Regional Court, it means that Facebook would then have to offer the German users the option regarding how their personal data are been processed. If the users decline from the option of unlimited processing, bundling and collection, Facebook cannot exclude these users from the service. Therefore they have to offer an actual choice. These choices could then spread elsewhere, especially if worldwide users demand them and regulators in different countries take action like the Bundeskartellamt.

Italian competition authority is running already an almost identical proceeding against WhatsApp and Facebook in Italy. The Italian authority relies on unfair use of commercial practices, basing its decision on Italian consumer protection law.[241] This reinforces the fact that Facebook group can be investigated upon the unfair terms and conditions based on competition

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[235] No Author, 'Facebook ordered by Germany to gather and mix less data' (bbc.com, 7th February 2019) available at: https://www.bbc.com/news/technology-47146431 <accessed 26th March.
[236] Ibid.
[237] Yvonne Cunnane, Nikhil Shanbhag, 'Why We Disagree With the Bundeskartellamt' (n87).
[238] Ibid.
[239] Ibid.
[240] Ibid.
[241] Decision of AGCM of 11 May 2017 in the WhatsApp Inc case. The original text of the decision in Italian is available at: www. Agcm.it (20 August 2018).

law and regarding consent, based on the GDPR. It will be a matter of time until a country in Europe decides to proceed against the Facebook group on a strictly antitrust point of view.

Other competition authorities in the EU can examine the decision by the Bundeskartellamt and apply TFEU and GPDR in order to establish whether Facebook is abusing its dominant position in other countries in the EU too with its exploitative terms and conditions. The terms and conditions can be regarded exploitative as they impose excessive prices on consumers based on the vast data collection, which is not clearly informed. Therefore, the terms and conditions lack of transparency and cannot be consented to pursuant to the provisions of the GDPR. Therefore the same principles from the German case can be applied elsewhere.

The violation of the TFEU through the provisions of the GDPR could result on heavy fines by the other competition authorities within the EU. The possible fine should reflect the length of the violation and how intentional it has been. Moreover, there should be weight given also to the violation of special responsibility of a dominant company and the lack of transparency, which was a factor in the EU's case against Google and therefore other cases with similar facts should follow the already established line of sanctions. This thesis argues that the Bundeskartellamt did not take the case in Germany as far as it could have been taken, especially regarding the sanctions that were imposed on Facebook.

4. The interplay between consumer protection, data protection and competition law

In 2014 the European Data Protection Supervisor (EDPS) kick-started a discussion on the interplay of data protection, competition law and consumer protection in the digital economy.[242] The EDPS report highlighted the crossroads between the three areas of law. Moreover, the report encouraged closer dialogue between experts and regulators across these legal boundaries. Now several years and several developments later we find ourselves still discussing about the same issues but in a different context.[243] Should competition law be concerned with data protection[244]?

The debate has become two-sided regarding the issue of whether competition law should apply to data protection matters and if it does apply, to what extent. On the one side academics argue that competition enforcement should prevent consumer harm in the form of privacy and data protection violations[245] and on the other side others advocate that privacy concerns fall out of the scope of intervention by competition enforcers.[246]

Therefore we have to ask ourselves, what is the harm for users if Facebook offers its services for free and therefore the users do not suffer any economic loss from the exploitative business terms? This means that the harm must be measured with non-financial harm, for example loss of control, whereas users are not able to determinate how their personal data is used.[247] This is challenging as harm can also be seen as subjective. The USA antitrust officials have a different point of view regarding whether the Bundeskartellamt's position that data is equivalent of price, is the correct approach. Can it be assumed that " a firm that is providing a service and acquiring

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[242] European Data Protection Supervisor, (n62).
[243] Orla Lynskey, 'At the Crossroads of Data Protection and Competition Law: time to take stock' (n208).
[244] Ibid.
[245] Allen P Grunes,Maurice E Stucke, 'No Mistake About It: The Important Role of Antitrust in the Era of Big Data' [2015] University of Tennessee Legal Studies Research Paper No 269; Allen P Grunes, Maurice E Stucke, 'Debunking the Myths Over Big Data and Antitrust' [2015] University of Tennessee Legal Studies Research Paper No 276.
[246] Geoffrey A. Manne, Ben Sperry, ' The Problems and Perils of Bootstrapping Privacy and Data into an Antitrust Framework' (2015) CPI Antitrust Chronicle; Daniel Sokol and Roisin Comerford, 'Does Antitrust Have a Role to Play in Regulating Big Data?', in Roger Blair & Daniel Sokol (eds), Cambridge Handbook of Antitrust, Intellectual Property and High Tech (Cambridge University Press, 2016).
[247] Bundeskartellamt, 'Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing' (n47).

data in exchange is effectively charging a price"?.[248] The view of the Bundeskartellamt and the EU Competition Commissioner is that data can be seen as a price.[249] Therefore if data is in fact a price, is the consumer harm the fact that Facebook is charging excessive price that is not clearly told to users? If so, the terms and conditions that allow this excessive "price" can be seen as exploitative business terms and therefore under Article 102 of the TFEU.

But if data is the new currency and privacy is the price being paid, is it really an antitrust concern regarding how much privacy the users pay? Michael Dietrich from Clifford Chance in Dusseldorf has stated that "data is the currency of the digital age, and if you were to convert that into money, you'd get to an absurdly high price and if users knew what they are being charged, they would immediately say: not at this price, I'm not crazy."[250] With this statement in mind, it does seem like an antitrust issue where consumers must be protected because they do not simply understand on what price they are being for "free" online platforms, such as Facebook. However, how far are we willing to let the competition authority go? If the user wants to give only little information to the company, is this acceptable and where is the boundaries when the user gives out so much data that it becomes an issue for the competition authority too? Moreover, is there a boundary when the issue is solely to be dealt with data protection authorities? Clear guidelines will be needed to clarify these questions.

According to Bundeskartellamt, by bundling the data, Facebook violates users' constitutionally protected right to informational self-determination.[251] Furthermore, it is argued that Facebook is not a necessity as users can choose whether the service is something it is worth giving data in exchange for.[252] Therefore, the approach of the Bundeskartellamt can be regarded paternalistic. However, this thesis argues that if the terms and conditions were presented in a way that is clear

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[248] Lewis Crofts, Joshua Sisco, Leah Nylen, 'Data acquisition doesnt equate to price hikes, FTC's Hoffman says' (MLex market insight, 12th April 2018) available at: https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/north-america/data-acquisition-doesnt-equate-to-price-hikes,-ftcs-hoffman-says <accessed 26th April 2019.
[249] Speech by Margrethe Vestager, Competition in a big data world, DLD 16 (Munich, 17 January 2016) available at: https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-big-data-world_en> accessed 14 April 2019.
[250] Karin Matussek, 'Facebook's Business Model Faces Its Toughest Test Yet' (n158).
[251] Bundeskartellamt, 'Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing' (n47).
[252] Alfonso Lamadrid de Pablo, 'Facebook, Privacy and Article 102 –a first comment on the Bundeskartellamt's investigation' (Chillin' Competition blog, 2 March 2016) available at: https://chillingcompetition.com/2016/03/02/facebook-privacy-and-article-102-a-first-comment-on-the-bundeskartellamts-investigation/ >accessed 6th May 2019.

and transparent, it is harder to justify the Bundeskartellamt's approach. The Bundeskartellamt concluded that average user does not understand how and to what extent his or her data is been processed and therefore the investigation by the Bundeskartellamt is justified. Especially when transparency has been a factor for heavy fines before.[253]

One must recognize the fact that when Bundeskartellamt started the investigation on Facebook regarding its possible abuse of market position by introducing unfair terms and conditions, there were loads of criticism for allegedly stepping on territory that was regarded to be for privacy regulators.[254] However recently that criticism has become less vocal.[255] Moreover, in 2016 the French and German competition authorities joined to write an report regarding the overlap between competition concerns and data protection and in the report they concluded that "decisions taken by an undertaking regarding the collection and use of personal data can have, in parallel, implications on economic and competition dimensions. Therefore, privacy policies could be considered from a competition standpoint whenever these policies are liable to affect competition, notably when they are implemented by a dominant undertaking for which data serves as a main input of its products or services."[256] Thereby, wherever the balance between competition law and privacy/data lies, it is no longer realistic to state that consumers pay for free services with their data unlimitedly. Even if competition law would not be the answer in the future, the privacy and data protection academics and regulators have been now woken up.

Despite this, it seems that the tech companies are surprised that not only the privacy regulators are interested in them but also competition law regulators. In fact, in the statement Facebook published after the Bundeskartellamt gave its decision, Facebook raised the question yet again regarding the competence of competition authorities regarding data protection matters.[257] Many other sources agree too that competition law cannot battle all the privacy issues that arise from big data and that data protection laws must be the long-term answer for that.[258] Furthermore,

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[253] Financial Times, 'https://amp.ft.com/content/e341f482-1d92-11e9-b126-46fc3ad87c65 <accessed 9th May 2019.
[254] Karin Matussek, 'Facebook's Business Model Faces Its Toughest Test Yet' (n158).
[255] Ibid.
[256] Autorite de la Concurrence and Bundeskartellamt (Franco-German report) Competition Law and Data –report (n37) p.23.
[257] Yvonne Cunnane, Nikhil Shanbhag, 'Why We Disagree With the Bundeskartellamt' (n87).
[258] Orla Lynskey, 'At the Crossroads of Data Protection and Competition Law: time to take stock' (n208); Alfonso Lamadrid, Sam Villiers, 'Big Data, Privacy and Competition Law: Do Competition Authorities Know How to Do it?' (n38)

some critics say what comes to data protection law in the EU means we do not need competition law anymore as the GDPR brings significant improvements, such as limitation on the "take it or leave it" conditions (article 7 (4)) and enhanced enforcement mechanisms.[259] However, strong data protection laws like the GDPR would probably not negate competition law completely out of the picture.[260] It is naïve to think that the cooperation between competition law and data protection legislation would not be needed in the future. In fact, the Bundeskartellamt made the decision with cooperation with the data protection authorities, which could be possible approach for the future cases in the EU too. The data industry will keep on growing and developing to directions no one can anticipate and therefore the legal field will need the dialogue across legal boundaries. The Articles 101 and 102 (TFEU) are capable of handling already a variety of different competition law infringements because the legislation is flexible and therefore it has been able to adapt on different changes in the economy.[261] This same view is shared by the head of German Bundeskartellamt, Andreas Mundt.[262] He explains that if everything is regulated with special legislation, those laws needs to reformed and re-invented again and again wheras competition law is faster.[263] It might not cure everything "but privacy is a good issue".[264] Therefore the responsibility shifts to the platforms. The Finnish Competition Authority explains in their report that the best results will become from the correct focus of EU competition law.[265] Moreover, the report states that the focus should be on the platforms' terms and conditions.[266]

In 2014 Alfonso Lamadrid and Sam Villiers shared the same view, they believe that competition law is a tool that has the flexibility to intervene regarding competition problems, how novel these unforeseen these problems might be, it is not designed nor is it well-suited for non-competition concerns such as privacy issues.[267] Lamadrid and Villiers continued that past few years have shaken these beliefs and whether competition law should interfere regarding issues of privacy

[259] Orla Lynskey, 'At the Crossroads of Data Protection and Competition Law: time to take stock' (n208).
[260] Ibid.
[261] KKV, 'Alustat Kilpailu- ja Kuluttajaoikeudellisessa tarkastelussa' (n11).
[262] Bundeskartellamt, 'Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing' (n47).
[263] Bundeskartellamt, Press Release (n230).
[264] Matthew Newman, 'Facebook won't face a fine in German antitrust probe of privacy terms' (n218).
[265] KKV, 'Alustat Kilpailu- ja Kuluttajaoikeudellisessa tarkastelussa' (n11).
[266] Ibid.
[267] Alfonso Lamadrid, Sam Villiers, 'Big Data, Privacy and Competition Law: Do Competition Authorities Know How to Do it?' (n38).

and big data, is back on the table for debate. Moreover, recent cases suggest that competition law is tied up with big data and privacy matters for the time being. Some suggests that consumers in the digital economy, which is nearly all of us, suffer discrimination partly because of the lack of attention in the application of competition law.[268]

Meriani argues that data protection issues cannot be excluded as competition law issues arise whenever data protection issues have an effect on competition law, despite the fact that these two issues and the laws regulating them have slightly different goals.[269] GDPR aims to protect the privacy and rights of consumers and competition law aims to protect consumer welfare through enabling fair competition between companies. More specifically, competition law aims to prevent companies harming consumer welfare by reducing input, quality, and innovation.[270] Moreover, the less companies in the market, the less there are competition and this usually is not favorable situation regarding pricing of the goods and services. According to the Finnish Data Ombudsman, the purpose of privacy regulations is to secure the protection of privacy and other fundamental rights whilst offering prerequisites for the processing of data.[271] Therefore both aim to protect consumers and prevent harm but through slightly different angles.

Orla Lynskey suggests that the question is not simply how competition law can render data protection more effective, but also how data protection law can enhance and inform the application of competition law.[272] Moreover, competition law is not a panacea, and strong data protection law is the first step to effective digital rights.[273] This reinforces the concept that the future will need a strong link and effective cooperation between competition law and data protection law within the EU.

Lynskey reminds that we should determine how competition law and data protection cases, regarding for example big data, should be allocated between respective authorities and how

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[268] Discrimination of Consumers in the Digital Single Market, study carried out by University of Osnabrück on behalf of European Parliament Directorate-General for Internal Polices Department for Economic and Scientific Policy, 2013.
[269] Marianna Meriani, 'Digital Platforms and the Spectrum of Data Protection in Competition Law Analyses' [2017] 38 Eur.Competition L.Rev. 93.
[270] Richard Whish, *Competition Law* (6th edn OUP 2008) p.1.
[271] The Finnish Data Ombudsman (2015).
[272] Orla Lynskey, 'At the Crossroads of Data Protection and Competition Law: time to take stock' (n208).
[273] Ibid.

cooperation function in practice.[274] Clear guidelines would definitely help companies, consumers and the market in general. Furthermore, what was echoed also from Facebook's statement[275], was that Facebook disagrees with the decision by the Bundeskartellamt because they did not see it coming. Facebook perhaps considered that it needs to focus on privacy, data protection and dealing with data protection regulators, not competition law authorities. Nevertheless, here we are. However, for the future clear guidelines would benefit everyone.

Moreover, another interesting aspect regarding clear guidelines between competition law and data protection is principles such as ne bis in idem and the principle of legality and how the autonomy of national authorities would fit into the guidelines.[276] Therefore, if at some point the German data protection authority would be keen to initiate proceedings against Facebook regarding its compliance of GDPR provision on consent, would they be able anymore? It could be possible that they could not because of the rule of ne bis in idem. Moreover, this might not be a problem if the appeal process ends up being favorable to Bundeskartellamt but if Düsseldorf Higher Regional Court concludes that Facebook was right and competition authority was not the right body to investigate and give decision regarding this matter? Could German data protection authority *then* initiate its own proceedings? Therefore, clear guidelines are definitely the next big challenge for the regulators.[277]

4.1. Big data, competition law and mergers

There are three pillars of competition law –restrictive agreements, abuse of dominant position and merger control.[278] Big data and privacy issues can be associated with any of these three pillars. For example, Google has been involved with restrictive agreements. Facebook and WhatsApp merger decision examined merger control regarding big data and privacy.[279] Finally,

[274] Ibid.
[275] Yvonne Cunnane, Nikhil Shanbhag, 'Why We Disagree With the Bundeskartellamt' (n87).
[276] Orla Lynskey, 'At the Crossroads of Data Protection and Competition Law: time to take stock' (n208).
[277] Ibid.
[278] Ivana Rakic, Ivana Dragic, 'Big data –between the competition policy and privacy and data protection' (n4) p17.
[279] Case No COMP(M.7217 – Facebook/WhatsApp (Regulation (EC) No 139/2004 Merger Procedure.

the recent Facebook case in Germany regarding the abuse of dominant market position on how the company processed the big data it had harvested (the focus of this thesis).[280]

Therefore the same link can be found between the big data and competition law, like it was found between data protection matters and competition law. In fact, competition law has applied to data before.[281] So if it has been applied to data issues 15 years ago, why not now? One might say that big data are different and therefore the problems are different. But what is big data? It is vast amounts of data. Therefore it is still *just* data, which are been used by company like any other profitable product.

Competition law is the only instrument in the legal field that could constrain the power of private companies, its intersection with data protection law is inevitable as big technology giants are solely based on data.[282] In particular, competition authorities have the competence to oversee mergers and acquisitions and therefore some critics have argued that some mergers in the data industry should have never had happened and that some mergers that has happened should be separated. The fact is that competition law the necessary flexibility whereas the GDPR does not solve or preclude issues regarding monopolies and the possibility of few companies being responsible for the personal data of majority of the world and them abusing this position.[283]

Finnish Competition Authority recognizes that when it comes to platforms and data industry in general, it is quite common that the same phenomenon that increase benefit for consumers could be regarded problematic from a competition point of view.[284] For example when a platform gains more market power, it can offer services to consumer, which it couldn't before. Therefore, it is not always regarded as bad for consumers when big technology giants grow and cooperate with other businesses or buy other businesses. For example, when Amazon bought Whole Foods, Walmart was forced to reconsider its home delivery strategies.[285] Walmart then teamed up with Uber, Lyft and Postmates, which of course meant that consumers had more options in regards to

[280] Bundeskartellamt, 'Case Summary–Facebook, Exploitative business terms pursuant to Section 19 (1) GWB for inadequate data processing' (n47).
[281] IMS Health GmbH & Co. OHG and NDC Health GmbH & Co. KG, C-418/01 2004:257.
[282] Orla Lynskey, 'At the Crossroads of Data Protection and Competition Law: time to take stock' (n208).
[283] Ibid.
[284] KKV, 'Alustat Kilpailu- ja Kuluttajaoikeudellisessa tarkastelussa' (n11).
[285] Chris Baraniuk, 'Should Google, Amazon and Facebook fear this woman?' (n155).

delivery of foods.[286] This view is also echoed by the "Unlocking digital competition, Report of the Digital Competition Expert Panel" (2019), it states that a large part of the reason for one or a small number of dominant firms exist is because they are more efficient and thus better for consumers or businesses. The report suggests that a firm grows because it offers better, more innovative products or provides integration that benefits consumers.[287] This has always a downside of for example raise of prices for consumers and reduce of choice.[288]

Jason Furman, who was the author of a recent UK government report on competitiveness in the digital economy, suggested similar approach.[289] He explained that rather than advocating the break-up of big companies or otherwise hinder the success of big companies, they could be forced to allow consumers to put their personal data with competing firms.[290] Moreover, the European Data Protection Supervisor suggested that data portability could release synergies between competition law and data protection law in at least the following ways: first, it could prevent abuse of dominance, where consumers are being locked into certain services through the limitation of production, markets or technical development to the prejudice of consumers.[291] Second, data portability could empower consumers to take advantage of value-added services from third parties while facilitating greater access to the market by competitors.[292] However, this thesis argues that this is not sufficient or plausible regarding the social networking platforms. Consumers will stay using those platforms that they are able to use for socializing (their friends are there too). Moreover, GDPR allows already consumers to request a company to send his/her data to another company (data portability) but as there are no real alternatives to move to different social networking platforms, data portability is not sufficient way to solve this dilemma.

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[286] Ibid.
[287] UK Government, 'Independent Report: Unlocking digital competition, Report of the Digital Competition Expert Panel' (gov.uk, 13th March 2019) available at: https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel <accessed 22th April 2019.
[288] Ibid.
[289] Ibid.
[290] Ibid.
[291] Article 102 (2) (b) of TFEU, European Data Protection Supervisor, Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy 2014 pp.34.
[292] European Data Protection Supervisor, (n62) p.34.

Some argue that the big tech companies have become "too big to innovate" and they will keep buying smaller start ups, to access new innovations.[293] This could appear to hinder competition according to EU competition law. Simon Bryant at market research firm Futuresource says he often has conversations with small companies who regularly witness their ideas repackaged by the big tech giants, who have access to a large consumer base.[294] Furthermore, the smaller companies have stated that "on the one hand they want to work with them, on the other hand they find it very difficult to compete".[295] Economides (2010) explains that bigger companies especially use incompatibility of platforms and apps as a "strategic weapon" when it comes to growth of companies and how easy it is for bigger companies acquire these smaller and sometimes more innovative companies.[296] This defines the market for platforms and constitutes whether the platforms are working against each other or in cooperation.[297] Also, other platforms benefit from additional services and developments for consumers that arise because the fast development of the data industry.[298] In summary, there is a real dilemma regarding the growth of big technology companies in terms of competition law and consumer protection.

Privacy considerations might affect merger reviews and decisions, when privacy and data protection is taken into account by the relevant competition authorities and considered as relevant parametres of non-price competition.[299] But when does a merger lead to reduction in privacy as a non-price parameter?[300] The easiest approach to this must be when the merger concerns dominant companies, which possess vast amounts of data that have been given for one purpose and merger could change the way that data will be used after the merger. However, the Google/DoubleClick merger[301] debunks this but we must keep in mind that the Google/DoubleClick merger decision is from 2008 so the decision could be very different if decided today. In the Google/DoubleClick merger, the Commission analyzed whether the parties' databases combined would impede competition and privacy issues were raised but they

[293] Chris Baraniuk, 'Should Google, Amazon and Facebook fear this woman?' (n155).
[294] Ibid.
[295] Ibid.
[296] KKV, 'Alustat Kilpailu- ja Kuluttajaoikeudellisessa tarkastelussa' (n11).
[297] Ibid.
[298] Ibid.
[299] Ivana Rakic, Ivana Dragic, 'Big data –between the competition policy and privacy and data protection' (n4) p.18.
[300] Samson Esayas, 'Privacy as a Non-Price Competition Parameter: Theories of Harm in Mergers' (n119).
[301] Case No COMP/M. 4731- Google/DoubleClick, Commission Decision of 11/03/2008.

did not play significant role in the merger decision.[302] It is clear that this decision is out-of-date and that data and privacy would probably play the biggest role if this case was brought to the Commission today. This thesis proposes that mergers in general can adversely affect non-price attributes of competition, like privacy[303] and therefore whenever privacy plays a big part of company's business model or the companies in question have collected and processed vast amount of data, which will somehow change its original purpose through the merger, it should taken into consideration. These considerations need to be examined thoroughly in the light of recent decision and the knowledge we have at the moment regarding fast-developing technology business as well as the privacy problems which have occurred with Facebook that have impacted USA Presidential election and for example Brexit in the UK.

For example, latest critic to call for the separation of Facebook, Instagram and WhatApp was the Co-founder Chris Hughes.[304] Hughes argued that Facebook and Mark Zuckerberg have too much power and it is time to break up Facebook.[305] Mark Zuckerberg controlling Instagram, WhatsApp and Facebook means that he has control over the data of almost everyone in the planet. It is far beyond that of anyone else in any government or in the private sector.[306] Moreover, as Mark Zuckerberg controls over 60% of the voting shares, he can alone decide how to configure Facebook's algorithms to determine what users see in their news feed on Facebook.com.[307] According to Chris Hughes, the fact that Facebook will face soon a 5 billion dollar fine and the offers of appointing "some kind of privacy czar" is just not enough.[308]

The merger of WhatsApp, Instagram and Facebook was the biggest mistake, according to Hughes.[309] Neither one of them had meaningful revenue but they were popular and therefore a threat to Facebook.[310] Therefore by acquiring them, Facebook gained domination on photo

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[302] Ivana Rakic, Ivana Dragic, 'Big data –between the competition policy and privacy and data protection' (n4) p.18.
[303] Statement of the Federal Trade Commission Concerning Google/DoubleClick FTC File No. 071-0170, 2.
[304] Chris Hughes, 'It's Time to Break Up Facebook' (The New York Times, 9th May 2019) available at: https://www.nytimes.com/2019/05/09/opinion/sunday/chris-hughes-facebook-zuckerberg.html <accessed 9th May 2019.
[305] Ibid.
[306] Ibid.
[307] Ibid.
[308] Ibid.
[309] Ibid.
[310] Ibid.

networking and on real-time messaging too.[311] Moreover, Facebook has also used its dominant position to shut down competing companies or has copied their innovative technology.[312]

Apparently Facebook is not afraid of few more regulations but it is afraid of an antitrust case. Therefore it needs to be hit where it hurts the most. Or at least do what Hughes is suggesting to the American government: break up Facebook's monopoly and regulate the company more so it would be accountable to the American people.[313] Perhaps this cry should taken seriously in the EU too and regulate the data industry and therefore Facebook too, and clear the unclear legal framework.

[311] Ibid.
[312] Ibid.
[313] Ibid.

5. Future

“Where there’s no competition, data protection is also in a weak state. But it works both ways: It can’t be that you’re violating privacy rules in order to secure your monopoly position.”[314] With this being said, many agree that the next step is a practical one: to determine how the different legal rules should and will apply, sometimes simultaneously.[315] For example the European Commission has warned Facebook over its misleading terms and conditions in past[316] but recently, the European Commission proposed new rules for the online platforms providing small businesses with a safety net in the digital economy.[317] Moreover, the European Law Institute Digital Law SIG has started a project regarding “Draft Model Rules on Online Intermediary Platforms”.[318] The objectives of the project is to aim to “develop model rules on online intermediary platforms that set out a balance between conflicting policy options, and demonstrate what potential regulation at EU or national level could look like."[319] The model rules on online intermediary platforms could become a European frame of reference for the law of Internet platforms and help forming European approach to platforms.[320] In the mean time, The Commission will continue to enforce EU competition rules in the digital sector whenever necessary.[321]

There are arguments that the EU should create clear guidelines for sanctions too as national authorities could feel conflicted on the right regime. Especially as over time the sanction policy across EU must be similar and therefore, EU laying ground rules over how and when sanctions

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[314] Statement by Johannes Caspar, Hamburg data regulator (2019) availbale at: https://www.bloomberg.com/news/articles/2019-02-06/facebook-set-for-german-antitrust-attack-on-its-business-model <accessed 28th April 2019.

[315] Orla Lynskey, ’At the Crossroads of Data Protection and Competition Law: time to take stock’ (n208).

[316] Ibid.

[317] Silvia Martinelli, ‘Online Platforms: Commission Sets New Standards on Transparency and Fairness’ (silviamartinellilaw.com, 26th April 2018) available at: https://silviamartinellilaw.com/2019/03/04/draft-model-rules-on-online-intermediary-platforms/ <accessed 30th March.

[318] European Law Institute, ‘Digital Law SIG’ available at: https://www.europeanlawinstitute.eu/hubs-sigs/sigs/digital-law-sig/ <accessed 30th March 2019.

[319] Silvia Martinelli, ‘Online Platforms: Commission Sets New Standards on Transparency and Fairness’ (n317).

[320] Silvia Martinelli, ‘Draft Model Rules on Online Intermediary Platforms’ (silviamartinellilaw.com, 14th March 2019) available at: https://silviamartinellilaw.com/2019/03/04/draft-model-rules-on-online-intermediary-platforms/ <accessed 30th March.

[321] Silvia Martinelli, ‘Online Platforms: Commission Sets New Standards on Transparency and Fairness’ (n317).

should be given is a good idea. This gives early guidelines to national authorities, which hopefully will be received with open minds. Either way, the decision of the Bundeskartellamt will be taken into close consideration regarding the future, whether it is on the point of view of sanctions or general application of GDPR in competition law matters.

One thing seems to be for sure, big technology companies will not able to provide their consumers long, elaborate, complicated and partly hidden terms and conditions that are unfair and do not leave room for choice. For example, privacy policies often contain small prints that use elastic terms like "improving customer experience"[322], which is not a true perception of the actual processing of the data and the reason behind it. Furthermore, from the 37 apps that average person has, only 61% of them had a privacy policy in place in 2013.[323] Now with GDPR in force, this number is hopefully drastically bigger. As without (understandable) privacy policy, how can consumer give informed consent to data processing according to the GDPR?

The European Commission has suggested new rules regarding clear and transparent terms and conditions regarding especially online platforms, which are difficult to understand for average consumer.[324] This thesis agrees with the importance laid out in the proposal paper, whereas the importance of well-informed decision was highlighted.[325] The rest is up to legal design and other tools regarding how these clear terms and conditions are presented to the user with the best possible way for undisputable consent.

Furthermore, early research suggests that consumers are willing to pay more for stronger privacy protection[326] With increasing awareness on privacy and issues regarding privacy, it is likely that privacy will become an competitive advantage and something consumers look for when choosing products and services. However, for now it seems that there is a risk of 'race to the bottom' regarding privacy, where failure to comply with data protection rules and the acquisition

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[322] European Data Protection Supervisor, (n62) p.34.

[323] Article 29 Working Party Opinion 02/2013 on apps on smart devices, WP 202, 27.02.2013.

[324] European Commission; Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, (Brussels 26.4.2018 COM (2018) 238 final.

[325] European Commission; Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, (Brussels 26.4.2018 COM (2018) 238 final.

[326] Tsai, J. Y., Egelman, S., Cranor, L. And Acquisti, A., 'The Effect of Online Privacy Information on Purchasing Behavior: An Experimental Study' [2011] 22 (2) Information Systems Research, pp. 254-268.

of data through anti-competitive means might lead to market power, with externality costs borne by users.[327] So even though media highlights privacy issues and Facebook's scandals and Google's fines[328], people (collectively) do not seem to be bothered by it enough that they would change their choices from easy-to-use user interface to something new, unfamiliar but which has a better data protection. For example, why people are still using Google instead of DuckDuckGo? This is why we need awareness on privacy matters.

5.1 Future for Facebook

"The Future is Private" –Mark Zuckerberg[329]

The real question should be: what was it before, in the past? The announcement of "the future is private" comes from the multiple fines Facebook is facing in the United States and abroad, for example in the EU. The decisions that have lead to the fines are based on privacy issues, data protection problems and of course, competition issues. Therefore Facebook is been now forced to focus on its privacy and hence, the announcement in the F8 conference. One of the biggest changes is encrypting the messages on Facebook, WhatsApp and Instagram.

It is however remarkable how Facebook expects multibillion-dollar fines but stock of Facebook still rises.[330] What is also interesting, are Facebook's future plans and how this decision will affect those plans. Facebook is planning to integrate Instagram, Facebook messenger and WhatsApp into one platform.[331] It is now more and more likely that the European competition authorities and privacy regulators are not in favor of this new development. Hughes suggested that Mark Zuckerberg is working hard on integrating these three so it would be possible to break

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[327] Allen P Grunes,'Another look at privacy' [2013] 20 (4) Geo.Mason L. Rev. p. 1112; Pamela Jones Harbour, Tara Isa Koslov, 'Section 2 in a Web 2.0 world: An expanded vision of relevant product markets' [2010] 76 Antitrust Law Journal, p. 769-797.

[328] European Commission press release, 'Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shoping service (27 June 2017).

[329] Facebook held its annual F8 conference where CEO Mark Zuckerberg announced his keynote: The future is private"

[330] Jeremy C Owens 'Facebook expects multibillion-dollar FTC fine, but stock still gains after earnings' (Market Watch 24.4.2019) available at: https://www.marketwatch.com/story/facebook-earnings-account-for-expected-multibillion-dollar-ftc-fine-but-stock-still-gains-2019-04-24 <accessed 7th May 2019.

[331] Zack Whittaker, 'Facebook to encrypt Instagram messages ahead of integration with WhatsApp, Facebook Messenger' (techcrunch, 2019) available at: https://techcrunch.com/2019/01/25/facebook-instagram-encryption-integration/ <accessed 26th March 2019.

them.[332] On the other hand, the merger procedure regarding Facebook and Whatsapp ended in a different solution.[333] The merger decision states: “For the purposes of this decision, the Commission has analysed potential data concentration only to the extent that it is likely to strengthen Facebook’s position in the online advertising market or in any sub-segments thereof. Any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition rules but within the scope of the EU data protection rules.”[334] We must bear in mind also that this decision was based on the details that WhatsApp and Facebook gave regarding the merger investigation. For example, WhatsApp’s CEO Jan Koum stated that: “Respect for users privacy is coded into our DNA, and we built WhatsApp around the goal of knowing as little about users as possible.”[335] He then added that: “If partnering with Facebook meant that we had to change our values, we wouldn’t have done it.”[336] If you examine this statement more closely it does not actually promise that for example the data that flows through the app is not used for marketing purposes. Moreover, this statement does not have a lot of value nowadays when the merger is completed and Facebook wishes to proceed developing its business onto different direction it may have discussed with WhatsApp in 2014. Moreover, the merger decision states that: “As a result, in the view of the Notifying Party, the Transaction will not have any effect on the data potentially available for Facebook’s use in targeting ads.”[337] This statement is of course faulty when considering what we know about Facebook’s privacy issues and plans nowadays. Chapter 186 of the merger decision states that if Facebook starts collecting data from WhatsApp users after the merger this may persuade users to swap platforms, which may reduce Facebook’s incentive to start collecting data from WhatsApp messages.[338] As we have discussed above, it is likely that users do not find an alternative to move to. Moreover, as the terms and conditions could be very similar, effort of changing messaging platform onto another might feel unnecessary to the users.

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[332] Chris Hughes, ‘It’s Time to Break Up Facebook’ (n304).
[333] Case No COMP(M.7217 – Facebook/WhatsApp (Regulation (EC) No 139/2004 Merger Procedure.
[334] Ibid.
[335] WhatsApp Blog, ‘Setting the record straight’ (whatsapp.com, 17th March 2014) available at: http://blog.whatsapp.com/529/Setting-the-record- straight <accessed 6th March 2019.
[336] Ibid.
[337] Case No COMP(M.7217 – Facebook/WhatsApp (Regulation (EC) No 139/2004 Merger Procedure (chapter 183).
[338] Ibid.

Therefore the merger decision was made under information that is not necessary relevant today and the academic opinions regarding data protection and competition law are outdated. Thereby, it is very likely that with recent decision and developments in the EU would have changed the outcome if this were decided today. Therefore it is a huge possibility that Facebook's plans to integrate the three platforms will get debunked and any future plans for mergers of big technology companies secure the same outcome as Facebook got in 2014. This is also partly because the big privacy scandals Facebook faced recently regarding for example Cambridge Analytica.

5.1.1 More regulation?

What comes to Facebook in the future, it will be regulated more if it is up to Mark Zuckerberg. Zuckerberg wrote an opinion paper for the Washington Post on the 30th March 2019 to try and influence on the inevitable regulations due to be introduced to regulate the social network businesses especially after the Cambridge Analytica scandal.[339] In his post, Zuckerbeg discusses about four areas; harmful content (influenced by the New Zealand attacks[340]), election integrity (Russian trolls[341]), privacy and data portability (influences from recent EU decisions and especially in the wake of GDPR).[342] He explains that the government should focus on these four areas when regulating social network platforms.[343]

More specifically Zuckerberg states that despite all the efforts taking down harmful content (by using artificial intelligence[344] and other tools), they will keep making mistakes and decisions that people disagree with.[345] As if the regulation was clear on this, the dissatisfaction on Facebook's policy determinations would fall on someone else than Facebook and therefore Facebook can

[339] Mike Isaac, "Mark Zuckerberg's Call to Regulate Facebook, Explained" (The New York Times, 2019) available at: https://www.nytimes.com/2019/03/30/technology/mark-zuckerberg-facebook-regulation-explained.html) <accessed 1st April 2019.
[340] The New York Times, 'Christchurch Mosque Shootings Were Partly Streamed on Facebook' available at: https://www.nytimes.com/2019/03/14/world/asia/christchurch-shooting-new-zealand.html <accessed 1st April 2019.
[341] The New York Times, 'The Russian Influence Reached 126 Million Through Facebook Alone' available at:https://www.nytimes.com/2017/10/30/technology/facebook-google-russia.html?module=inline <accessed 1st April 2019.
[342] Mike Isaac, "Mark Zuckerberg's Call to Regulate Facebook, Explained" (n339).
[343] Ibid.
[344] Yvonne Cunnane, Nikhil Shanbhag, 'Why We Disagree With the Bundeskartellamt' (n87).
[345] Ibid.

effectively shield itself from blame when something inevitably goes wrong.[346] Same goes for election protection. If lawmakers would determine what is and is not a political advertisement, Facebook could point toward the law it was forced to follow when another scandal emerges.[347] Regarding the election protection, Zuckerberg states that Facebook has already made significant changes around political ads and advertisers in many countries, stating advertisers must verify their identities before purchasing political ads.[348] However, according Zuckerberg deciding whether an ad is political is not always straightforward and therefore Facebook's systems would be more effective if regulation created common standards for verifying political actors.[349]

Finally, Zuckerberg calls for globally harmonized framework regarding effective data protection and privacy rules.[350] He then refers to the EU and the new GDPR and exclaims that more countries should adopt common framework like GDPR.[351] This statement is rather ironic as since the GDPR commenced into force Facebook has experiences massive legal battles in the EU as mentioned earlier. Moreover, Mark Isaac states that since the GDPR and its strict privacy guidelines were implemented last year, one of the most consistent worries from the technology community has been how difficult the life of start-ups will be after this because of the limited resources they have.[352] The most self-serving statement from Zuckerberg was regarding data portability.[353] He suggests that "if you share data with one service, you should be able to move it to another. This gives people choice and enables developers innovate and compete."[354] According to Mark Isaac, even though this statement refers to a choice, possibilities and openness, it is essentially a way for Facebook to argue that it does not have a monopoly on social networking.[355] Furthermore, Facebook claims with this statement that data portability gives people freedom to take their information from one network to the next and this gives people the ability to choose where they spend their time while allowing competitors a fair chance at winning over audiences.[356] However, in reality as mentioned above, Facebook already owns the

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[346] Mike Isaac, "Mark Zuckerberg's Call to Regulate Facebook, Explained" (n339).
[347] Ibid.
[348] Ibid.
[349] Ibid.
[350] Ibid.
[351] Ibid.
[352] Ibid.
[353] Ibid.
[354] Ibid.
[355] Ibid.
[356] Ibid.

lion's share of much of the world's social networking companies. [357] Facebook is already stated that it is looking to integrate all of the messaging services of the platforms Facebook owns which would further tighten the network users across all of this services and this would make it more difficult for lawmakers to break up Zuckerberg's company, something he has gone to great lengths to defend against.[358]

There have been speculation of Mark Zuckerberg running for presidency under the Democratic party.[359] "Zuckerberg's election would mean handing over the leadership of an already privacy-violating government to the creator of one of the world's most invasive surveillance platform".[360] This way he could decide the future of data from the White House. However, since these rumors about Zuckerberg's presidency, the world became aware of Cambridge Analytics, which hopefully crushed any hopes for Zuckerberg running for President of United States.

There have been several authorities stating that Facebook and other large technology companies should be separated in order to avoid abuse of market position and to increase competition in the field by removing the barriers to competition. This would increase options for consumers and moreover, smaller technology companies would be easier to manage in the regulatory point of view. This is because when the companies keep increasing in size because they conduct acquisitions regarding smaller and innovative companies (killer acquisitions), they also keep expanding outside of the legal framework regulators have been built in order to meet the challenges the industry brings.

[357] Ibid.
[358] Ibid.
[359] Jake Bittle, 'A Mark Zuckerberg Presidency Isn't Ridiculous –It's Terrifying' (n110).
[360] Ibid.

6. Conclusion

The decision Bundeskartellmat presented in February 2019 is the first to establish violation of competition law due to the infringement of data protection provisions and so, causing disbelief and debate within the competition and privacy community. Even though the decision was regarded controversial, it could have been a lot more controversial in terms of the implications. Bearing in mind, the case was against major tech giant that had for years purposefully collected and processed personal data of millions of individuals in order to gain market dominance.

This thesis argues that the Bundeskartellamt's decision can be a template for the rest of the EU too as when applying the TFEU, Facebook group can be found to be violating the EU competition law in terms of unfair trading practices and the GDPR regarding data processing without the consent of the user as explained above.

Even though the decision has been appealed, it gives us important indication of the future. EU is very keen on examining the decision and it is likely that it will apply it to some extent to the future investigations regarding big tech giants. The debate on whether competition authorities in Germany went too far will continue and perhaps that is one the reasons why Bundeskartellamt did not give Facebook a fine, it might have been too controversial considering it already created a conflict in the legal precedence in the EU. Perhaps in order to change the views of academics and professionals, baby steps are the way to do it.

Hopefully in the upcoming years the debate has moved towards more constructive criticism whereas we can start forming new regulations and guidelines. As data industry will keep on growing and new innovations will bring new problems to the market. In order for the industry to bloom in a manner that does not violate consumers protection, privacy, data protection or competition law, the community must know the rules in order to know how to play. One thing is for sure, before we have clear regulations and guidelines in place, competition law, consumer protection, privacy and data protection will keep crossing paths in the future. For example, The German Federal Cartel Office is already said that it is pursuing a separate case against Amazon to explore whether the company has acted illegally with third parties who use its platform.[361] The goals of data protection, competition and consumer protection share some common goals,

[361] Bundeskartellamt, 'Press Release: Abuse proeeeding against Amazon' (bundeskartellamt.de, 29th November 2018).

including the promotion of growth, innovation and the welfare of individual consumers,[362] it should not be too hard to find a common ground. As closer dialogue between regulators and academics across policy boundaries not only aid enforcement of competition rules and consumer protection, but also stimulate the market for privacy-enhancing services.[363]

Moreover, the common ground will not be found by shutting one field of law outside of the conversation. For example, competition law is and will be essential what comes to dealing with these challenges as it is already equipped to adapt its analytical tools to deal with data related competition problems and to apply a consumer welfare standard.[364] Current EU competition laws are flexible and used to deal with different markets and different products and therefore it is more than suitable to tackle issues arising from the data industry. It seems that competition authorities do not need a new theory of harm to consider anti-competitive behavior of data - driven companies but need to understand new types of effects because currently, under comparative competition law, privacy-related issues are likely to remain one of the most sensitive topics.[365]

Privacy and data protection are public interests and fundamental rights recognized in the Treaties[366], the lack of interaction in the development of different policies on competition, consumer protection and data protection might have reduced the effectiveness of competition rules' enforcement and the incentive for developing services, which enhance privacy and minimize potential harm to the consumers.[367] Consumer protection is vital, as they increasingly feel that they have no choice but to choose these dominant companies in order to use their services[368] as social networking platforms can be hugely important for especially for example people who struggle in life and they have found communities from strangers who have become

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[362] European Data Protection Supervisor, (n62) p.3.
[363] Ibid.
[364] Ivana Rakic, Ivana Dragic, 'Big data –between the competition policy and privacy and data protection' (n4) p.20.
[365] Ibid.
[366] Universal Declaration of Human Rights, the United Nations General Assembly in Paris on 10 December 1948, Article 12;
European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950 ETS 5, Article 8;
Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, Article 7 (Article 8 contains the explicit right for the protection of personal data).
[367] European Data Protection Supervisor, (n62) p.37.
[368] Ivana Rakic, Ivana Dragic, 'Big data –between the competition policy and privacy and data protection' (n4) p.20.

important in their lives, thereby Facebook can save lives, just like it can destroy too. Chris Hughes, who was the co-founder of Facebook argued recently that Facebook and Mark Zuckerberg have too much power and it is time to break up Facebook.[369] Mark Zuckerberg controlling Instagram, WhatsApp and Facebook means that he has control over the data of almost everyone in the planet. No other government or private sector has that much power.[370]

One important aspect is raising awareness of privacy issues and transparency of the conduct of the big tech giants, especially regarding the terms and conditions they impose on users. Otherwise, whenever Facebook group start offering choices, users cannot make informed decisions regarding on how they want their data to be processed. Moreover, EU is promoting currently for more transparency regarding the terms and conditions of an online platform[371], this would also ensure that the users will understand the terms as the EU proposes that requirement for "clear and unambiguous language" in terms and conditions is in enforceable law.[372] As long as users are properly informed, there should lie be the end of competence of competition authorities.

This thesis also agrees with Hughes on the note that in the future we need to allocate more funds to the government agencies in order to oversee the regulations, applications and implications of the data industry.[373] This is because:

> "If we don't have public servants shaping these policies, corporations will".

[369] Chris Hughes, 'It's Time to Break Up Facebook' (n304).
[370] Ibid.
[371] European Commission; Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, (Brussels 26.4.2018 COM (2018) 238 final.
[372] European Commission; Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, (Brussels 26.4.2018 COM (2018) 238 final.
[373] Chris Hughes, 'It's Time to Break Up Facebook' (n304).

ABBREVIATIONS

EU	European Union
TFEU	Treaty on the Functioning of the European Union
GDPR	General Data Protection Regulation

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