Excessive Data Collection as Abuse of Dominance under Art 102 TFEU

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I. Introduction

The increasing mobility and ubiquity of the internet and the advent of platform-based business models enable the collection, storage and analysis of large amounts of data from different sources and formats at an enormous speed (commonly known as Big Data[1]). Operators of platform-based business models are among the most important

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players in the digital economy and act as so-called information intermediaries[2] by bringing together different market participants. These information intermediaries include *inter alia* search engines, social networks, online marketplaces, electronic communication services, payment systems, comparison tools, dating agencies and platforms in the sharing economy[3]. The processing of data by these platforms can help to develop new products, optimise business processes, improve targeted advertisement and predict future developments more quickly.[4] Users benefit from increased data collection in the form of supposedly 'free' offers and a dynamic market environment with ongoing innovation. Against this backdrop, Big Data contributes to the creation of efficiencies, both for companies and consumers.[5]

At the same time, the right to privacy and the protection of personal data[6] are key principles of the GDPR[7]. Public criticism is voiced in particular with regard to the handling of (personal) data and the lack of transparency for users associated with its collection, storage and analysis.[8] Despite being generally concerned about the protection of their privacy, studies show that users are willing to disclose data with

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[1] Benjamin Schütze/Stefanie Hänold/Nikolaus Forgó, 'Big Data – Eine informationsrechtliche Annäherung' in Barbara Kolany-Raiser/Carsten Orwat/Reinhard Heil/Thomas Hoeren (eds.), *Big Data und Gesellschaft* (Wiesbaden: Springer, 2018) 233-308, p. 237.

[2] Alexander Schiff, Informationsintermediäre - Verantwortung und Haftung (Tübingen: Mohr Siebeck, 2021) pp. 145-46.

[3] On this term see Ulrich Schwalbe/Martin Peitz, 'Kollaboratives Wirtschaften oder Turbokapitalismus - Zur Ökonomie der Sharing economy' (2016) PWP 232-52.

[4] Monopolkommission, 'Sondergutachten 68 - Herausforderung digitale Märkte' (2015), para. 69 <http://www.monopolkommission.de/images/PDF/SG/SG68/S68_volltext.pdf> accessed 18 August 2023.

[5] See Andreas Engert, 'Digitale Plattformen' (2018) AcP 304-76.

[6] Cf. Art 7 respectively 8 Charter of Fundamental Rights of the European Union (CFR) (OJ 2012 C 326 p. 391), Art 16 TFEU (OJ 2012 C 326/47) and Art 8 European Convention for the Protection of Human Rights (ECHR) <https://www.echr.coe.int/documents/convention_eng.pdf> accessed 18 August 2023.

[7] Commission Regulation (EU) No 2016/679 (OJ 2016 L 119 p. 1).

[8] A prominent example is the so-called Cambridge Analytica scandal, in which a marketing company 'tapped' data from around 87 million Facebook users and used it for psychological profiling during the US presidential election in favour of Donald Trump, see e.g. <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html> accessed 18 August 2023.

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relatively little consideration[9] (so-called privacy paradox)[10]. This is in line with the finding that the vast majority of consumers regularly agree to general terms and conditions (including data processing terms) without actually having read them.[11]

Against this backdrop, data-driven business models do not only attract the attention of consumer and data protection authorities. Rather, new types of data-related abusive strategies are increasingly being targeted by competition authorities. The increasing importance of data in the digital economy reveals links between these fields of law. Given that access to data constitutes an essential criterion for market entry, as well as subsequent success in the digital economy, it seems at least reasonable – if not necessary – for competition authorities and/or courts to review the intersection between data protection and competition law in a given case.[12] Where access to data is crucial for the market position of an undertaking (such as data-driven products like social networks or search engines) the lawful and correct treatment of personal data may have meaningful competitive consequences.[13] First, extensive data collection can lead to competitive advantages vis-à-vis competitors (e.g., by enabling more targeted advertising opportunities). Second, excessive data collection by a market dominant undertaking could, at the same time, harm users of the respective digital platform. Instead of monetary prices, users typically 'pay' with their data for using the services and functionalities of digital business models.[14] Given that data serves as a non-

[9] Alessandro Acquisti/Curtis Taylor/Liad Wagman, 'The Economics of Privacy' (2016) JEL 442-92.

[10] On this behavioural anomaly see, e.g., Patricia Norberg/Daniel Horne/David Horne, 'The Privacy Paradox: Personal Information Disclosure Intentions versus Behaviors' (2007) JCA 100-26; Nina Gerber/Paul Gerber/Melanie Volkamer, 'Explaining the privacy paradox: A systematic review of literature investigating privacy attitude and behavior' (2018) Comput Secur 226-61.

[11] Jonathan Obar/Anne Oeldorf-Hirsch, 'The biggest lie on the Internet: ignoring the privacy policies and terms of service policies of social networking services' ICS (2020) 128-47, p. 135; on the general reluctance of users to read terms and conditions see Ralph Gross/Alessandro Acquisti, 'Information Revelation and Privacy in Online Social Networks, Workshop on Privacy in the Electronic Society' (2005) <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html> accessed 18 August 2023.

[12] Rupprecht Podszun/Michael de Toma, 'Die Durchsetzung des Datenschutzes durch Verbraucherrecht, Lauterkeitsrecht und Kartellrecht' (2016) NJW 2987-2994, p. 2993; Marco Botta/Klaus Wiedemann, 'EU Competition Law Enforcement vis-à-vis Exploitative Conduct in the Data Economy – Exploring the Terra Incognita' (2018) MPI Research Paper No. 08 1-89, p. 66.

[13] Peter Stauber, 'Facebook's abuse investigation in Germany and some thoughts on cooperation between antitrust and data protection authorities' (2019) CPI Antitrust Chronicle Vol. 2(2) 36-43, p. 41.

[14] In this context, some commentators refer to data as the new currency of the 21st century, cf. Carmen Langhanke/Martin Schmidt-Kessel, 'Consumer Data as Consideration' (2015) EuCML 218-23, p. 218; Thomas Hoeren, 'Personenbezogene Daten als neue Währung der Internetwirtschaft' (2013) WuW 463.

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monetary form of consideration, extensive data collection (e.g., based on too far-reaching terms and conditions regarding the processing of personal data) may be qualified as exploitative behaviour (similar to excessive [monetary] prices applied in the 'brick-and-mortar' industry).[15]

Against this backdrop, this paper aims to clarify whether excessive data collection may constitute an abuse of dominance under Art 102 TFEU[16] (Section 5 Austrian Cartel Act[17]). In this context, the prohibition stipulated in Art 102 lit a TFEU is of particular importance regarding which consumers are protected from excessive pricing and (other) unfair business terms of market-dominant undertakings. This paper elaborates, *inter alia*, whether an infringement of other bodies of law by a market dominant undertaking *ipso iure* constitutes an abuse of market power within the meaning of Article 102 TFEU (e.g., data policies contravening data protection law). Moreover, irrespective of a breach of law, it will be examined whether and to what extent considerations outside of competition law (such as data protection interests) can influence the outcome of an analysis under competition law.

In accordance with the constituting elements of Art 102 TFEU, these questions will be answered with regard to the definition of the relevant market (Section II.A.), the determination of market power (Section II.B.) and the assessment of the incriminated conduct's fairness (Section II.C.). Due to their social and economic significance, large tech companies have triggered a wide-ranging regulatory debate. Against this background, this paper includes an overview of recent legislative developments tackling data-related abusive practices of online platform providers, namely the European Digital Markets Act (DMA)[18], the Austrian Competition and Cartel Law Amendment Act (KaWeRÄG 2021)[19] and the German Amendment of

[15] Aleksandra Gebicka/Andreas Heinemann, 'Social Media & Competition Law' (2014) WoCo 149-72, p. 165: '[...] an undue increase in the use of personal data may very well be compared to excessive prices. An unreasonable expansion of the data use policy [...] may therefore constitute an abuse of a dominant position'; Harri Kalimo/Klaudia Majcher, 'The concept of fairness: Linking EU competition and data protection law in the digital marketplace' (2017) ELR 210-33, p. 213; Wolfgang Kerber, 'Digital Markets, Data and Privacy: Competition Law, Consumer Law and Data Protection' (2016) GRUR Int 639-47, p. 643.

[16] Consolidated version of the Treaty on the Functioning of the European Union (OJ 2012 C 326/47).

[17] Bundesgesetz gegen Kartelle und andere Wettbewerbsbeschränkungen, Austrian Federal OJ I 2005/61 as last amended by OJ I 2021/176; all Austrian federal statutes can be accessed via https://www.ris.bka.gv.at/Bund/ with their title, amendments can be found by their OJ number.

[18] Commission Regulation (EU) No. 2022/1925 (OJ 2022 L 265 p. 1).

[19] Kartell- und Wettbewerbsrechts-Änderungsgesetz 2021 – KaWeRÄG, Austrian Federal OJ I 2021/176.

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the Act Against Restraints on Competition (10th GWB Amendment)[20] (Section III.). Section IV. concludes with a summary of the main findings of the paper.

II. Application of Art 102 TFEU in the digital economy

Due to the scope and complexity of each of the three constituting elements of Art 102 TFEU (definition of the relevant market, determination of market power and assessment of the incriminated conduct's fairness)[21], this article is limited to the challenges of applying Art 102 TFEU to multi-sided markets[22] in the digital economy.

A. Definition of the relevant market

As a preliminary step, only a thorough delineation of the relevant (product, geographic and temporal) market enables reliable statements about the competitive situation and, subsequently, about a conduct's fairness within the meaning of Art 102 TFEU.[23] The definition of the relevant market(s) is already a challenge in one-sided 'brick-and-mortar' markets; this becomes all the more complex in the digital economy. Besides the multi-sidedness of online platforms, difficulties arise in particular from the innovation competition, the interdependence between the different platform sites due to (partly strong) network effects as well as the supposedly free offers that are widespread in the digital economy.[24]

[20] Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer wettbewerbsrechtlicher Bestimmungen („GWB-Digitalisierungsgesetz"), German Federal OJ I 2021/1, all German federal statutes can be accessed via https://www.gesetze-im-internet.de/ with their title, amendments can be found by their OJ number.

[21] Moreover, Art 102 TFEU applies only if the conduct in question appreciably affects trade between EU member states; cf. Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ 2004 C 101 p. 81), paras. 21-22 and 97.

[22] For fundamental information on the theory of multi-sided markets see Jean-Charles Rochet/Jean Tirole, 'Platform Competition in two-sided markets' (2003) JEEA 990-1029; Jean-Charles Rochet/Jean Tirole, 'Two-sided markets: A progress report' (2006) RJE 645-67.

[23] Commission Notice on the definition of relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5), para. 2; cf. Jonathan Faull/Ali Nikpay, *The EU Law of Competition*, 3rd edn. (Oxford: Oxford University Press, 2014), para. 1.1.37.

[24] For an extensive overview on the economic peculiarities of multi-sided online platform markets see Arno Scharf, *Datenmissbrauch im Kartellrecht* (Wien: Lexis Nexis, 2023) pp. 15-36.

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1. Prerequisite: *Existence* of a (user) market for non-monetary exchange relationships

In the digital economy, instead of a monetary price, users often 'pay' with their data (on the economic differences between monetary prices and data, see Section II.C.1.) for the use of the platform. In this context, it may be questionable whether such non-monetary exchange relationships (also referred to as 'zero-price' markets), have any market quality at all in terms of competition law. Due to the alleged gratuitousness of the exchange of services, one could argue that no separate (user) market can be defined,[25] meaning that there would be no starting point for competitive intervention. Such a result would not only be unsatisfactory but also misjudge the economic dimension and functioning of supposedly free business models as described in more detail below.

In Germany, the existence of a relevant market under competition law was initially denied by the authorities and courts due to the absence of a paid exchange relationship[26] as an 'essential prerequisite for the exchange of services in the market process'[27]. Similarly, in the US, the applicability of US antitrust law was rejected on the grounds that it does not apply to offers provided free of charge.[28] On a European level, the EC based its analysis concerning free-to-air TV channels on a TV advertising market,[29] whereas the question of whether an audience market existed was

[25] Christian Kersting/Sebastian Dworschak, 'Google als Marktbeherrscher? – zur (geringen) Aussagekraft hoher Nutzerzahlen im Internet' (2014) ifo Schnelldienst 7-9, p. 9: '[...] serious doubts about the existence of markets [...]'; similar Robert H. Bork, 'Antitrust and Google' (Chicago Tribune, 6.4.2012) <http://articles.chicagotribune.com/2012-04-06/opinion/ct-perspec-0405-bork-20120406_1_unpaid-search-results-search-enginessearch-algorithms> accessed 18 August 2023: 'Regulators may attempt to develop additional antitrust complaints against the search engines but they are unsupportable. There is no coherent case for monopolization because a search engine, like Google, is free to consumers [...]'.

[26] Düsseldorf Higher Regional Court 9.1.2015, *HRS*, VI - Kart 1/14 (V), para. 43; German FCO 3.4.2008, *Kabel Deutschland/Orion Cable*, B7-200/07, paras. 138-139: 'However, a gratuitous service cannot be regarded as a market service, since the latter conceptually presupposes a remunerated exchange relationship'; German FCO 29.8.2008, *Intermedia/Health & Beauty*, B6-22131-Fa-52/08, para. 34.

[27] German FCO 19.1.2006, *Springer/ProSiebenSat.1*, B6-92202-Fa-103/05, para. 23.

[28] US District Court for the Northern District of California 16.3.2007, *Kinderstart.com, LLC vs. Google Inc*, C 06-2057 JF, 2007 WL 831806, para. 5.

[29] Commission 21.3.2000, *CLTUFA/CANAL+/VOX*, COMP/M.1889, para. 12; Commission 3.8.1999, *Kirch/Mediaset*, IV/M.1574, para. 11; Commission 7.10.1996, *Bertelsmann/CLT*, IV/M.779, para. 13; Commission 17.5.1995, *CLT/Disney/Super RTL*, IV/M.566, para. 14.

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explicitly left open.[30] Similarly, for free-to-air radio programmes, the EC did not appear to include radio listeners in the relevant market.[31]

In the meantime, competition authorities have moved away from their scepticism regarding free offers. In recent decisions, free (advertising-financed) services were analysed. The EC has examined various internet markets, although the platform services in question were offered to the users free of charge. The existence of a market was not even discussed but simply assumed as given, despite the lack of remuneration.[32] Similarly, in its more recent decisional practice, the German Federal Cartel Office (FCO) also assigned market quality to areas in which no monetary payment flow takes place.[33] For example, in its prominent abuse of dominance proceedings against Facebook, the German FCO qualified the social network's (supposedly free) offer to private users as a market in terms of competition law.[34] This is in line with the legal clarification introduced by the 9th amendment of the German Act against Restraints of Competition[35], according to which 'the fact that a service is provided free of charge' does not prevent the definition of a relevant market.[36]

The above-mentioned developments are welcome, as they are the result of a deeper examination and better understanding of the functioning of multi-sided markets by competition authorities. Free services essentially serve to bind those users to the platform from which the strongest network effects emanate. Thus, zero prices are the result of a differentiating pricing strategy and represent a deliberate economic decision of the platform operator. Rejecting free services as market-relevant

[30] Commission 3.8.1999, *Kirch/Mediaset*, IV/M.1574, para. 11; Commission 7.10.1996, *Bertelsmann/CLT*, IV/M.779, para. 15.

[31] Commission 8.9.2009, *Bertelsmann/KKR/JV*, COMP/M.5533, para. 46.

[32] E.g., Commission 3.10.2014, *Facebook/WhatsApp*, COMP/M.7217, paras. 13-44 (market for consumer communication services) and 45-61 (market for social networks); Commission 27.6.2017, *Google Search (Shopping)*, AT.39740, paras. 341-671; Commission 7.10.2011, *Microsoft/Skype*, COMP/M.6281, paras. 18-43 (confirmed by CFI 11.12.2013, *Cisco*, T-79/12, ECLI:EU:T:2013:635); Commission 6.3.2013, *Microsoft (Tying)*, COMP/39.530; Commission 24.3.2004, *Microsoft*, COMP/C-3/37.792, paras. 402-425.

[33] German FCO 8.9.2015, *Google/VG Media*, B6-126/14, paras. 142-146; German FCO 22.10.2015, *Parship/ElitePartner*, B6-57/15, paras. 70, 81-86; German FCO 20.4.2015, *Immowelt/Immonet*, B6-39/15, p. 3; German FCO 3.1.2017, *CTS Eventim*, B6-53/16, para. 145.

[34] German FCO 6.2.2019, *Facebook*, B6-22/16, para. 239.

[35] Neuntes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, German OJ I 2017/33.

[36] Cf. Section 18 para 2a GWB, German OJ I 2013/1750 as last amended by OJ I 2022/1214.

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relationships would misjudge economic reality[37] and at the same time lead to false estimations in terms of competition law.[38] This finding is consistent with the traditional definition of a market as a place where supply and demand meet at a certain price.[39] Apart from money, prices can also exist in other economically valuable means of exchange (e.g., data).[40] Accordingly, the fact that the service in question is provided free of charge does not in itself preclude the definition of a relevant market in terms of competition law. Otherwise, the contractual relationship between platform operators and private users would be (regularly) cut out from scrutiny under competition law. Such a finding appears inappropriate insofar as Art 102 TFEU does not only protect competitors of the market dominant undertaking but also the opposite side of the market from exploitative behaviour. In this context, Art 102 lit a TFEU prohibits imposing unfair prices or other unfair trading conditions on consumers. Thus, consumers are protected against exploitative conduct with regard to the actual exchange relationship, which – based on the explicit wording of Art 102 lit a TFEU – may also consist in demanding non-monetary services such as unfair terms and conditions (i.e., is not limited to monetary prices)[41] (for details see Chapter II.C.2.).

2. Demand-side oriented market concept preferrable to price-related concepts (e.g., SSNIP-test)

Traditional concepts for defining relevant markets in terms of competition law are linked to monetary prices. This applies, e.g., to the so-called SSNIP-test (Small Significant Non-transitory Increase in Price), which assumes a given price increase above the current level (usually five to ten percent) over one year by a hypothetical

[37] German Federal Government, explanatory remarks on the government bill proposing the 9th GWB-Amendment, BT-Drs. 18/10207, p. 48.

[38] Lapo Filistrucchi/Damien Geradin/Eric van Damme/Pauline Affeldt, 'Market Definition in Two-Sided Markets: Theory and Practice' (2014) JCLE 293-339, p. 321.

[39] Rupprecht Podszun/Benjamin Franz, 'Was ist ein Markt? – Unentgeltliche Leistungsbeziehungen im Kartellrecht' (2015) NZKart 121-27, p. 121, who subsequently suggest a renewal of the market concept ('open market concept').

[40] Magali Eben, 'Market Definition and Free Online Services: The Prospect of Personal Data as Price' (2018) I/S 227-81, pp. 240-43; Caleb Fuller, 'Privacy Law as price control' (2018) EJLE 225-50, p. 230; Chris Jay Hoofnagle/Jan Whittington, 'Free: Accounting for the Costs of the Internet's Most Popular Price' (2014) UCLA Law Rev 606-70, p. 635: 'It is worth noting that trade in economically valuable goods occurs with or without money'.

[41] Heike Schweitzer, 'Neue Machtlagen in der digitalen Welt? Das Beispiel unentgeltlicher Leistungen', in Torsten Körber/Jürgen Kühling (eds.), *Regulierung - Wettbewerb – Innovation* (Baden-Baden: Nomos, 2017) 269-306, p. 293: 'The protective purpose of competition law is not limited to undistorted prices'.

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monopolist. If customers switch to other products in response to the price increase, these other products (substitutes) belong to the same relevant product and geographic market. Applying the SSNIP-test is ruled out if – as is widespread in the digital economy – no monetary price is charged at all (the initial price of zero still remains zero in case of a price increase).[42] Similar problems arise with regard to other price-related concepts, such as the cross-price elasticity analysis (*Kreuzpreiselastizitätsanalyse*).[43] Alternative methods proposed in legal literature, which instead of a price increase focus on a reduction in quality (so-called SSNDQ-test: Small but Significant and Non-transitory Decrease in Quality)[44] or an increase in other costs (such as the quantity or duration of the advertisement to be consumed or the personal data provided by the user) (so-called SSNIC-test: Small but Significant and Non-transitory Increase in [exchanged] Costs)[45], can be seen, in principle, as positive developments. However, due to considerable difficulties in application, they are not (yet) able to compensate suitably for the deficits of traditional concepts. Particularly, the relevant parameters linked to the respective method (quality, advertising volume, data) are difficult to measure and often depend on the subjective perception of the individual user.[46]

In line with the EC's decision-making practice, it is suggested to determine substitutability based on the well-established demand-side oriented market concept. According to this method, the (functional) interchangeability of the products or

[42] Further difficulties of applying the SSNIP-test to multi-sided online platform markets arise from (strong) network effects; see, e.g. David Evans/Richard Schmalensee, 'The Industrial Organization of Markets with Two-Sided Platforms' (2007) CPI 151-79, p. 173.

[43] Podszun/Franz, 'Was ist ein Markt?', p. 127; Christiane Kehder, *Konzepte und Methoden der Marktabgrenzung und ihre Anwendung auf zweiseitige Märkte* (Baden-Baden: Nomos, 2013) p. 267.

[44] Gebicka/Heinemann, 'Social Media & Competition Law', 149-72, pp. 156-59; similar Michal Gal/Daniel Rubinfeld, 'The Hidden Costs of Free Goods: Implications for Antitrust Enforcement' (2016) Antitrust L. J. 521-62, p. 551.

[45] John M. Newman, 'Antitrust in Zero-Price Markets: Applications' (2016) Washington University Law Rev 49-112, p. 66.

[46] Regarding the SSNDQ-Test see e.g. European Union, Contribution to the OECD Roundtable on the Role and Measurement of Quality in Competition, DAF/COMP(2013)17, p. 80 <https://www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf> accessed 18 August 2023: 'Price increases can immediately be translated into the evaluation of profits, while a very complex assessment would be needed for profits derived from quality degradation (such as calculations of cost savings)'; Jens-Uwe Franck/Martin Peitz, 'Market Definition and Market Power in the Platform Economy', CERRE-Report (2019), p. 65 <https://cerre.eu/wp-content/uploads/2020/08/2019_cerre_market_definition_market_power_platform_economy_lowres.pdf> accessed 18 August 2023; regarding the SSNIC-Test see e.g. Newman, 'Antitrust in Zero-Price Markets: Applications', pp. 66-67; Kerber, 'Digital Markets, Data and Privacy', p. 642.

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services in question is decisive.[47] In general, based on this concept, separate markets exist if the business models to be examined satisfy different customer demands. The application of the demand-side oriented market concept seems to be appropriate also in the area of multi-sided online platform markets.[48] In the following, reference is made to two groups of customers which are particularly common on (ad-financed) online platforms: private users on the one side and advertisers on the other side. From a user's point of view, all platforms with similar offerings and functionalities are to be regarded as interchangeable. Therefore, platforms with less (sophisticated) or simply different functionalities that serve different purposes are not substitutable and thus not part of the same relevant market. Despite partial overlaps with social networks[49], separate markets were, e.g., defined for (i) photo[50] and (ii) video portals[51], (iii) communication platforms[52], (iv) microblogging services[53] and (v) specialised social networks such as those for professional networking[54]. From an advertiser's perspective, the extent to which various forms of advertising are interchangeable is decisive. In this regard, separate markets were defined for the placement of advertisements (i) on- and (ii) offline.[55] Within the market for online advertising, a further distinction was made between (iii) search-based and (iv) non-search-based

[47] Commission 27.06.2017, *Google Search (Shopping)*, AT.39740, para. 145.

[48] Jacques Crémer/Yves Alexandre de Montjoye/Heike Schweitzer, 'Competition Policy for the Digital Era', p. 45 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 18 August 2023; Nela Grothe, *Datenmacht in der kartellrechtlichen Missbrauchskontrolle* (Baden-Baden: Nomos, 2019) pp. 246-247; for a different view see Michael Dietrich, *Wettbewerb in Gegenwart von Netzwerkeffekten* (Frankfurt am Main: Peter Lang, 2006) p. 115 with further references.

[49] Commission 03.10.2014, *Facebook/WhatsApp*, COMP/M.7217, para. 46.

[50] For details on the distinction between social networks and photo portals see German FCO 6.2.2019, *Facebook*, B-6 22/16, paras. 334-338.

[51] German FCO 6.2.2019, *Facebook*, B-6 22/16, paras. 309-318.

[52] Commission 03.10.2014, *Facebook/WhatsApp*, COMP/M.7217, paras. 54-56; for details on the distinction between social networks and communication platforms see German FCO 6.2.2019, *Facebook*, B-6 22/16, paras. 286-294.

[53] German FCO 6.2.2019, *Facebook*, B-6 22/16, paras. 319-327.

[54] Commission 6.12.2016, *Microsoft/LinkedIn*, COMP/M.8124, para. 115; for details on the distinction between social networks and professional networking see German FCO 6.2.2019, *Facebook*, B-6 22/16, paras. 277-285.

[55] Commission 17.12.2020, *Google/Fitbit*, COMP/M.9660, para. 151; Commission 06.09.2018, *Apple/Shazam*, COMP/M.8788, para. 133; Commission 03.10.2014, *Facebook/WhatsApp*, COMP/M.7217, para. 74; Commission 18.02.2010, *Microsoft/Yahoo*, COMP/M.5727, para. 61; Commission 11.3.2008, *Google/DoubleClick*, COMP/M.4731, paras. 45-46 and 56.

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advertising,[56] and in the area of non-search-based advertising (or display advertising), a further subdivision was considered between (v) video advertising and (vi) non-video advertising, as well as between (vii) advertising on social networks and (viii) outside social networks, but was ultimately left open.[57]

When assessing substitutability, the economic peculiarities of the digital economy must be taken into account. In this context, network effects can limit the interchangeability between large online platforms with smaller providers that have a lower user density.[58] Despite comparable offerings, consumers regularly opt for the provider with the highest user density because of the resulting benefits (e.g., highest interaction and networking possibilities). As a result, platforms with only a small number of participants are regularly not seen as real alternatives for established platforms from a user's point of view.[59]

3. Defining only one market vs. several interrelated markets

Internet platforms maintain business relationships with several groups of customers (e.g., private users, advertisers, etc) that are linked by the presence of indirect network effects. In this context, the question arises whether (i) only one market (encompassing all sides) or (ii) several interrelated markets – corresponding to the relationship between the platform operator and the respective customer group – need to be defined.[60]

Legal literature suggests differentiating between so-called transaction platforms and non-transaction platforms, whereby merely one market should be defined in the case of non-transaction platforms.[61] Transaction platforms are characterised by (observable) transactions taking place between different customer groups (e.g., on

[56] Commission 17.12.2020, *Google/Fitbit*, COMP/M.9660, para. 152; Commission 20.3.2019, *Google Search (AdSense)*, AT.40411, para. 121; German FCO 6.2.2019, *Facebook*, B-6 22/16, paras. 358-360.

[57] Commission 17.12.2020, *Google/Fitbit*, COMP/M.9660, para. 148; cf. CMA, Online platforms and digital advertising – Market study final report, para. 5.23 <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study> accessed 18 August 2023.

[58] With regard to social networks see German FCO 6.2.2019, *Facebook*, B-6 22/16, paras. 272-276.

[59] Zschoch, *Soziale Netzwerke im Kartellrecht*, pp. 97-98.

[60] Helmut Bergmann/Lilly Fiedler, 'Art 102 AEUV', in Ulrich Loewenheim/Karl Meessen/Alexander Riesenkampff/Christian Kersting/Hans Jürgen Meyer-Lindemann (eds.), *Kartellrecht*, 4th edn. (München: C.H.Beck, 2020), para. 45.

[61] Lapo Filistrucchi, 'Market Definition in Multi-Sided Markets' in OECD (ed.), Rethinking Antitrust Tools for Multi-Sided Platforms (2018), p. 43 <https://www.oecd.org/daf/competition/Rethinking-antitrust-tools-for-multi-sided-platforms-2018.pdf> accessed 18 August 2023; critical Franck/Peitz, 'Market Definition and Market Power in the Platform Economy', pp. 24-28.

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auction platforms, real estate portals, credit card markets, etc).[62] In this context, the interests of the different customer groups overlap insofar as they are aimed at concluding a legal transaction (e.g., a purchase agreement). In contrast, non-transaction platforms lack a direct transaction or direct business relationship between different groups of customers (e.g., newspaper markets, search engine markets[63], social networks, etc).[64] Moreover, the objectives and interests of the different customer groups are heterogeneous. Whilst, e.g., advertisers demand (personalised) advertising space, private users are interested in the functionalities and content of the platform itself.[65] Against this background, some authors suggest defining two distinct (but interrelated) markets for non-transactional platforms.[66]

In principle, defining separate markets with non-transaction platforms appears comprehensible as, due to the absence of a direct transaction, the platform sides are not closely connected.[67] In addition, non-transaction platforms serve different demands, depending on the needs of the respective customer group; the substitutes from an advertisers' perspective do not correspond to the substitutes from a private users' perspective.[68] As a result, depending on the respective platform side, different competitors face each other. This is why an asymmetric market definition seems to be appropriate. On the other hand, defining only one market with transaction platforms appears comprehensible, as the product consists in the intermediation service as such, i.e., in matching supply and demand. The product cannot be divided (e.g., into services for buyers and sellers); rather, both user groups are to be included.[69] Assuming that the different customer groups on transaction platforms are closely

[62] Filistrucchi, 'Market Definition in Multi-Sided Markets', p. 38.

[63] Although transactions can be observed between, e.g., users and advertisers through the implementation of Pay-per-click advertising, search markets are non-transaction markets, cf. Ralf Dewenter/Jürgen Rösch, *Einführung in die neue Ökonomie der Medienmärkte* (Wiesbaden: Springer Gabler, 2014) p. 242.

[64] Filistrucchi, 'Market Definition in Multi-Sided Markets', p. 38.

[65] Max Klasse/Lars Wiethaus, 'Digitalisierungsvorschriften in der 9. GWB-Novelle' (2017) WuW 354-62, p. 358; with regard to social networks see German FCO 6.2.2019, *Facebook*, B-6 22/16, para. 235.

[66] Filistrucchi, 'Market Definition in Multi-Sided Markets', p. 42.

[67] Bergmann/Fiedler, 'Art 102 AEUV', para. 45.

[68] With regard social networks see German FCO 6.2.2019, *Facebook*, B-6 22/16, para. 235.

[69] German FCO, B6-113/15, Arbeitspapier – Marktmacht von Plattformen und Netzwerken, p. 31 <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Think-Tank-Bericht.pdf%3F__blob%3DpublicationFile%26v%3D2> accessed 18 August 2023; Carsten Grave, 'Marktbeherrschung bei mehrseitigen Märkten und Netzwerken', in Christian Kersting/Rupprecht Podszun (eds.), *Die 9. GWB-Novelle* (München: C.H.Beck, 2017) p. 24.

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interconnected, (mostly) have the same needs and the fallback options of the user groups do not differ significantly from each other, defining only one market appears to be appropriate.[70] In any case, for advertised-financed platforms, an additional market must be defined which exists separately from other markets.

However, it should be noted that the proposed distinction in legal literature between transaction and non-transaction platforms (including the consequences for market definition linked to it) does not have general validity in practice.[71] Depending on the circumstances in the individual case, different customer groups of a non-transaction platform may be so closely interlinked that a single market is to be defined.[72] Conversely, on transaction platforms, complex structures may lead to separate (interrelated) markets being defined for each platform side.[73] As a result, the definition of only one market or several separate markets cannot – irrespective of the classification as a transaction or non-transaction platform – be based on objective criteria. Rather, a case-by-case analysis is required. In this regard, it is decisive whether the different groups of customers are exposed to the same competitive conditions (i.e., whether they have the same fallback options available to them).[74] In the affirmative it can be argued that – depending on the specific circumstances in the individual case – only one market is to be defined; in the negative, there are good reasons for defining several (interrelated) markets.

4. Interim conclusion

Due to their economic dimension, supposedly free business models (like, e.g., social media networks, search engines, etc.) are considered to be market-relevant within the meaning of competition law. Thus, non-monetary exchange relationships are subject to the ban on abusive conduct under Art 102 TFEU. Limiting the applicability of competition law to monetary prices would lead to an unjustified restriction of

[70] With regard to real estate portals see German FCO 20.4.2015, *Immonet/Immowelt*, B6-39/15, pp. 1-3; with regard to online-dating platforms see German FCO 22.10.2015, *Parship/Elitepartner*, B6-57/15, paras. 71-80.

[71] Cf. Franck/Peitz, 'Market Definition and Market Power in the Platform Economy', pp. 25-28.

[72] Bergmann/Fiedler, 'Art 102 AEUV', para. 45.

[73] E.g., Commission 19.12.2007, *MasterCard I*, COMP/M.34579, paras. 261-316, where the Commission – despite the existence of a direct transaction between credit card holders and merchants – defined two separate markets due to the complex vertical structure of the payment system in question.

[74] Grave, 'Marktbeherrschung bei mehrseitigen Märkten und Netzwerken', p. 25 with further references.

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competitive parameters and thus to a 'protection gap' in dynamic areas, where users typically 'pay' with their data.[75]

As zero-price markets are considered to be within the scope of competition law, their exact dimension must be examined in a second step. Due to the absence of a monetary consideration, traditional price-oriented concepts (that, for instance, rely on price increases to define a market such as the so-called SSNIP-test) do not lead to appropriate results. Rather, to define a market, the concept of (functional) substitutability is preferable, i.e., whether the products or services are interchangeable from a customer's point of view. Based on this concept, separate markets exist if the business models to be examined satisfy different customer demands. As a result, different markets exist, e.g., for social networks, search engines and online marketplaces. When assessing substitutability, the economic peculiarities of the digital economy must be taken into account. This applies, for example, to network effects that may further limit the interchangeability between digital products or services: Despite comparable offers, platforms with a low user density may not be seen as real alternatives to incumbents with a high number of participants (as the latter usually offer more [sophisticated] functionalities).[76] As a result, separate markets would have to be defined for each business model (e.g., for small social networks on one side and incumbents like Facebook on the other).[77]

As platform providers maintain business relationships with several groups of customers (e.g., private users, advertisers, etc.) the question arises whether (i) an overall market or (ii) several markets (for each user group) need to be defined. Where the demand is homogeneous across different groups of customers, defining only one market seems to be appropriate. This might, e.g., apply to dating or real estate platforms, where the product consists in the intermediation service as such, i.e., in matching supply and demand. In contrast, if the objectives and interests of the different groups of customers are heterogeneous, defining separate markets seems to be appropriate. This might, e.g., apply to social networks or search engines: Whilst advertisers demand (personalised) advertising space, private users are interested in the functionalities and content of the platform itself. As a result, separate markets may be defined for each group of customers. Due to complex structures and

[75] Claudia Zschoch, *Soziale Netzwerke im Kartellrecht* (Köln: Carl Heymanns Verlag, 2018) pp. 61-62; Schweitzer, 'Neue Machtlagen in der digitalen Welt?, p. 294.

[76] Zschoch, *Soziale Netzwerke im Kartellrecht*, pp. 97-98.

[77] Cf. German FCO 6.2.2019, *Facebook*, B-6 22/16, para. 275, according to which, from a user perspective, it is 'very doubtful' that StudiVZ or Jappy are comparable to Facebook.

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peculiarities of certain platform-based business models, a case-by-case analysis is always required.

B. *Determination* of market power

Once the relevant market has been defined, the existence of market power in this specific area must be proven for the application of Art 102 TFEU. The addressees of the ban on abusive practices are undertakings whose dominant position extends to the entire EU internal market or a substantial part thereof.[78] The TFEU does not contain a definition of the term 'dominant position'. According to the decision-making practice of the CJEU, undertakings that can determine the terms and conditions of their economic activity on a given market to an appreciable extent independently of (actual or potential) competitors, customers and ultimately of consumers are considered to be dominant.[79] In this context, the concept of independence is primarily reflected in the undertaking's ability to profitably charge supra-competitive prices over a longer period of time.[80] However, prices are only one of many competitive parameters (such as output, variety or quality of a product or service, etc.) that can be influenced by a market dominant undertaking to the detriment of competitors or consumers.

The determination of market power is based on a number of different factors which, taken individually, do not have to be decisive on their own.[81] In practice, parameters such as the market structure (i.e., the competitive situation existing on the market), the corporate structure and the market behaviour of the undertaking concerned are considered to be meaningful characteristics.[82] The most important indicator is the market shares of the undertaking concerned which are traditionally determined on

[78] This requirement is interpreted broadly and is regularly considered to be fulfilled even for markets limited to the territory of a single EU member state; see Richard Whish/David Bailey, *Competition Law*, 9th edn. (Oxford: Oxford University Press, 2018) p. 196.

[79] Established case law see e.g., CJEU 14.2.1978, *United Brands*, C-27/76, ECLI:EU:C:1978:22, para. 63/66; it should be noted that the definition applies not only to dominant suppliers but also to dominant demanders, regarding the latter configuration see CJEU 15.3.2007, *British Airways*, C-95/04, ECLI:EU:C:2007:166.

[80] Commission, Guidance on exclusionary conduct (OJ 2009 C 45, p. 7) para. 11; CFI 01.07.2010, *Astra Zeneca*, T-321/05, ECLI:EU:T:2010:266, para. 267; Commission 9.12.1971, *Continental Can Company*, IV/26.811, II. B. para. 3; the exact period depends on the products and markets concerned and is therefore case-specific; in most cases, the Commission considers a period of two years to be sufficient, cf. Commission, Guidance on exclusionary conduct (OJ 2009 C 45, p. 7) footnote 6.

[81] CJEU 14.2.1978, *United Brands*, C-27/76, ECLI:EU:C:1978:22, para. 63/66.

[82] Friedrich-Wenzel Bulst, 'Art 102 AEUV', in Hermann-Josef Bunte (ed.), *Kartellrecht*, 13th edn. (Köln: Luchterhand Verlag, 2018), vol. II, para. 44.

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the basis of price or volume-based concepts; the existence of a dominant position is rebuttably presumed in case of a market share of 50% or more.[83]

1. Metrics for the calculation of market shares in zero-price markets

In the digital economy, the first challenge is to find a suitable metric for calculating market shares in areas where the platform service is offered free of charge (i.e., without monetary consideration). As opposed to markets of the traditional economy, relying on volume- or revenue-based metrics is not possible in zero-price markets.[84] In the traditional economy, market shares are primarily based on the number of products sold or the turnover achieved by the undertaking concerned. These company-specific figures are then set in relation to the overall market volume, which is either the total number of products sold, or the aggregated turnover achieved by all undertakings active in the market at hand. This in turn allows market shares to be calculated for each company (Example: Dividing EUR 50 million turnover of company A achieved by selling product X in 2022 by the total market volume associated with the sale of product X in 2022 of EUR 500 million results in a market share of company A of 10 %). Due to the lack of monetary consideration, market shares cannot be determined in the conventional way in zero-price markets (e.g., in the area of social networks or search engines where users 'pay' with their data).[85] Even where a (small) monetary consideration of the users exists, the price – which is regularly low due to network effects – does not reflect the true value of the products or services (as the user side is regularly subsidised by relatively high prices achieved on the advertising side). Thus, relying on sales figures for calculating market shares is not expedient.[86] Instead, metrics based on the actual intensity of use of the platform seem to be preferable. For example, the actual time spent on the platform,[87] the number of search queries or the number of users active on the platform (daily or

[83] CJEU 3.7.1991, *AKZO*, C-62/86, ECLI:EU:C:1991:286, para. 60.

[84] Rupprecht Podszun, 'Unentgeltliche Leistungen', in Christian Kersting/Rupprecht Podszun (eds.), *Die 9. GWB-Novelle* (München: C.H.Beck, 2017) p. 13; Andrea Lohse, 'Marktmachtmissbrauch durch Internetplattformen' (2018) ZHR 321-358, p. 342; Monopolkommission, 'Sondergutachten 68 - Herausforderung digitale Märkte' (2015), para. 56.

[85] David Evans/Richard Schmalensee, 'The Antitrust Analysis of Multi-Sided Platform Businesses' in Roger Blair/Daniel Sokol (eds.), *Oxford Handbook on International Antitrust Economics* (Oxford: Oxford University Press, 2014), vol. I, 404-48, pp. 423-24.

[86] Crémer/Montjoye/Schweitzer, 'Competition Policy for the Digital Era', p. 48.

[87] Samson Esayas, 'Competition in (data) privacy: 'zero'-price markets, market power, and the role of competition law' (2018) International Data Privacy Law 181-99, pp. 192-94; critical Commission 3.10.2014, *Facebook/WhatsApp*, COMP/M.7217, footnote 45, whereby the specific method used for calculating market shares is not apparent.

University of Vienna Law Review, Vol. 6 No 1 (2022), pp. 141-198, https://doi.org/10.25365/vlr-2022-6-1-141.

monthly) can be considered.[88] These company-specific figures are then set in relation to the overall market volume, which is – dependent on the metrics chosen – e.g., the total number of search queries or active users in a given market. Based on the number of active users, the German FCO considered Facebook to hold a dominant position in the German market for social networks with market shares exceeding 80% (monthly active users) and 90% (daily active users), respectively.[89] The German FCO divided Facebook's number of active users in Germany by the overall number of consumers active on social media platforms in Germany (like, e.g., on Google+[90], Stayfriends, StudiVZ, Jappy, Wiz.Life, etc.), which allowed market shares to be computed.

In any case, due to the possibility of multi-homing and the dynamic nature of the digital economy, the number of users can only serve as an indication of the existence of market power.[91] Depending on the specific characteristics of the business model concerned, it must be determined on a case-by-case basis which metric is best suited for assessing the market position of the undertaking concerned.

2. From market shares to potential competition

Irrespective of the metrics used, it is questionable to what extent market shares are at all suitable for assessing market power in the digital economy.[92] In general, market shares only serve as a snapshot and lose their significance all the more where market structures are changing rapidly due to disruptive technological progress.[93] This is in particular true for dynamic markets of the digital economy, which are characterised by sequential *Schumpeterian* competition for innovation, potentially leading to (high) fluctuations of market shares.[94] Against this background, competition authorities have stated that, in dynamic industries, market shares are only of limited significance.[95]

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[88] German FCO, B6-113/15, 'Arbeitspapier – Marktmacht von Plattformen und Netzwerken' (2016), p. 79.

[89] German FCO 6.2.2019, *Facebook*, B6-22/16, paras. Rz 392 and 395.

[90] Despite considerable financial resources, Google+ did not succeed in the social network market and is not active anymore.

[91] Christian Kersting/Sebastian Dworschak, 'Win-Win-Situation auf mehrseitigen Märkten: Google muss nicht zahlen!' (2016) ZUM 840-46, p. 843.

[92] Franck/Peitz, 'Market Definition and Market Power in the Platform Economy', p. 81.

[93] Stephen P. King, 'Two-Sided Markets' (2013) The Australian Economic Review 247-58.

[94] Torsten Körber, 'Analoges Kartellrecht für digitale Märkte?' (2015) WuW 120-33, p. 126; cf. Commission 03.10.2014, *Facebook/WhatsApp*, COMP/M.7217, para. 99.

[95] CFI 11.12.2013, *Cisco*, T-79/12, ECLI:EU:T:2013:635, para. 69: '[...] consumer communications sector is a recent and fast-growing sector which is characterised by short innovation cycles in which

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Thus, even for undertakings with (very) high market shares, a case-by-case analysis is necessary. However, a general reference based on high dynamics and innovation is not sufficient to invalidate the existence of a dominant position.[96] Conversely, the fact that digital markets typically tend towards one or a few standards should not *per se* lead to the determination of market power.

Rather, the existence of a dominant position depends on the continuity of market shares. Accordingly, the decisive factor is whether and to what extent the position of the alleged market dominant undertaking is contestable and not merely a temporary phenomenon.[97] Indications for this are, e.g., market structures that have remained unchanged over several years.[98] In this context, the concept of potential competition, i.e., the pressure exercised upon incumbents by the possibility that new or existing firms will enter a given market, is of particular importance.[99] This in turn depends on the existence of barriers to market entry that influence the degree of potential competition.

3. Competitive parameters in the digital economy

In the digital economy, prominent examples of barriers to market entry are, in particular, network effects and access to competition-relevant data. Exclusive or privileged access to a specific type of data can lead to competitive advantages vis-à-vis competitors and thus create market entry barriers.[100] In this context, the need for data

large market shares may turn out to be ephemeral. In such a dynamic context, high market shares are not necessarily indicative of market power [...]'; Commission 6.9.2018, *Apple/Shazam*, COMP/M.8788, para. 162; Commission 27.6.2017, *Google Search (Shopping)*, AT.39740, para. 267; Commission 3.10.2014, *Facebook/WhatsApp*, COMP/M.7217, para. 99; Commission 7.10.2011, *Microsoft/Skype*, COMP/M.6281, para. 78; for Germany see German FCO 6.2.2019, *Facebook*, B6-22/16, paras. 401-402; German FCO 22.10.2015, *Parship/ElitePartner*, B6-57/15, para. 143.

[96] German FCO, B6-113/15, 'Arbeitspapier – Marktmacht von Plattformen und Netzwerken' (2016), p. 84; Zschoch, *Soziale Netzwerke im Kartellrecht*, p. 104.

[97] Commission 16.7.2003, *Wanadoo*, COMP/38.233, para. 217; Commission 24.3.2004, *Microsoft*, COMP/C-3/37.792, paras. 437-447.

[98] Cf. Commission 27.6.2017, *Google Search (Shopping)*, AT.39740, para. 267: 'However, this fact cannot preclude application of the competition rules, in particular Article 102 of the Treaty, especially if a fast-growing market does not show signs of market instability during the period at issue and, on the contrary, a rather stable hierarchy is established'.

[99] Commission 4.7.2007, *Wanadoo España*, COMP/38.784, paras. 247-276; cf. Max Erbard, *Marktmachtverlagerung durch Suchmaschinenbetreiber* (Frankfurt am Main: Peter Lang, 2014) pp. 89-90.

[100] German FCO, B6-113/15, 'Arbeitspapier – Marktmacht von Plattformen und Netzwerken' (2016), pp. 95-96; cf. Section 18 para 3a nr 4 GWB; on 'data ecosystems' as sources of market power see Peter J. Van De Waerdt, 'Everything the Data Touches Is Our Kingdom: Market Power of 'Data Ecosystems' (2023) WoCo 65-98.

University of Vienna Law Review, Vol. 6 No 1 (2022), pp. 141-198, https://doi.org/10.25365/vlr-2022-6-1-141.

access, the availability of substitutes and other specific circumstances of the individual case must be taken into account.[101] Competitive concerns may, e.g., arise from the self-reinforcing effect of data, which may further strengthen the position of incumbents to the detriment of smaller market players.[102] This self-reinforcing effect of data arises from network effects:[103] (i) An increase in users will enable the platform operator to collect even more data. Extended data pools can be used to improve the products or services in question and thus may increase the benefit of the platform for the individual user;[104] this, in turn, attracts further users (direct network effects).[105] (ii) Moreover, data collected on one platform side can be used to improve offerings on other platform sides.[106] For example, data collected from private users enables more targeted advertising opportunities, which in turn attracts further advertisers (indirect network effects). As a result, direct and indirect (data-related) network effects lead to an increased value of the platform for private users and advertisers, leading to a higher number of participants on both platform sides.[107]

However, whether exclusive or privileged access to a certain type of data as such or in combination with other factors (such as network effects) leads to a competitive advantage or a barrier to market entry can only be assessed on the basis of the specific circumstances of the individual case. *Gal/Lynskey*[108] argue that the impact of data on market power might be mitigated in the future due to the advent of so-called synthetic data. Synthetic data is artificial data with analytical value; it is generally generated by

[101] German FCO/Autorité de la concurrence, 'Competition Law and Data' (2016), pp. 36-52 <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2> accessed 18 August 2023; Inge Graef, *Data as Essential Facility* (Alphen aan den Rijn: Wolters Kluwer, 2016) p. 256.

[102] For details on these so-called feedback loops see, e.g., Andres V. Lerner, 'The Role of 'Big Data' in Online Plattform Competition' (2014), paras. 35 and 66-76. <https://ssrn.com/abstract=2482780> accessed 18 August 2023.

[103] For details see Scharf, *Datenmissbrauch im Kartellrecht*, pp. 130-31.

[104] For example, by improving the algorithm responsible for the individual news feed on Facebook that corresponds to the interests and preferences of the user; cf. German FCO, B6-113/15, 'Arbeitspapier – Marktmacht von Plattformen und Netzwerken' (2016), p. 95.

[105] With regard to social networks see German FCO 6.2.2019, *Facebook*, B-6 22/16, para. 496.

[106] Nils-Peter Schepp/Achim Wambach, 'On Big Data and Its Relevance for Market Power Assessment' (2016) JECLAP 120-24, p. 122.

[107] Antje Zimmerlich/Detlef Aufderheide, 'Herausforderungen für das Wettbewerbsrecht durch die Internetökonomie' (2004),), p. 3 <https://www.econstor.eu/bitstream/10419/46582/1/518481778.pdf> accessed 18 August 2023.

[108] Michal Gal/Orla Lynskey, 'Synthetic Data: Legal Implications of the Data-Generation Revolution' (2023) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4414385)> accessed 18 August 2023.

University of Vienna Law Review, Vol. 6 No 1 (2022), pp. 141-198, https://doi.org/10.25365/vlr-2022-6-1-141.

computer simulations or algorithms (using generative AI).[109] This means that synthetic data can be created without having to actively collect (all of it) from events that take place in the real world ('collected data') via human or technological sensors; rather, techniques such as autonomous generation models or interferences from collected data are used.[110] Crucially, synthetic data allows for replacing collected data characterised by high access barriers. It can potentially reduce costs at all stages of the data value chain as it essentially combines the process of data collecting, labelling and organising the data automatically during the generation process ('Generation-for-purpose').[111] With the help of synthetic data, collected datasets which are otherwise too small to be useful may be supplemented or replaced.[112] This could allow companies with relatively small datasets to compete with undertakings in possession of much more collected data. Therefore, with the help of synthetic data, competitive advantages resulting from data-based network effects and feedback loops described above (which allow incumbents to further entrench their data-based market power) might be overcome.[113] If collected data no longer grants incumbents a significant comparative advantage, this could in turn create greater incentives to share data (potentially capped with the price corresponding to the relatively low cost of generating synthetic data).[114] By potentially lowering some access barriers to data, synthetic data might help to change the competitive dynamic in data-driven markets. On the other hand, synthetic data does not necessarily reduce all data access barriers. Where collected data is unique and essential for synthetic data generation, synthetic data could even further increase the competitive advantage of those controlling collected data. Therefore, the countervailing risk that synthetic data could entrench self-perpetuating feedback loops, network effects and economies of scale of incumbent firms, in principle, remains.

Besides network effects and access to (competition-relevant) data described above, (i) economies of scale and scope, (ii) the existence multi-homing (i.e., the parallel use of multiple services), (iii) switching costs (i.e., the amount of effort required from a

[109] Gal/Lynskey, 'Synthetic Data' (2023), pp. 2 and 6.

[110] On the numerous methods for generating synthetic data (and the typology derived from it) see Gal/Lynskey, 'Synthetic Data' (2023), pp. 6ff.

[111] Gal/Lynskey, 'Synthetic Data' (2023), pp. 13 and 20 (on potential harms and risks of synthetic data see pp. 18f, on corresponding data governance challenges related to synthetic data see pp. 54ff).

[112] On the potentially strengthening effects of synthetic data on data quality see Gal/Lynskey, 'Synthetic Data' (2023), pp. 46ff.

[113] Gal/Lynskey, 'Synthetic Data' (2023), pp. 20ff.

[114] Gal/Lynskey, 'Synthetic Data' (2023), pp. 20f.

University of Vienna Law Review, Vol. 6 No 1 (2022), pp. 141-198, https://doi.org/10.25365/vlr-2022-6-1-141.

user to switch to a competitor) and (iv) innovation-driven competitive pressure must be taken into account when assessing market power in digital markets. Although these qualitative criteria have already found their way into national and European decision-making practice in the past, recent legislative changes have provided greater legal certainty. Namely, for the (ex-ante) determination of a gatekeeper-position[115] within the meaning of the DMA, dominance on multi-sided platform markets according to Section 28a Austrian Cartel Act as well as undertakings with 'paramount cross-market significance' under Section 19a para 1 German Act against Restraints on Competition, attention is explicitly paid to the multi-sidedness and interdependence of the various customer groups (network effects) and access to competition-relevant data of the undertakings concerned (see Chapter III.). Switching costs, multi-homing, lock-in effects and economies of scale and scope - all of which are influenced by (data-related) network effects - are closely connected to the two aforementioned criteria.

4. Interim conclusion

The ban on abusive conduct (Art 102 TFEU) only applies to market dominant undertakings. Thus, once the relevant market has been defined, the existence of dominance in this specific area must be proven. The determination of dominance is based on a number of different factors. The most important indicator for dominance is the market shares of the undertaking concerned. Due to the lack of monetary consideration, relying on revenue-based concepts (e.g., sales figures) for calculating markets shares is not possible in zero-price markets. Instead, metrics based on the actual intensity of use of the platform seem to be preferable. For example, the actual time spent on the platform, the number of search queries or the number of users active on the platform (daily or monthly) can be considered. As market shares only serve as a snapshot, a case-by-case analysis is necessary, even for undertakings with (very) high market shares. Due to their dynamic nature, this is particularly true for digital markets. Market structures that have remained unchanged over several years may serve as an indication for the existence of a dominant position. This can be facilitated by the existence of (high) market entry barriers which lower the competitive pressure upon incumbents and further strengthen their economic power.

Besides market shares, particular attention must be given to the following criteria when assessing dominance in digital markets: (i) network effects, (ii) access to (competition-relevant) data, (iii) economies of scale and scope, (iv) multi-homing, (v) switching costs and (vi) innovation-driven competitive pressure. Dominance must

[115] Art 3 para 8 lit c-f DMA, OJ 2022 L 265 p. 1 with regard to an individual determination procedure.

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always be determined on a case-by-case basis with a consideration for the specific characteristics of the business model and market concerned.

C. Fairness of the incriminated conduct

Art 102 TFEU does not prohibit the existence of a dominant position as such but rather the abuse thereof.[116] The provision explicitly mentions four categories of abusive practices in a demonstrative list of examples. According to one of these examples, undertakings are prohibited from exploiting their dominant position by imposing unfair prices (exploitative pricing) or other trading conditions (exploitative business terms) (Art 102 lit a TFEU), both of which fall under the broader category of exploitative abuses. If a platform operator collects (quantitatively and/or qualitatively) more data from its customers than would be possible under normal competitive conditions, this conduct may, in principle, be caught under Art 102 lit a TFEU in the form of abusive pricing or other exploitative business terms.[117]

1. Exploitative pricing: data are not prices under competition law

As already stated, instead of monetary prices, users typically 'pay' with their data for using the services and functionalities of digital platforms (based on data processing terms).[118] Despite their economic value, data cannot be equated with monetary prices.[119] The lack of substitution between these two valuable means of exchange is supported by the specific economic peculiarities of data being different from those of prices.[120] First, as opposed to paying a monetary price, the disclosure of data is often not perceived as a transfer of value by the user;[121] rather, the use of the platform concerned still seems to be free. Second, in contrast to money, data cannot be

[116] Jonathan Faull/Ali Nikpay, The EU Law of Competition, 3rd edn. (Oxford: Oxford University Press, 2014), para. 4.03; as opposed to US-Antitrust Law, cf. Section 2 Sherman Act, 15 U.S. Code.

[117] Kalimo/Majcher, 'The concept of fairness', p. 213.

[118] Cf. Langhanke/Schmidt-Kessel, 'Consumer Data as Consideration', pp. 218-23; Hoeren, 'Personenbezogene Daten als neue Währung der Internetwirtschaft', p. 463.

[119] Schweitzer, 'Neue Machtlagen in der digitalen Welt?', pp. 275-77; Torsten Körber, 'Die Facebook-Entscheidung des Bundeskartellamtes – Machtmissbrauch durch Verletzung des Datenschutzrechts?' (2019) NZKart 187-95, p. 191; for a different view see Kerber, 'Digital Markets, Data and Privacy', p. 643; Gebicka/Heinemann, 'Social Media & Competition Law', p. 165.

[120] For an extensive overview on the economic peculiarities of data see Ralf Dewenter/Hendrik Lüth, 'Datenhandel und Plattformen' (2018), p. 10 <http://www.abida.de/sites/default/files/ABIDA_Gutachten_Datenplatformen_und_Datenhandel.pdf> accessed 18 August 2023.

[121] Schweitzer, 'Neue Machtlagen in der digitalen Welt?', pp. 275-276.

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measured in nominal terms; the economic value of data is hard to determine for the user.[122] Third, users' privacy attitudes (e.g., the degree of concern about different types of private information or changes in users' privacy) varies greatly.[123] These findings are in line with the German FCO's proceedings against Facebook based on alleged excessive data collection, which was seen as a case of exploitative business terms (and not as abusive pricing).

2. Exploitative business terms: data processing terms as unfair trading conditions

Against this background, platform operators' terms of use (demanding large amounts of data from their users) may still be qualified as unfair trading conditions within the meaning of Art 102 lit a TFEU. In this context, the term 'trading conditions' must be interpreted broadly, including terms of use of internet platforms.[124] Similar to exploitative pricing, terms and conditions are only abusive if there is a clear disproportion between performance and consideration. In a first step, it must be examined whether the terms and conditions used are clearly unfair or clearly disproportionate to the service offered.[125] However, general criteria for determining such a serious unfairness have not yet been developed in case law. Unless there is an obvious inequity or if such inequity cannot be determined based on conventional concepts (e.g., within the framework of the comparative market concept[126]), a comprehensive weighing of interests must be carried out in a second step.[127] As laid

[122] German FCO 6.2.2019, *Facebook*, B-6 22/16, para. 569; Guiseppe Colangelo/Mariateresa Maggiolino, 'Data Accumulation and the Privacy-Antitrust Interface: Insights from the Facebook case for the EU and the U.S.' (2018) TTLF Working Paper No. 31, p. 29.

[123] Laura Brandimarte/Alessandro Acquisti, 'The Economics of Privacy', in Martin Peitz/Joel Waldfogel (eds.), *The Oxford Handbook of the Digital Economy* (Oxford: Oxford University Press, 2012) 547-71, p. 563.

[124] Tobias Lettl, 'Missbräuchliche Ausnutzung einer marktbeherrschenden Stellung nach Art. 102 AEUV, para. 19 GWB und Rechtsbruch' (2016) WuW 214-21, p. 216; Kalimo/Majcher, 'The concept of fairness', p. 226; Giulia Schneider, 'Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's investigation against Facebook' (2018) JECLAP 213-25, p. 221; German FCO 6.2.2019, *Facebook*, B6-22/16, paras. 561-568.

[125] Commission 20.4.2001, *Duales System Deutschland*, COMP D3/34 493, para. 111; Christian Jung, 'Art 102 AEUV', in Eberhard Grabitz/Meinhard Hilf/Martin Nettesheim (eds.), *Das Recht der Europäischen Union*, 72nd edn., (München: C.H.Beck, 2021), para. 175.

[126] The comparative market concept is only of limited relevance when assessing the unfairness of data processing terms in multi-sided online platform markets, for details see Scharf, *Datenmissbrauch im Kartellrecht*, pp. 163-65.

[127] CJEU 27.3.1974, *BRT II/SABAM*, C-122/73, ECLI:EU:C:1974:25, para. 6/8; Thomas Eilmansberger/Florian Bien, 'Art 102 AEUV', in Florian Bien/Peter Meier-Beck/Frank Montag/Franz-Jürgen Säcker (eds.), *MüKo Wettbewerbsrecht*, 3rd edn. (München: C.H.Beck, 2020) vol. I, para. 377; this also applies to Austrian Competition Law, cf. most recently Austrian OGH

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out in (sparse) case law, the balancing of interests follows the principle of proportionality.[128]

Based on this, the application of a *(cumulative) four-step test* which focuses on whether the terms and conditions used (a) pursue a legitimate purpose, (b) are suitable for achieving this legitimate purpose, (c) are necessary in the sense that there are no less restrictive means for achieving the respective purpose and (d) the legitimate purpose outweighs the exploitative effect emanating from the clause is suggested.[129]

Besides commercial interests of the platform operator (monetisation of data through marketing), the collection of data regularly enables the development of new products and the improvement of existing offerings through personalisation. Thus, the exploitation of (personal) data by the platform operator is – at least to a certain extent – also in the interest of private users.[130] If users benefit from the increased value of the platform through improved personalisation, it can be argued that the data processing terms pursue a legitimate purpose (*point a) of the four-step test approach*).[131] Moreover, the collection of data significantly contributes to achieving this legitimate purpose as it enables personalisation and thus improved user experience in the first place (*point b) of the four-step test approach*).

Regarding the necessity criterion (*point c) of the four-step test approach*), it should be kept in mind that, particularly in the area of supposedly 'free' digital products, a certain degree of data collection is required to be able to offer the service (free of charge) at all.[132] Thus, in order to keep ad-financed platforms and innovation alive, the collection of data by a market dominant platform operator cannot *per se* lead to

17.02.2021, *Peugeot/Büchl*, 16 Ok 4/20d, para. 169; all decisions of the Austrian OGH can be accessed via <http://ris.bka.gv.at/Jus/> with their case number.

[128] Commission 20.4.2001, *Duales System Deutschland*, COMP D3/34.493, para. 112 referring to CJEU 14.2.1978, *United Brands*, C-27/76, ECLI:EU:C:1978:22, para. 190; for Austria cf. Austrian OGH 17.02.2021, *Peugeot/Büchl*, 16 Ok 4/20d, para. 169.

[129] For details see Scharf, *Datenmissbrauch im Kartellrecht*, pp. 169-170; cf. Robert O'Donoghue/Jorge Padilla, *The Law and Economics of Article 102 TFEU*, 2nd edn. (Oxford/Portland/Oregon: Hart Publishing, 2013), p. 856; Maximilian N. Volmar/Katharina Helmdach, 'Protecting consumers and their data through competition law? Rethinking abuse of dominance in light of the Federal Cartel Office's Facebook investigation' (2018) ECJ 195-215, p. 202.

[130] Justus Haucap, 'Data Protection and Antitrust: New types of abuse cases? An economist's view in light of the German Facebook decision' (2019) CPI Antitrust Chronicle 57-61, p. 58.

[131] Affirmative Volmar/Helmdach, 'Protecting consumers and their data through competition law?', p. 202.

[132] Jochen Mohr, 'Konditionenmissbrauch durch soziale Netzwerke: Facebook' (2020) WuW 506-12, p. 507.

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a breach of Art 102 TFEU. Rather, the collection of data to an extent that is necessary for the provision and maintenance of the platform (plus an appropriate profit margin) must be permitted under competition law.[133] Practical difficulties may arise in distinguishing between the (permitted) amount of data that is necessary for maintaining or improving platform operations plus generating an appropriate profit margin on the one hand and excessive (i.e., exploitative) data collection prohibited by Art 102 TFEU on the other hand. In any case, invoking commercial interests or enabling an improved user experience does not entitle the platform operator to collect and exploit data to an unlimited extent.[134] Processing the data at hand must not only be suitable for achieving the legitimate purpose but must rather also be the least intrusive means of achieving it.[135] If the platform operator can finance and/or improve its offering based on a lower volume of data, the necessity criterion is *prima facie* not fulfilled.[136] It is, e.g., conceivable that the personalisation of a social network's offering would – albeit less precisely targeted – still be possible solely based on (user) data generated on the social network itself; the same could apply to customer-driven advertising. Although the use of third-party data could theoretically (further) improve the targeting of the offering or advertising, data collected outside of the platform may not be absolutely necessary for financing or improving the social network. This question is also dealt with in the ongoing proceedings of the German FCO against Facebook based on excessive data collection outside the social network (so-called 'off-Facebook' data) which is subsequently linked to Facebook user profiles.[137] Similarly, the German FCO's investigation against Google concerns the processing of user data across different services without granting the users sufficient choice as to how the platform will use their data (see Chapter III. B.).[138]

In order to minimise competitive risks, platform operators should offer (at least) two usage models: Users should have the choice between (i) a 'data-saving' usage model,

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[133] Zschoch, *Soziale Netzwerke im Kartellrecht*, p. 126; Robertson, 'Excessive data collection: Privacy considerations and abuse of dominance in the era of big data' (2020) CMLR, 161-90, p. 180.

[134] Cf. German FCO 7.2.2019, *Facebook*, B6-22/16, paras. 690-693.

[135] Robertson, 'Excessive data collection', p. 181.

[136] From a data protection perspective see Mark-Oliver Mackenrodt/Klaus Wiedemann, 'Zur kartellrechtlichen Bewertung der Datenverarbeitung durch Facebook und ihrer normativen Kohärenz mit dem Datenschutzrecht und dem Datenschuldrecht' (2021) ZUM 89-103, pp. 99-100.

[137] German FCO 6.2.2019, *Facebook*, B6-22/16.

[138] German FCO, Press release 11.01.2023 < https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/11_01_2023_Google_Data_Processing_Terms.html;jsessionid=1122A76D027CF64F84523ED274EBAFA4.2_cid390?nn=3591568> accessed 18 August 2023.

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which is less personalised and gets by with limited data access, and (ii) a 'data-intensive' usage model, which involves strong personalisation and unrestricted data access.[139] In practice, this could be implemented by introducing a selectable option that allows platform users to opt in or out of the collection of additional data. To avoid circumvention, recital 36 of the DMA clarifies that any 'data-saving' alternatives must be of equivalent quality and scope, i.e., not subject to restrictions. Alternatively, a paid model that gives users more privacy in exchange for a monetary fee could also be implemented.[140]

In a final step, the negative effects emanating from the clause in question must be weighed against the benefits of its legitimate purpose (*point d) of the four-step test approach*). This requires an assessment on a case-by-case basis, taking into account all the specific circumstances.[141] In the area of data-driven business models, it is necessary to compare all the benefits for the users associated with the commercialisation of their data (e.g., maintaining the possibility to use the platform, personalised user experience, customer-driven advertising, etc.) with the extent of its impairment (e.g., restriction of the user's economic freedom of choice, loss of control over data, violation of the fundamental right to informational self-determination, etc). In this context, particular attention must also be paid to (i) the imbalance of power between the platform operator and its users, including a (potential) lack of alternative options (in particular with regard to so-called 'take-it-or-leave-it' offers),[142] (ii) user expectations regarding the extent of data collection, which is influenced by the lack of transparency (of data processing terms) and information asymmetries[143] and (iii) competitive efficiencies associated with the data collection at hand, i.e., whether and to what extent users participate in any welfare gains[144].[145] If the exploitative effect

[139] Recital 36 DMA, OJ 2022 L 265 p. 1; German BGH 23.6.2020, *Facebook*, KVR 69/19, paras. 57, 86 and 121; all decisions of the German BGH can be accessed via <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/list.py?Gericht=bgh&Art=en&Datum=Aktuell&Sort=12288> with their case number.

[140] Kerber, 'Digital Markets, Data and Privacy', p. 644.

[141] Volmar/Helmdach, 'Protecting consumers and their data through competition law?', pp. 202-03.

[142] Commission 20.4.2001, *Duales System Deutschland*, COMP D3/34.493; German BGH 23.6.2020, *Facebook*, KVR 69/19, para. 121.

[143] Robertson, 'Excessive data collection', pp. 181-82 referring to CJEU 14.3.2013, *Allianz Hungaria*, C-32/11, ECLI:EU:C:2013:160, para. 47.

[144] Brics Competition Law and Policy Center, Digital Era Competition: A Brics View (2019), pp. 872-73, <https://publications.hse.ru/mirror/pubs/share/direct/321442173.pdf> accessed 18 August 2023.

[145] For details on these criteria see Scharf, *Datenmissbrauch im Kartellrecht*, pp. 177-84.

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of the clause in question prevails, the balance of interests must tilt in favour of private users, leading to a violation of art 102 lit a TFEU.[146]

3. Exclusionary effects of excessive data collection

In addition to exploitative effects to the detriment of private users, excessive data collection can also impede competitors of the market dominant undertaking (e.g., in the form of barriers to market entry) and thus fall under the broader category of exclusionary abuse which is alco covered by Art 102 TFEU.[147] In general, due to the close interconnectedness of different customer groups on multi-sided online platform markets, exploitative and exclusionary abuses are moving closer together. This applies, in particular, when data serves as a kind of non-monetary consideration on one side of the platform (e.g., on the user market) and at the same time determines the quality of the offering on another side of the platform (e.g., on the advertising market) like, e.g., on social networks or search engines. In such cases, increased data collection can impede competitors on (i) the user market as well as on (ii) other markets (in particular, on online advertising markets), a development which is described in more detail below. For determining an exclusionary abuse, it is sufficient that the incriminated conduct is likely to restrict competition, i.e., potentially leads to anticompetitive foreclosure of the market; proof of actual anticompetitive effects is not required.[148]

Excessive data collection enables the dominant undertaking to improve its offering to an extent that is not possible for competitors. Facebook, for example, can predict user behaviour even more accurately based on data collected outside the social network and thus develop its services even more precisely;[149] this in turn attracts further users and enables the collection of an even greater amount of data (self-reinforcing effect). This strengthens barriers to market entry and (further) secures the position of the market dominant undertaking.[150] Due to the self-reinforcing effect

[146] A breach of Art 102 TFEU may, *inter alia*, trigger fines of up to 10 % of the worldwide group turnover achieved in the last financial year (Art 23 Reg 1/2003 [OJ 2003 L 1 p. 1]).

[147] On the applicability of Art 102 lit a TFEU with regard to horizontal relationships (i.e., towards competitors), see CJEU 11.4.1989, *Ahmed Saeed*, C-66/86, ECLI:EU:C:1989:140, paras. 42-46; Commission 20.4.2001, *Duales System Deutschland*, COMP D3/34.493; Jung, 'Art 102 AEUV', para. 158.

[148] CJEU 6.12.2012, *Astra Zeneca*, C-457/10 P, ECLI:EU:C:2012:770, para. 112; CJEU 19.4.2012, *Tomra*, C-549/10 P, ECLI:EU:C:2012:221, para. 79; CJEU 17.2.2011, *TeliaSonera*, C-52/09, ECLI:EU:C:2011:83, para. 64; CJEU 15.3.2007, *British Airways*, C-95/04 P, ECLI:EU:C:2007:166, para. 68.

[149] With regard to social networks see German BGH 23.6.2020, *Facebook*, KVR 69/19, para. 94.

[150] Cf. Commission, Guidance on exclusionary conduct, (OJ 2009 C 45, p. 7) para. 20.

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based on extensive data collection, competitors may be prevented from reaching a critical (user) mass required to finance a data-driven business model. Thus, excessive data collection can have exclusionary effects on the user market to the detriment of (actual or potential) competitors of the dominant undertaking.[151]

At the same time, network effects stemming from enhanced data collection may also have exclusionary effects in other markets like, e.g., online advertising markets, which are closely connected to the user market.[152] Extended data collection enables the market dominant undertaking to better predict user behaviour. This allows the platform operator to place advertisements that are even more targeted than those of its (potential) competitors.[153] It follows that, for data-driven business models, the scope and quality of the data collected are of high relevance for acquiring advertising customers and generating revenues. Thus, excessive data collection by a (market dominant) platform operator may unduly disadvantage other undertakings in competing for advertising contracts necessary for financing data-driven business models.[154]

4. Incorporating privacy issues into competition law analysis

In general, the lawfulness under competition law is unrelated to compliance or non-compliance with other legal rules.[155] This is in line with the core purpose of competition law, namely to protect the competitive process itself,[156] as opposed to protecting consumers from breaches of other bodies of law (e.g., data protection provisions).[157] Therefore, an infringement on other bodies of law is neither necessary nor sufficient for a violation of the ban on abusive conduct in the meaning of Art 102

[151] German BGH 23.6.2020, *Facebook*, KVR 69/19, paras. 92-101.

[152] German BGH 23.6.2020, *Facebook*, KVR 69/19, para. 43; despite final clearance see Commission 20.3.2019, *Google/Fitbit*, AT.40411, para. 468; Commission 3.10.2014, *Facebook/WhatsApp*, COMP/M.7217, para. 187.

[153] Heike Schweitzer/Justus Haucap/Wolfgang Kerber/Robert Welker, *Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen* (Baden-Baden: Nomos, 2018), p. 16.

[154] German BGH 23.6.2020, *Facebook*, KVR 69/19, para. 94; CMA, Online platforms and digital advertising – Market study final report, para. 5.165.

[155] CJEU 6.12.2012, *Astra Zeneca*, C-457/10 P, ECLI:EU:C:2012:770, para. 132.

[156] For a (historical) overview on different approaches with regard to the protective purpose of Competition Law see Scharf, *Datenmissbrauch im Kartellrecht*, pp. 191-207.

[157] Guiseppe Colangelo/Mariateresa Maggiolino, 'Data Protection in Attention Markets: Protecting Privacy through Competition?', JECLAP 363-69, p. 367.

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TFEU.[158] However, any restriction of competition caused by a breach of law as a means of exploitation or obstruction may constitute an aggravating factor to the detriment of the market dominant undertaking.[159] It follows that privacy issues and the corresponding use of (personal) data can be part of the competitive assessment *only* if they are liable to affect the competitive process.[160] This may be particularly relevant for data-driven business models of the digital economy where decisions related to the collection and use of personal data may have meaningful economic and competitive implications.[161]

Moreover, irrespective of a breach of law, considerations outside of competition law (such as data protection interests) can find their way into the competitive analysis in the course of assessing the (un)fairness of a platform operator's business terms.[162] Due to the importance of data for business models in the digital economy, data (protection) has a meaningful impact on the market and thus on competition.[163] Access to data has expressly been recognised as an important element of non-price competition and may therefore have crucial competitive consequences, insofar as the preservation of open markets or the protection of the opposite side of the market (against exploitation or heteronomy) is affected.[164] This line of reasoning is supported by the ECJ's findings in *Allianz Hungaria*[165] according to which external influences may be considered in competition law. In this case, the ECJ held that the impairment of goals pursued by a set of national rules outside of competition law could be considered when assessing whether there was a restriction of competition. Moreover, in general, the competitive assessment of a conduct must be based on the 'content,

[158] Advocate General Rantos, Opinion as of 20.9.2022, *Meta*, C-252/21, para. 23, footnote 18: '[...] it is clear that conduct relating to data processing may breach competition rules even if it complies with the GDPR; conversely, unlawful conduct under the GDPR does not automatically mean that it breaches competition rules'.

[159] Francisco Costa-Cabral/Orla Lynskey, 'View Family ties: The intersection between data protection and competition in EU law' (2017) CMLR 11-50, p. 30; Mohr, 'Konditionenmissbrauch durch soziale Netzwerke: Facebook', p. 510; Monopolkommission, 'Sondergutachten 68 - Herausforderung digitale Märkte' (2015), para. 523; cf. German BGH 23.6.2020, *Facebook*, KVR 69/19, para. 99.

[160] German FCO/Autorité de la concurrence, 'Competition Law and Data' (2016), p. 23.

[161] German FCO/Autorité de la concurrence, 'Competition Law and Data' (2016), p. 23.

[162] Sebastian Telle, 'Konditionenmissbrauch durch Ausplünderung von Plattform-Nutzerdaten' (2016) WRP 814-820, pp. 818-19.

[163] CJEU 4.7.2023, *Meta*, C-252/21, paras. 50f.

[164] Nothdurft, 'para. 19 GWB', para. 190.

[165] CJEU 14.3.2013, *Allianz Hungaria*, C-32/11, ECLI:EU:C:2013:160, para. 47.

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its objectives and the economic and legal context of which it forms a part'.[166] Accordingly, whether data-related conduct has a (potentially) negative impact on competition and thus violates competition law must be examined on a case-by-case basis, taking into account all the circumstances of the individual case. Given that access to data constitutes an essential criterion for market entry, as well as for subsequent success in (digital) markets, rejecting the inclusion of data protection considerations does not appear to be appropriate (any longer). Rather, where data serves as a vital input for economic activities and thus has a competitive impact, the (correct) handling and use of data can be taken into account when assessing a conduct's fairness.[167] This finding corresponds to the predominant view in legal literature[168] as well as extensive studies carried out by competition authorities and specialised institutions[169] that advocate for the inclusion of data protection interests under competition law.[170]

Accordingly, in its recent *Meta*[171] decision, the CJEU explicitly found that national competition authorities are allowed to incorporate data protection considerations in their assessments under competition law. This landmark decision of the CJEU is based on a request of the Düsseldorf Higher Regional Court[172] for a preliminary ruling

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[166] CJEU 14.3.2013, *Allianz Hungaria*, C-32/11, ECLI:EU:C:2013:160, para. 66; cf. CJEU 26.9.2018, *Infineon*, C-99/17 P, ECLI:EU:C:2018:773, para. 156; CJEU 4.7.2023, *Meta*, C-252/21, para. 47 referring to Advocate General Rantos, Opinion as of 20.9.2022, *Meta*, C-252/21, para. 23.

[167] Stefan Holzweber/Arno Scharf, 'Datenmissbrauch im Kartellrecht?' (2018) ecolex 258-61, pp. 260-61.

[168] See e.g., Wouter Wils, 'The obligation for the competition authorities of the EU member states to apply EU Antitrust Law and the Facebook decision of the Bundeskartellamt' (2019) Concurrences Review Art. N° 91034 para. 28; Costa-Cabral/Lynskey, 'View Family ties', pp. 31, 35-36; Schneider, 'Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's investigation against Facebook', p. 221; Volmar/Helmdach, 'Protecting consumers and their data through competition law?', p. 209; Stefan Holzweber, 'Daten als Machtfaktor in der Fusionskontrolle' (2016) NZKart 104-12, p. 107; Arno Scharf, 'Exploitative business terms in the era of big data – the Bundeskartellamt's Facebook decision' (2019) ECLR 331-339, p. 332.

[169] See e.g. Crémer/Montjoye/Schweitzer, 'Competition Policy for the Digital Era', p. 77: 'Competition law has to take data protection law into account, [...]'; German FCO/Autorité de la concurrence, 'Competition Law and Data' (2016), pp. 23-24; Monopolkommission, 'Sondergutachten 68 - Herausforderung digitale Märkte' (2015), paras. 515-528; Brics Competition Law and Policy Center, 'Digital Era Competition: A Brics View' (2019), pp. 869-80.

[170] For an extensive overview on the existing decisional practice, views in legal literature and studies on this issue see Scharf, *Datenmissbrauch im Kartellrecht*, pp. 209-39.

[171] CJEU 4.7.2023, *Meta*, C-252/21, para. 62.

[172] Düsseldorf Higher Regional Court 24.3.2021, Kart 2/19 (V); taking into account the findings in CJEU 4.7.2023, *Meta*, C-252/21, the Facebook proceeding pending before the Düsseldorf Higher Regional Court can now continue.

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under Art 267 TFEU stemming from the prominent German Facebook saga. The Düsseldorf Higher Regional Court asked the CJEU, in essence, whether national competition authorities are entitled to assess the compliance of data processing with the GDPR.[173] The CJEU answered this question in the affirmative and ruled that 'it may be necessary for the competition authority of the Member State concerned also to examine whether that undertaking's conduct complies with rules other than those relating to competition law'[174] (such as the rules on the protection of personal data under the GDPR). According to the CJEU, the reason for acknowledging data protection concerns within the wider context of competition law lies in the fact that the access and use of personal data became a significant parameter of competition between undertakings in the digital economy.[175] This applies, in particular, to those business models that are financed through the marketing of personalised advertising.[176] Therefore, the CJEU held that 'excluding the rules on the protection of personal data from the legal framework to be taken into consideration by the competition authorities [...] would disregard the reality [...]' of digital economic development and undermine competition law's effectiveness altogether.[177] Following the Opinion of Advocate General Rantos, the CJEU agrees to consider the (non)compliance of an undertaking with the GDPR within the 'all-of-the-circumstances' analysis under competition law; the CJEU emphasises that the compliance or non-compliance of a conduct with the GDPR may 'be an important indication of whether that conduct amounts to a breach of competition rules.'[178]

To minimise the risk of (potential) divergences between national competition and data protection authorities, the CJEU provides an important institutional limitation: Following (again) the opinion of Advocate General Rantos, the CJEU emphasises that, in the absence of rules governing the cooperation between national competition authorities and data protection authorities, they are at least both bound by the duty

[173] Cf. questions 1 and 7 of the preliminary ruling; the rest of the questions of the preliminary ruling relate to the interpretation and application of certain provisions of the GDPR (Questions 2, 3 to 5 and 6).

[174] CJEU 4.7.2023, *Meta*, C-252/21, para. 48.

[175] On the potentially mitigating effect of synthetic data (i.e., artificially-generated data created using generative AI) on data as a source of market power, see Gal/Lynskey, 'Synthetic Data' (2023).

[176] CJEU 4.7.2023, *Meta*, C-252/21, para. 50.

[177] CJEU 4.7.2023, *Meta*, C-252/21, para. 51.

[178] CJEU 4.7.2023, *Meta*, C-252/21, para. 47 referring to Advocate General Rantos, Opinion as of 20.9.2022, *Meta*, C-252/21, para. 23; for a detailed analysis of the opinion of Advocate General Rantos in the *Meta* case see Fabian Uebele, 'Die Interdependenz von Datenschutz- und Kartellrecht - Die Schlussanträge des GA Rantos im Verfahren EuGH - C-252/21 - Meta Platforms' (2023) WRP 9-13.

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to cooperate in good faith enshrined in Art 4 para 3 TEU[179].[180] It follows that, when interpreting the GDPR, national competition authorities are required to consult the data protection authorities concerned in order to observe, if relevant, their respective powers and competences.[181] Within this wider duty to cooperate, national competition authorities must also determine if there are any prior examinations or decisions of data protection authorities concerning the same facts. If this is the case, national competition authorities cannot depart from it. However, they remain free to draw their 'own conclusions from the point of view of the application of competition law.'[182] If the competent data protection authorities do not have any objection (or do not reply within a reasonable time[183]), the national competition authority may continue its own investigation of the relevant data protection rules.[184]

5. Interim conclusion

Excessive data collection by a market dominant platform operator is, in principle, caught by the ban on abusive practices (Art 102 TFEU). Despite their economic value, data cannot be equated with monetary prices under competition law. This is based on the finding that the economic peculiarities of data are different from those of monetary prices.

Instead of abusive pricing, excessive data collection may still be qualified as 'unfair trading conditions' within the meaning of Art 102 lit a TFEU. The term 'trading conditions' must be interpreted broadly, including terms of use of internet platforms. It is suggested that platform operators' terms and conditions (demanding large amounts of data from their users) are 'fair' (i.e., lawful) under Art 102 TFEU lit a TFEU if they (a) pursue a legitimate purpose, (b) are suitable for achieving this legitimate purpose, (c) are necessary in the sense that there are no less restrictive means for achieving the respective purpose, *and* (d) the legitimate purpose outweighs the exploitative effect emanating from the clause. In this context, the interests of the

[179] Consolidated Version of the Treaty on European (OJ 2012 C 326/13).

[180] CJEU 4.7.2023, *Meta*, C-252/21, para. 53 referring to Advocate General Rantos, Opinion as of 20.9.2022, *Meta*, C-252/21, para. 28.

[181] CJEU 4.7.2023, *Meta*, C-252/21, para. 54; in the case at hand, the CJEU stated that the German FCO fulfilled its cooperation obligation sufficiently by contacting (national and regional) data protection authorities.

[182] CJEU 4.7.2023, *Meta*, C-252/21, para. 56.

[183] Given resource constraints of the GDPR authorities, precedence waivers may not be all that rare in the future, cf. Peter Georg Picht, 'CJEU on Facebook: GDPR Processing Justifications and Application Competence' (2023) GRUR 1169-72 (1170).

[184] CJEU 4.7.2023, *Meta*, C-252/21, para. 59.

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users (such as maintaining the possibility to use the platform, informational self-determination, etc.) must be balanced with those of the respective platform provider (commercialisation of user data). This requires an assessment on a case-by-case basis, taking into account all the specific circumstances. Take-it-or leave it offers with strong personalisation and unrestricted data access run the risk of failing the four-step test approach described above. In order to minimise competitive risks, platform operators should (at least) offer a less personalised usage model with limited data access.

Besides exploitative effects to the detriment of private users, excessive data collection can also impede competitors of the market dominant undertaking: Extended data collection enables the market dominant undertaking to better predict user behaviour and place advertisements that are even more targeted than those of its (potential) competitors. As a result, excessive data collection may unduly disadvantage other undertakings in competing for advertising contracts necessary for financing data-driven business models.

An infringement of other bodies of law is neither necessary nor sufficient for a violation of the ban on abusive conduct in the meaning of Art 102 TFEU. However, any restriction of competition caused by a breach of law (such as data protection regulations) may constitute an aggravating factor to the detriment of the market dominant undertaking.[185] Given that access to data constitutes an essential criterion for market entry, as well as subsequent success in (digital) markets, privacy issues and the corresponding use of (personal) data can regularly be included in the competitive assessment.

III. Shift from *ex post* antitrust intervention to *ex ante* regulation - recent legislative developments

Due to the above-mentioned challenges when applying competition law to data-driven business models, numerous legislators are reacting with reforms.[186] In the following, an overview of the EU's legislative package to ensure fair digital markets (DMA) is given and compared with recent developments in Germany (10th GWB-

[185] Francisco Costa-Cabral/Orla Lynskey, 'View Family ties: The intersection between data protection and competition in EU law' (2017) CMLR 11-50, p. 30; Mohr, 'Konditionenmissbrauch durch soziale Netzwerke: Facebook', p. 510; Monopolkommission, 'Sondergutachten 68 - Herausforderung digitale Märkte' (2015), para. 523; cf. German BGH 23.6.2020, *Facebook*, KVR 69/19, para. 99.

[186] For an overview of the reasons behind the rise of regulatory intervention in digital markets, including corresponding examples of regulatory tools in the EU, US and UK, cf. Vikas Kathuria, 'The Rise of Participative Regulation in Digital Markets' (2023) JECLAP 537-48.

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Amendment)[187] and Austria (KaWeRÄG 2021). Albeit with differences in detail, the common objective of these reforms is to create a regulatory framework to ensure fair competition in the digital economy. It is seen as a positive development that the new frameworks explicitly take into account the economic peculiarities of platform-based business models (like, e.g., cross-market importance of user data, network effects, etc.).

A. Digital Markets Act (DMA)

The DMA aims to address concerns regarding 'contestability' and 'fairness' in the digital economy.[188] These concerns largely corresponds with the purpose of the Austrian KaWeRÄG 2021 (Section 28a KartG) and the German 10th GWB-Amendment (Section 19a GWB).

The DMA is applicable to companies that act as so-called gatekeepers in the digital economy. Companies operating one or more of the 'core platform services' listed in the DMA (e.g., search engines, social networking service, etc.)[189] in at least three EU member states may qualify as a gatekeeper. To be designated a gatekeeper, a company must meet three (cumulative) qualitative criteria listed in Art 3 para 1 DMA; these qualitative criteria are presumed to be met if a firm meets certain quantitative criteria laid down in Art 3 para 2 DMA. This interplay is described below. (i) First, the company must have a significant impact on the European market. This criterion is presumed to be met when the company's annual EU turnover amounts to at least EUR 7.5 billion in each of the last three financial years, *or* its average market capitalisation/fair market value is at least EUR 75 billion in the last financial year. (ii) Second, the company provides a core platform service that is an important gateway for business users to reach final consumers. This criterion is presumed to be met if the company provides a core platform service to at least 45 million monthly active end users and at least 10,000 yearly active business users in the EU in the last financial year. (iii) Third, the company must (or will most likely soon) have an entrenched and

[187] The 11th GWB-Amendment (which was accepted by the German parliament on 6 July 2023 and will enter into effect following the Federal Council's final adoption expected end of September 2023 before being published in the official journal) could not be considered in the context of this article; for an overview see Nada Ina Pauer, 'The 11th Amendment of the German Act Against Restraints of Competition - A 'New Competition Tool', Facilitated Disgorgement and the DMA's Enforcement' (2023) JECLAP 1-6; on the relationship between Section 32f GWB (introduced in the context of the 11th GWB-Amendment) and the DMA, cf. Thomas Weck, 'DMA-Torwächter und § 32f GWB' (2023) NZKart 392-96; Boris Paal/Fabian Kieß, 'Ausweitung von Sektoruntersuchungen durch § 32f GWB-E: Gebotene Komplettierung oder Paradigmenwechsel?' (2022) NZKart 678-84 (683).

[188] Recital 7 DMA, OJ 2022 L 265 p. 1.

[189] Art 2 para. 2 DMA, OJ 2022 L 265 p. 1.

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durable market position. This criterion is presumed to be met in case the company met the second criterion during the last three years.

The DMA imposes numerous *ex-ante* obligations on gatekeepers,[190] most of which are inspired by the decisional practice of Article 102 TFEU.[191] With regard to data-related practices, the DMA contains provisions for gatekeepers concerning the processing of data, the combination and cross-use of personal data, the use of non-publicly available data of business users and data portability. In this context, Art 5 para 2 and Art 6 para 2 DMA are relevant. While Art 5 para 2 DMA contains prohibitions regarding the processing of data of end users, Art 6 para 2 DMA concerns the processing of data of commercial users.

Article 5 para 2 DMA contains four specific prohibitions: (i) Absent express user consent, gatekeepers must not – for advertising purposes – process personal data from end users using services of third parties (which in turn make use of core platform services of the gatekeeper). This makes it more difficult to cross-subsidise the user side of the platform based on selling personal data for targeted advertising opportunities. (ii) Article 5 para 2 lit b DMA requires gatekeepers to refrain from combining personal data obtained by a core platform service with data obtained by any other services of the gatekeeper or third-party services, absent express user consent. Therefore, gatekeepers cannot automatically combine user data across different services of its own ecosystem into a single profile without the user's explicit consent (e.g., data collected on a social network cannot be combined with data collected in the context of an online messaging service). With Section 19a para 2 Nr. 4 lit a GWB, a similar provision was implemented in Germany, according to which the (unconsented) combination of user data is prohibited (see Chapter III.B.). (iii) Art 5 para 2 lit c DMA prohibits gatekeepers from cross-using personal data between the relevant core platform service and any other services (including other core platform services) provided by the gatekeeper, unless users express consent. (iv) Finally, Art 5 para 2 lit d DMA requires gatekeepers to refrain from signing in end users to other services of the gatekeeper in order to combine personal data, unless users express consent. This provision is intended to ensure users' freedom to use several platforms and services separately and independently of each other.

The conduct prohibited under Art 5 para 2 DMA is permissible under two conditions: First, users must have consented to the respective conduct in a GDPR-

[190] Art 5 and 6 DMA, OJ 2022 L 265 p. 1.

[191] For a comparison of obligations under the DMA with precedents from case law under Art 102 TFEU cf. Jan Blockx, 'The Expected Impact of the DMA on the Antitrust Enforcement of Unilateral Practices' (2023) JECLAP 1-9 (4).

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compliant manner, i.e., voluntarily and informed.[192] Second, the gatekeeper must provide a less personalised (but equivalent) alternative, without making the use of the core platform service or specific functionalities thereof dependent upon the user's consent.[193] Apart from the existence of an effective, GDPR-compliant consent of the user, gatekeepers may justify data processing (also) under Art 6 para 1 lit c-e GDPR.

In addition to Art 5 para 2 DMA, Art 6 para 2 DMA prohibits gatekeepers from processing non-public data generated by their *commercial* users (or their end-users). This provision recalls the proceedings of the Commission against Amazon allegedly spying on its commercial users in order to compete with them (so-called 'sherlocking').[194] With Section 19a para 2 Nr 4 lit b GWB, a similar provision was introduced in Germany (see Chapter III.B.).

From a legal competence point of view, it should be noted that the DMA is considered to be a sector-specific regulation explicitly located outside of competition law. The DMA was not based on Art 103 TFEU, which is intended for the implementation of Art 101 and 102 TFEU, but exclusively on the 'harmonisation clause' of Art 114 TFEU.[195] This corresponds to the fact that – according to the EU legislator[196] – the DMA protects a different legal interest than competition law. While competition law aims at protecting undistorted competition across all markets, the DMA aims to protect the contestability and fairness of those markets where so-called gatekeepers are active. In the author's view, both sets of rules protect fair and contestable competition; the differentiation made by the EU legislator appears rather artificial.[197] The correct classification can have meaningful consequences, e.g., when

[192] In this regard, the DMA explicitly refers to Article 4 para 11 and Article 7 of the GDPR.

[193] Recital 36-37 DMA, OJ 2022 L 265 p. 1; for more details cf. Christian Schmid/Cajetan Späth, 'Die weniger personalisierte Alternative nach Art. 5 Abs. 2 DMA – ein europäischer Sonderweg?' (2022) NZKart 568-74.

[194] Commission, Press release 10.11.2020, IP/20/2077, <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077> accessed 18 August 2023.

[195] Critical Alfonso Lamadrid De Pablo/Nieves Baýon Fernández, 'Why the Proposed DMA Might Be Illegal under Article 114 TFEU, and How to Fix It' (2021) JECLAP 576-589, pp. 578-82, questioning the lawfulness of Art 114 TFEU as a legal basis for the DMA; similar Jürgen Basedow, 'Das Rad neu erfunden: Zum Vorschlag für einen Digital Markets Act' (2021) ZEuP 217-26, pp. 221 and 225, who considers it necessary to base the DMA at least also on Art 103 TFEU (in addition to Art 114 TFEU).

[196] Recital 11 DMA, OJ 2022 L 265 p. 1.

[197] Consenting Heike Schweitzer, 'The Art to Make Gatekeeper Positions Contestable and the Challenge to Know What Is Fair A Discussion of the Digital Markets Act Proposal' (2021) ZEuP 503-44, pp. 511 and 517; Marco Botta, 'Sector regulation of digital platforms in Europe: uno, nessuno e

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assessing the applicability of the prohibition on double jeopardy.[198] According to this principle, no one may be punished twice for the same conduct (*ne bis in idem*). In competition law, the application of the *ne bis in idem*-principle has so far required the threefold identity of the facts, the infringer and the protected legal interest (in contrast to other areas of EU law where the identity of the protected legal interest is irrelevant).[199] Given the lack of identity of protected legal interests between the DMA and competition law (as intended by the EU legislator[200]), a double punishment would, in principle, be possible.[201] Although confirmed in *Slovak Telekom*[202], in its two recent judgments *bpost*[203] and *Nordzucker*[204], the ECJ moves away from its three-fold identity approach in the field of EU competition law.[205] By abandoning the criterion of the protected legal interest (and thus opting for a twofold identify approach), the CJEU signals a shift towards a unified test for *ne bis in idem* principle across EU law, including competition law.[206] With regard to the DMA, it can be assumed that a dual identity will also suffice (i.e., identity of offender and identity of facts).[207] However, assuming that the 'idem' condition is satisfied, the Court must, in a second step,

centomila' (2021) JECLAP 500-12, p. 509; Pierre Larouche/Alexandre de Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021) JECLAP 542-60, p. 544.

[198] Cf. Lukas Harta, 'Der Digital Markets Act und das Doppelverfolgungsverbot' (2022) NZKart 102-08.

[199] CJEU 14.2.1978, *Aalborg Portland*, C-204–00 P, EU:C:2004:6, para. 338; EuGH 14.02.2012, *Toshiba*, C-17/10, ECLI:EU:C:2012:72, para. 97; CJEU 3.4.2019, Powszechny Zakład Ubezpieczeń na Życie S.A. w Warszawie, C-617/17, ECLI:EU:C:2019:283, para. 26; critical with regard to this narrow interpretation of the prohibition of double jeopardy in competition law cf. Advocate General Wahl, Opinion as of 29.11.2018, *Powszechny Zakład Ubezpieczeń na Życie S.A. w Warszawie*, C-617/17, para. 46; Advocate General Kokott, Opinion as of 8.9.2011, *Toshiba*, C-17/10, para. 117; Advocate General Sharpston, Opinion as of 15.6.2006, *Gasparini ua*, C-467/04, para. 156.

[200] Recital 11 DMA, OJ 2022 L 265 p. 1.

[201] Cf. Dieter Thalhammer/Daniel Metz, '§ 28a KartG', in Alexander Egger/Natalie Harsdorf-Bosch (eds.), *Kartellrecht* (Wien: Linde, 2022) para. 42; Marcel Zober, 'Durchsetzung des DMA-E und dessen Verhältnis zum Kartellrecht' (2021) NZKart 611-17, p. 615.

[202] CJEU 25.2.2021, *Slovak Telekom*, C-857/19, para. 43, ECLI:EU:C:2021:139.

[203] CJEU 22.3.2022, *bpost*, C-117/20, ECLI:EU:C:2022:202.

[204] CJEU 22.3.2022, *Nordzucker*, C-151/20, ECLI:EU:C:2022:203.

[205] Michael Mayr, 'Redefining the Ne Bis in Idem Principle in EU Competition Law: bpost and Nordzucker' (2022) JECLAP 553–57 (556).

[206] CJEU 22.3.2022, *bpost*, C-117/20, paras. 34f; CJEU 22.3.2022, *Nordzucker*, C-151/20, paras. 38f.

[207] Andrea Achleitner, 'Digital Markets Act beschlossen: Verhaltenspflichten und Rolle nationaler Wettbewerbsbehörden' (2022) NZKart 359-66 (365); however, it should be noted that the court has consistently taken a rather narrow view of the identity of facts condition.

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consider whether the duplication of proceedings is justified. In its cases *bpost*[208] and *Nordzucker*[209], the Court argues that the duplication of proceedings is justified, *inter alia*, if two proceedings pursue – for the purpose of achieving a legitime objective of general interest – complementary aims. As already stated above, the EU legislator argues that the DMA is complementary to competition law and pursues an objective that is different from that of protecting undistorted competition on any given market (as defined in competition-law terms). Again, such an approach would pre-empt any concerns over parallel proceedings in breach of the *ne bis in idem* principle, on the ground that the different regulatory frameworks (DMA on the one hand and competition law on the other) protect different legal interests. As a result, an undertaking could thus still be fined twice for the same conduct, both ex-ante (according to the DMA) and ex-post (based on Art 102 TFEU). In the author's view, such a result appears to be at least questionable if not too far reaching.[210] It remains to be seen how this conflict will be handled in practice.

The DMA entered into force on 1 November 2022 and started to apply as of 2 May 2023. Potential gatekeepers shall within two months notify their core platform services to the Commission if they meet the thresholds established by the DMA (see above).[211] Once the Commission has received the complete notification, it will have 45 business days to designate undertakings as gatekeepers.[212] Following their designation, the respective gatekeeper must comply with the obligations laid down in the DMA within 6 months.[213] In case a gatekeeper fails to comply with the obligations under the DMA, the Commission may impose fines of up to 10% (or 20% for recidivism) of the total worldwide group turnover achieved in the last financial year.[214]

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[208] CJEU 22.3.2022, *bpost*, C-117/20, paras. 49f.

[209] CJEU 22.3.2022, *Nordzucker*, C-151/20, para. 52.

[210] Cf. Heike Schweitzer, 'The Art to Make Gatekeeper Positions Contestable' pp. 511 and 517, according to which the DMA and competition law protect the same legal interest, making a double punishment of the same conduct impermissible; Achleitner, 'Digital Markets Act' p. 365.

[211] Art 3 para. 3 DMA, OJ 2022 L 265 p. 1; so far, the Commission has received notifications from the following companies: Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft and Samsung, cf. Commission, Press release 4.7.2023 <https://digital-markets-act.ec.europa.eu/potential-gatekeepers-notified-commission-and-provided-relevant-information-2023-07-04_en> accessed 18 August 2023.

[212] Art 3 para. 4 DMA, OJ 2022 L 265 p. 1.

[213] Art 3 para. 10 DMA, OJ 2022 L 265 p. 1.

[214] Art 30 para. 1 and 2 DMA, OJ 2022 L 265 p. 1.

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B. German Amendment of the Act Against Restraints on Competition (10th GWB Amendment)

Similar to the DMA, the 10th GWB amendment has implemented an *ex-ante* procedure to capture economic power and its possible anti-competitive effects on competition in the digital economy.[215] Based on Section 19a para 1 GWB, the German FCO can determine companies to be of 'paramount cross-market significance'. In contrast to the DMA, the German legislator has decided to rely exclusively on qualitative criteria[216] to establish whether an undertaking is subject to the extended abuse control measures (i.e., no turnover or user thresholds to be exceeded). Another difference to the European 'one-size-fits-all' approach[217], which lays down *per se* obligations for companies that fulfil the gatekeeper criteria under the DMA, lies in the two-step approach of the German legislator: Following the determination of an undertaking to be of 'paramount cross-market significance', the German FCO can prohibit such undertakings from engaging in certain types of conduct. However, this has to be done in a separate decision by means of an order (Section 19a para 2 GWB). Companies declared to be of 'paramount cross-market significance' are thus not automatically (by statute) subject to the extended abuse control measures. Rather, relevant conduct will only be prohibited once the FCO has issued a separate prohibition decision.

With regard to data-related abusive conduct, the German FCO may invoke Section 19a para 2 Nr 4 GWB. This provision contains two new types of conduct that refer to certain types of data use. First, an undertaking may be prohibited from making use of its services conditional on the user's consent to the processing of data from other services of the undertaking or a third-party provider without giving the user sufficient choice as to whether, how and for what purpose such data are processed (Section 19a para 2 Nr 4 lit a GWB). This provision is similar to Article 5 para 2 lit b DMA (see

[215] For an analysis of the relationship between the German Section 19a GWB and the DMA, cf. Philipp Bongartz, '§ 19a GWB – a keeper? Die bleibende Bedeutung der Vorschrift im Abgleich mit dem DMA-Entwurf' (2022) WuW 72-82.

[216] Cf. Section 19a para. 1 Nr. 1 - 5 GWB.

[217] Justus Haucap/Heike Schweitzer, 'Revolutionen im deutschen und europäischen Wettbewerbsrecht' (2021) WRP

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Chapter III.A.) and reminiscent of the prominent German *Facebook*[218] case.[219] In this proceeding, the German Federal Court of Justice qualified the combination of user data outside of Facebook's social network (i.e. data collected from third party sources as well as from group-owned services like WhatsApp and Instagram) with Facebook user profiles to be abusive.[220] Second, an undertaking may be required to refrain from processing competitively sensitive data of its commercial users for purposes other than those necessary for the provision of its own services to these undertakings (Section 19a para 2 Nr 4 lit b GWB). This provision is similar to Article 6 para 2 lit b DMA that also restricts the processing of data received from business users (see Chapter III.A.).

Due to their wide variety of products and services, large digital companies can hold an economic position of power across different markets that is difficult for competitors to challenge.[221] Using data across markets allows those companies to further strengthen and expand their (cross-market) systems of products and services, which are often scalable and connected in various ways. Data collected on one market (e.g., from users of a social network) may be used on other, interrelated markets to the detriment of competitors (e.g., on advertising markets by enabling advertisements that are even more personalised). The bundling of data collected across different markets could thus act as a barrier to entry for new market participants. Against this backdrop, Sections 19a para 2 Nr 4 GWB intends to counteract such (data-related) market entry barriers.[222]

So far, the German FCO has made generous use of its declaratory power under Section 19a para 1 GWB. In its proceedings against Google/Alphabet[223], Amazon[224],

[218] German BGH 23.6.2020, *Facebook*, KVR 69/19, paras. 57, 86.

[219] The legislative materials for the 10th GWB amendment explicitly refer to the Facebook case, cf. German Federal Government, explanatory remarks on the government bill proposing the 10th GWB-Amendment, BT-Drs. Drucksache 19/23492, p. 76.

[220] German BGH 23.6.2020, *Facebook*, KVR 69/19, para. 64.

[221] German Federal Government, explanatory remarks on the government bill proposing the 10th GWB-Amendment, BT-Drs. Drucksache 19/23492, p. 73.

[222] German Federal Government, explanatory remarks on the government bill proposing the 10th GWB-Amendment, BT-Drs. Drucksache 19/23492, p. 76.

[223] German FCO 3.4.2023, *Google*, B7-61/21.

[224] German FCO 5.7.2022, *Amazon*, B2-55/21; Amazon has appealed this decision – the appeal proceedings are currently pending before the German BGH, cf. German FCO, Press release 14.11.2022,
<https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2022/14_11_2022

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Facebook/Meta[225] and Apple[226] the German FCO has already declared all four GAFA to be of 'paramount cross-market significance'. The decisions are valid for five years.[227] The German FCO is currently working on similar determinations for Microsoft.[228] No decisions have yet been published regarding the second step of the Section 19a GWB procedure – that is, the prohibition of specific conduct. However, according to a press release, the German FCO is currently, e.g., conducting an in-depth analysis of Google's data processing terms based on the extended abuse control measures laid out in Section 19a para 2 GWB.[229] Akin to the well-known German *Facebook*[230] data processing case, a key question in the ongoing proceedings against Google is whether consumers wishing to use Google's services have sufficient choice as to how the platform collects and connects their data across multiple services. Based on its current terms and conditions, Google can combine a variety of data from various services to, e.g., build detailed user profiles that can be deployed for advertising purposes or functions training. Google's terms and conditions allow the company to collect and process data across multiple of its own services (such as Google Search, YouTube, Google Play, Google Maps and Google Assistant) and even third-party sites as well as Google's background services, such as Google Play, which also collect data from Android devices. In its statement of objections (issued in December 2022), the German FCO tentatively concluded that users are not given sufficient choice as to whether, how and for what purpose they agree to this far-reaching processing of their data (Section 19a para 2 Nr 4 GWB). The authority argues, in particular, that the choices offered so far (if any) lack sufficient transparency and are too general.[231] In order to qualify as supplying sufficient choice, users must

_Amazon_19a.html;jsessionid=455916815879B3C7BBEA74DD8B560AA5.2_cid362?nn=3591568 > accessed 18 August 2023.

[225] German FCO 2.5.2022, *Meta*, B6 – 27/21.

[226] German FCO 3.4.2023, *Apple*, B9-67/21.

[227] Section 19a para 1 last sentence.

[228] German FCO, Press release 28.3.2023, <https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2023/28_03_2023_Microsoft.html> accessed 18 August 2023.

[229] German FCO, Press release 25.5.2021, <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2021/25_05_2021_Google_19a.html> accessed 18 August 2023.

[230] German BGH 23.6.2020, *Facebook*, KVR 69/19.

[231] German FCO, Press release 11.01.2023 < https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/11_01_2023_Google_Data_Processing_Terms.html;jsessionid=1122A76D027CF64F84523ED274EBAFA4.2_cid390?nn=3591568> accessed 18 August 2023.

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have the possibility to limit the processing of data to certain services and to distinguish between the different purposes for which the data will be used. Moreover, the German FCO says that the choices must not be devised in a way that makes it easier for users to approve rather than deny this data collection. Against this background, the German FCO 'is currently planning to oblige the company [Google] to change the choices offered'. This would mean a change from the hitherto passive attitude of prohibiting certain practices (such as in the *Facebook* case, where the authority prohibited the social network from combining user data across sources) towards a more active (interventionalist) approach.[232] Google will now have the opportunity to present reasons justifying its practices or to provide potential remedies to the German FCO's concerns. As the object of the proceedings — combining user data across different services — is also covered by the DMA in its Article 5 para 2, questions about the relationship between national competition authorities and enforcers of the European DMA are raised. In this regard, the German FCO claimed that Section 19a GWB (on which their investigation is based) 'partially exceeds the [...] requirements of the DMA' and that the authority 'is in close contact with the European Commission'.[233]

C. Austrian Competition and Cartel Law Amendment Act (KaWeRÄG 2021)

Similar to the European and German legislators, the KaWeRÄG 2021 introduced an *ex-ante* procedure to identify a particularly strong market position. However, in contrast to its European and German counterparts, Section 28a Austrian Cartel Act refers to the well-established concept of dominance (and not to 'gatekeepers' or undertakings of 'paramount cross-market significance'). According to Section 28a Austrian Cartel Act, an undertaking active on a 'multi-sided digital market'[234] can be declared as dominant within the meaning of Section 4 Austrian Cartel Act.[235] Besides

[232] Alba Ribera Martinez, A Facebook-Like Infringement Under Section 19a German Competition Act Against Google's Data Processing Terms, Kluwer Competition Blog, 23.01.2023 <https://competitionlawblog.kluwercompetitionlaw.com/2023/01/23/a-facebook-like-infringement-under-section-19a-german-competition-act-against-googles-data-processing-terms/> accessed 18 August 2023.

[233] German FCO, Press release 11.01.2023 < https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2023/11_01_2023_Google_Data_Processing_Terms.html;jsessionid=1122A76D027CF64F84523ED274EBAFA4.2_cid390?nn=3591568> accessed 18 August 2023.

[234] On these terms see Florian Reiter-Werzin/Maria Dreher, 'Der Antrag auf Feststellung einer marktbeherrschenden Stellung nach § 28a Kartellgesetz – Teil 2' (2022) ÖZK 96-107, pp. 98-101.

[235] This possibility is explicitly limited to the finding of (absolute) dominance under Section 4 Austrian Cartel Act; cases of relative market strength pursuant to Section 4a Austrian Cartel Act are not covered;

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the Austrian Federal Cartel Prosecutor and certain regulators, the Austrian FCO is entitled to file an application for a declaratory finding of dominance with the Austrian Cartel Court.[236] Unlike the German FCO or the Commission, the Austrian FCO still has no decision-making power. Rather, the Austrian FCO must always approach the Austrian Cartel Court to enforce competition law. The Austrian Cartel Court is the only authority able to declare an undertaking as dominant within the meaning of Section 28a Austrian Cartel Act. According to the explanatory remarks of the KaWeRÄG 2021, the Austrian Cartel Court can make use of its declaratory power pursuant to Section 28a Austrian Cartel Act 'insofar as there is a legitimate interest in doing so'[237]. Such a legitimate interest may, e.g., exist in digital markets which are considered to be particularly prone to abusive conduct.[238] If such a legitimate interest exists and the substantive requirements are met, the Austrian Cartel Court must (upon application) find that an undertaking holds a dominant position in a multi-sided digital market. It follows that – if the requirements are met – the Austrian Cartel Court has no discretion but is rather obliged to declare an undertaking as dominant.[239] Once an undertaking has been declared as dominant, the Austrian Cartel Court can only reverse its finding at the request of the company concerned. However, this is only possible if the undertaking proves that the circumstances which have led to the finding of dominance have changed in the meantime.[240] In contrast to the German Section 19a GWB, Section 28a Austrian Cartel Act does not contain a certain time limit after which the dominant position automatically ceases to exist.

Based on Section 28a Austrian Cartel Act, market dominant platform operators are neither subject to *per-se* obligations (Art 5 and 6 DMA) nor can be prohibited from engaging in certain types of conduct by means of an order (Section 19a para 2 GWB). The KaWeRÄG 2021 thus does not provide for sector-specific abuse rules along the lines of the European DMA or the German GWB. Unlike the European and German legislators, Section 28a Austrian Cartel Act did not introduce any new

for details on the concept of dominance in Austrian competition law, cf. Dominik Erharter, '§ 4 KartG', in Alexander Egger/Natalie Harsdorf-Bosch (eds.), *Kartellrecht* (Wien: Linde, 2022).

[236] Section 36 para 2a Austrian Cartel Act; for an overview of the procedural requirements of the *ex-ante* procedure under Section 28a Austrian Cartel Act, cf. Florian Reiter-Werzin/Maria Dreher, 'Der Antrag auf Feststellung einer marktbeherrschenden Stellung nach § 28a Kartellgesetz – Teil 3' (2022) ÖZK 140-47.

[237] Explanatory Remarks KaWeRÄG 2021, 951/ME 27.GP, p. 14.

[238] Explanatory Remarks KaWeRÄG 2021, 951/ME 27.GP, p. 14.

[239] Reiter-Werzin/Dreher, 'Der Antrag auf Feststellung einer marktbeherrschenden Stellung – Teil 3', p. 143.

[240] Explanatory Remarks KaWeRÄG 2021, 951/ME 27.GP, pp. 14-15.

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categories of prohibited abusive conduct linked to the finding of dominance. The Austrian Cartel Act does, e.g., not entail specific provisions related to the correct handling of data (as is the case in Section 19a para 2 no. 4 GWB and Articles 5 para 2 and 6 para 2 DMA). Nevertheless, the general ban on abusive practices pursuant to Section 5 Austrian Cartel Act (Art 102 TFEU) also applies to market-dominant platform operators. As argued in this paper, the use of extensive data processing terms may qualify as unfair trading conditions and thus be prohibited (see Chapter II.C.2. and II.C.3.). This finding corresponds with the broad wording of Section 5 para 1 Austrian Cartel Act (being identical to Art 102 TFEU) according to which 'any abuse [...] of a dominant position' is forbidden.[241] Due to this flexibility, the general clause may *inter alia* cover novel (data-related) strategies prevailing in the digital economy. A more holistic view is also suggested by the economic approach set out in Section 20 Austrian Cartel Act. According to this provision, all facts and circumstances of a case are to be assessed according to their 'true economic content'.

To summarise, the KaWeRÄG 2021 proves to be less intrusive than its European and German counterparts. Instead of implementing new types of abusive conduct (along the lines of the DMA or GBW), the Austrian legislator has limited itself to the possibility of quickly initiating conventional abuse proceedings (pursuant to the general clause stipulated in Section 5 Austrian Cartel Act).[242] By shortening the time span between the initial suspicion of an anticompetitive behaviour and the issuance of a cease-and-desist order, Section 28a Austrian Cartel Act is intended to speed up subsequent abuse proceedings.[243]

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[241] Cf. Austrian FCO, Thesenpapier Digitalisierung und Wettbewerbsrecht (2020), p. 8, <https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Thesenpapier_Digitalisierung_und_Wettbewerbsrecht.pdf> accessed 18 August 2023.

[242] Johannes Peter Gruber, 'Das KaWeRÄG 2021 – Erster Teil- Kartellgesetz' (2021) ÖZK 123-34, p. 124.

[243] Explanatory Remarks KaWeRÄG 2021, 951/ME 27.GP, p. 14; sceptical Austrian FCO, Statement on the governmental bill proposing the KaWeRÄG 2021, para. 180, stating that abuse proceedings in the digital economy are primarily delayed at the stage of developing a consistent theory of harm (and thus at the stage of assessing the fairness of the conduct) and not at the stage of assessing dominance, <https://www.bwb.gv.at/fileadmin/user_upload/BWB__XXVII_SNME_97529_1_Volltext.pdf> accessed 18 August 2023; cf. Dieter Thalhammer/Daniel Metz, '§ 28a KartG', in Alexander Egger/Natalie Harsdorf-Bosch (eds.), *Kartellrecht* (Wien: Linde, 2022) para. 43.

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IV. Summary

Given their economic peculiarities, multi-sided platform markets pose new challenges for competition enforcement and policy.[244] Novel (data-related) strategies of market dominant undertakings can, in principle, be caught by the current ban on abusive practices under Art 102 TFEU. However, to better reflect the economic reality of data-driven business models in competition law (i.e., data as a competitive parameter, strong network effects, etc.) the existing analytical framework must be slightly adapted. A legally well-founded competitive assessment makes it necessary to understand the (economic) peculiarities as well as the functioning of the digital economy. Reliable results warrant economic concepts that adequately consider the multi-sidedness of platform markets, the interconnectedness of different customer groups, the platform operators' pricing logic, access to competition-relevant data[245] as well as the competition in innovation prevailing in the digital economy. In accordance with the constituting elements of Art 102 TFEU, this applies to the definition of the relevant market, the determination of market power, as well as to the assessment of the incriminated conduct's fairness.

Excessive data collection by a market dominant platform operator may, under certain circumstances, contravene the ban on abusive practices to the detriment of the opposite side of the market (exploitative abuse) and competitors (exclusionary abuse). The decisive factor is whether the data processing terms are unfair in the meaning of Art 102 lit a TFEU, i.e., if they withstand the (cumulative) four-step test approach derived from the principle of proportionality. In this context, terms and conditions are lawful provided that they (a) pursue a legitimate purpose, (b) are suitable for achieving this legitimate purpose, (c) are necessary in the sense that there are no less restrictive means for achieving the respective purpose, and (d) the legitimate purpose outweighs the exploitative effect emanating from the clause. In general, contractual provisions of market dominant platform operators that grossly disadvantage users or restrict their choice more than necessary may fail the proportionality test. This applies, e.g., to business terms that demand more data from their users than they could reasonably expect or do not give them a (real) choice between a 'data-intensive' usage model linked to strong personalisation and a less intrusive usage model with limited data access. Infringements of other bodies of law (e.g., data protection provisions) are neither necessary nor sufficient for a violation of

[244] Daniel Zimmer, 'The digital economy: a challenge for competition policy?', in Paul Nihoul/Pieter Van Cleynenbreugel (eds.), *The role of innovation in competition law analysis* (Cheltenham/Northampton: Edward Elgar, 2018) 299-306.

[245] On the potentially mitigating effect of synthetic data (i.e., artificially-generated data created using generative AI) on data as a source of market power, see Gal/Lynskey, 'Synthetic Data' (2023).

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Art 102 TFEU. However, any data-related conduct that restricts competition (as a means of exploitation or obstruction) must be taken into account when assessing the (un)fairness of business terms under competition law. In this context, a breach of law may constitute an aggravating factor to the detriment of the market dominant undertaking. In its landmark decision against *Meta*[246], the CJEU explicitly confirmed that a competition authority may, in exercising its powers, take account of the compatibility of a commercial practice with the GDPR. However, a competition authority, when interpreting the GDPR, is bound by the duty to cooperate in good faith with the data protection authorities concerned (Article 4 para TEU). Therefore, the competition authority must take into account any decision or investigation by the competent data protection authority, inform the latter of any relevant details and, where appropriate, consult the latter authority as well.

Business conduct of large online platforms regularly affect different, economically-interconnected markets with various groups of customers. In order to prevent anti-competitive effects across different markets, an early application of the ban on abusive practices would promote the efficiency of competition law in multi-sided online platform markets. In this context, – albeit with (considerable) differences in detail – recent legislative changes in Austria (KaWeRÄG 2021)[247], Germany (10th GWB Amendment)[248] and on a European level (DMA)[249] reflect a shift from *ex post* antitrust intervention to *ex ante* regulation. The implemented changes allow for an *ex ante* identification of a particularly strong market position of the undertaking concerned, irrespective of suspected abusive conduct; this possibility is limited to a few large online platforms that pose an increased potential for abuse (especially GAFAM).[250] The new rules enable competition enforcers to intervene earlier and

[246] CJEU 4.7.2023, *Meta*, C-252/21, paras. 48 and 62.

[247] For an overview concerning the ban on abusive practices see Arno Scharf, 'Digitalisierungsupdate für das Kartellrecht' (2022) Nova et Varia 80.

[248] For an overview see e.g., Jens-Uwe Franck/Martin Peitz, 'Digital Platforms and the New 19a Tool in the German Competition Act' (2021) JECLAP 513-28.

[249] For an overview see e.g., Nicolas Petit, 'The Proposed Digital Markets Act (DMA) - A Legal and Policy Review' (2021) JECLAP 529-41.

[250] Luis Cabral/Justus Haucap/Geoffrey Parker/Georgios Petropoulos/Tommaso Valletti/Marshall Van Alstyne, 'The EU Digital Markets Act - A Report from a Panel of Economic Experts' (2021), p. 9 <https://publications.jrc.ec.europa.eu/repository/bitstream/JRC122910/jrc122910_external_study_report_-_the_eu_digital_markets_acts.pdf> accessed 18 August 2023: 'Effectively, it comes down to the GAFAM tech giants (Google, Apple, Facebook, Amazon and Microsoft), possibly a few more'; cf. German Federal Government, explanatory remarks on the government bill proposing the 10th GWB-Amendment, BT-Drs. Drucksache 19/23492, p. 60, according to which the new provisions will most likely be limited in quantity.

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more effectively against practices of large tech companies. While the DMA establishes a wide range of *per se* obligations for so-called 'gatekeepers' of core platform services (Art 5 and 6 DMA), the German FCO can prohibit undertakings with 'paramount cross-market significance' from engaging in specific exclusionary practices by means of an order ('two-step approach') (Section 19a Abs 2 GWB). Rather than implementing self-executing obligations like those under the DMA, the German legislator chose a two-step approach (making it necessary to issue a separate decision to prohibit specific conduct). In contrast to the European DMA and the German GWB, Section 28a Austrian Cartel Act is limited to the possibility of an *ex ante* determination of market power in multi-sided online platform markets, i.e., it neither triggers automatic prohibitions nor allows the Austrian Federal Competition Authority to issue orders. However, Section 28a Austrian Cartel Act may accelerate subsequent (traditional) proceedings for abusive conduct under Section 5 Austrian Cartel Act.[251]

The new analytical frameworks described above do not only explicitly take into account the economic peculiarities of platform-based business models but, *inter alia*, also include provisions on data-related conduct. Art 5 para 2 DMA contains a comprehensive ban on the processing and combination of user data without the user's explicit consent.[252] Furthermore, Art 6 para 2 DMA prohibits gatekeepers from processing non-public data of their commercial users whom they compete with.[253] Similar, Section 19a para 2 Nr 4 GWB prohibits undertakings from engaging in exclusionary practices using competition-relevant data across different markets. As opposed to the DMA and the GWB, the Austrian KaWeRÄG 2021 refrained from

[251] Sceptical Austrian Federal Competition Authority, statement on the government bill proposing the KaWeRÄG 2021, para. 180 <https://www.bwb.gv.at/fileadmin/user_upload/BWB__XXVII_SNME_97529_1_Volltext.pdf> accessed 18 August 2023, according to which proceedings for abuse of market power in the digital economy are primarily delayed at the stage of formulating a consistent theory of harm and thus when assessing the incriminated conduct's fairness (and not when determining market power).

[252] On the original version of the DMA concerning data-related conduct see Rupprecht Podszun, 'Should Gatekeepers Be Allowed to Combine Data Ideas for Art. 5(a) of the Draft Digital Markets Act' (2022) GRUR Int. 197-205.

[253] Cf. Commission, Press Release 10.11.2020, IP/20/2077 concerning an alleged abuse of dominance by Amazon by systematically relying on non-public business data of independent sellers to the benefit of Amazon's own retail business, which directly competes with those third party sellers; more information on this investigation (including details on Amazon's proposed commitments in this case) is available on the Commission's competition website, in the public case register under case number AT.40703 <https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_AT_40703> accessed 18 August 2023.

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including exemplary cases.[254] However, novel (data-related) strategies can be assessed under the general ban on abusive conduct stipulated in Section 5 para 1 first sentence Austrian Cartel Act.

Although shifting towards *ex ante* regulation in digital markets is generally to be welcomed, innovations must not be unduly diminished as a result of (too much) regulatory intervention, e.g., by implementing (too) far-reaching obligations.[255] In this regard, some commentators argue that the growing prevalence of synthetic data (i.e., artificially-generated data created using generative AI) should lead to a less interventionist approach by competition authorities in the future.[256] According to their assumptions, firms might quickly get access to vast amounts of data at a relatively cheap price with the help of synthetic data, potentially changing the competitive dynamics in markets where access to data constitutes a significant barrier to entry. Against this background, it remains to be seen how the new analytical frameworks will prove themselves in practice and whether the advent of synthetic data will lead towards a more nuanced hands-off regulatory approach in the future (e.g., with regard to mandatory data sharing as a remedy for anti-competitive conduct).

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[254] Endorsing Gruber, 'Das KaWeRÄG 2021 – Erster Teil- Kartellgesetz', p. 124; Scharf, 'Digitalisierungsupdate für das Kartellrecht', p. 80; cf. Oliver Budzinski/Sophia Gaenssle/Annika Stöhr, 'Der Entwurf zur 10. GWB Novelle: Interventionismus oder Laissez-faire?' (2020) List Forum 157-84, pp. 177-81, who otherwise warn of a 'kaleidoscope of new rules'.

[255] Budzinski/Gaenssle/Stöhr, 'Der Entwurf zur 10. GWB Novelle: Interventionismus oder Laissez-faire?', p. 179; Carmelo Cennamo/Tobias Kretschmer/Panos Constantinides/Cristina Alaimo/Juan Santaló, 'Digital Platforms Regulation: An Innovation-Centric View of the EU's Digital Markets Act' (2023) JECLAP 44-51.

[256] Gal/Lynskey, 'Synthetic Data' (2023), pp. 4 and 23ff.

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