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„Comparison of EU Measures Concerning Online Platforms within the Scope of Competition Law and Data Protection Law“

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Table of Abbreviations

Art	Article
BGH	Bundesgerichtshof
BKA	Bundeskartellamt
CJEU	Court of Justice of the European Union
CRM	customer relationship management
DMA	Digital Markets Act
DSA	Digital Services Act
etc.	et cetera
e.g.	for example
ECC	Error-Correcting Code
EDPS	European Data Protection Supervisor
EEA	European Economic Area
Et. Al.	Et alii
EU	European Union
EUR	Euro
FTC	Federal Trade Commission
GAFAM	Google, Facebook, Amazon and Microsoft
GDPR	General Data Protection Regulation
GmbH	Gesellschaft mit beschränkter Haftung
GWB	Gesetz gegen Wettbewerbsbeschränkungen
Ibid	in the same place
Inc	Incorporated
IP	Intellectual Property
lit	litera
NGO	non governmental organisation
Para	Paragraph
PC	personal computer
R&D	Research and Development
Sec	Section
SME	Small and medium-sized enterprises
SSNDQ	small but significant non-transitory decrease in quality
SSNIP	small but significant non-transitory increase in price
SSNIC	small but significant non-transitory increase in cost

TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
TV	Television
US	United States
USA	United States of America
USD	US Dollar

1. Introduction

As commonly known, online platforms offer great advantages for users in many different areas, such as online marketplaces, online social networking sites, online search engines as well as online software application stores. Over 10.000 online platforms exist solely in Europe, however most of them are SMEs. Notably only a few big players make more profit than all the other online platforms that can be considered SMEs together[1]. However, as the sector of online platforms is rapidly developing and network effects are common amongst online platforms, scholars fear that they are more likely to use anti-competitive behaviour in order to protect their position in the market.

It must be noted that the traditional competition law regime of the EU, which is laid down mostly in Art 101 and 102 TFEU as well as clarified in extensive case law, is no longer able to address the issues arising with the growth of few large online platforms in a suitable manner. This is mostly because traditional competition law approaches solely consider effects on competition but when applying these approaches and doctrines, one overlooks other areas of law such as data protection law to help tackle these issues. Moreover, these approaches are not suited to keep up with demands of the rapidly changing market of online platforms.

This issue is widely discussed in academia and many scholars attempted to offer solutions to combat the growing power of online platforms with the help of competition and data protection law. Many approaches were discussed amongst scholars which ultimately led to some advancements regarding the growing competitive power of online platforms. However, not only scholars, but also the EU and individual member states recognized this problem. Therefore, now a vast number of old (reinterpreted) and new legislative approaches attempt to combat this issue.

It is necessary to take a closer look at this phenomenon and discuss the reasons for the development in the diverse market for online platforms. I will lay focus on data collection strategies of online platforms and discuss how they may gain a competitive advantage by having huge amounts of data available to create a good user experience. I will also discuss old and new legislative and academic approaches to control the growing power of online platforms and point out their advantages and shortcomings. With all those different academic and legislative

[1]Regulation (EU) 2022/1925 of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [2022] OJ L265/1.

approaches attempting to tackle the issue of growing power of online platforms due to strong network effects on the market, this paper ultimately asks the question, how those approaches play together and feed off each other and where there are differences, if and how these differences can be justified.

Therefore, I will first discuss the key areas of competition law relevant for my paper. In this chapter I will focus on Art 102 TFEU and briefly touch upon Art 101 TFEU as well as the merger regulation. Furthermore, I will discuss the main principles of data protection law under the GDPR and will focus on issues of data collection by online platforms. Next, I will briefly define online platforms and touch on key terms relevant for online platforms such as network effects and economies of scale.

After these introductory chapters, which are necessary to understand the roots of these developments, I will take a closer look at the intersection of competition and data protection law and briefly introduce cases that concern both data protection and competition law and focus on issues that the CJEU, Court and Commission encountered. The main case that I will be analysing in this paper is the Facebook decision by the German competition authority, as a new approach was taken in this decision. I will also touch upon the essential facilities doctrine and discuss its relevance for data and point out what problems might be encountered, if data is to be considered an essential facility. Moreover, this paper contains a chapter on the Digital Markets Act (DMA), where I will discuss the content, possible advantages and shortcomings of this approach.

To conclude the paper and tie all the various approaches together, I will compare the different legislative approaches and highlight their shortcomings and advantages to answer the question, how those different approaches play together and feed off each other. I will also discuss, if the different approaches are justified.

2. Competition Law regime in the EU

2.1. Overview

The EU competition law regime addresses many different practices. First, Art 101 TFEU bans all anticompetitive agreements, as such practices have the potential to distort the level playing field on the market and therefore harm consumers and competitors. These agreements may be

between two (or more) undertakings on the same level of production (cartels) or be between undertakings on different levels of production (vertical agreements)[2].

Art 102 TFEU plays an important role when it comes to the issues of online platforms in the scope of competition and data protection law. Generally, Art 102 TFEU prohibits abuse by undertakings, which hold a dominant position in the relevant market[3]. Art 102 TFEU therefore provides a non-exhaustive list of prohibited conduct by dominant undertakings (e.g. predation, the charging of excessive prices, tying and bundling and the refusal to deal with certain counterparts)[4]. The general aim of Art 102 TFEU is to set standards for the conduct of economically powerful firms that have a certain degree of immunity from the ”normal” disciplining effects of the market[5]. The wording of Art 102 TFEU suggests that several cumulative requirements must be met before a violation of the provision can be established:

- There is no clear definition of the term undertaking, but case law has established that an undertaking is any person engaging in economic activity[6].
- The undertaking must hold a dominant position in a relevant market. As this requirement is relevant for most EU competition law instruments and leads to difficulties when it comes to establishing the dominant position of online platforms, I will discuss this issue in greater detail below.
- The dominant position must be held in a substantial part of the common market. This requirement stems from the consideration that EU competition law should not be concerned with “trivial” or localised matters. However, in practice this condition is mostly met, especially when it comes to online platforms[7].
- There must be an abuse. Art 102 TFEU provides a non-exhaustive list of abusive conducts[8]:

> *“directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions, limiting production, markets or technical development to the prejudice of consumers, applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive* disadvantage and making *the conclusion of contracts subject to acceptance by the other*

[2]Treaty on the Functioning of the European Union [2007] OJ C 326/49, art 101.
[3]ibid, art 102.
[4]European Parliament, ‘Competition Policy’ (Fact Sheets of the European Union) <https://www.europarl.europa.eu/ftu/pdf/en/FTU_2.6.12.pdf> accessed 4 May 2023, 4.
[5]Robert O’Donoghue and Jorge Padilla, *The law and economics of Article 102 TFEU* (3rd edition, Hart Publishing 2014), 3.
[6]ibid, 4.
[7]ibid. 4.
[8]Andreas Wiebe et al., *Wettbewerbs- und Immaterialgüterrecht* (4th edition, Facultas 2018), 490.

> *parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts"*[9].

- The abuse must affect trade between member states. This criterion takes the different competences of EU law and member state laws into consideration[10].

Lastly, the EU competition law regime covers mergers and acquisitions, which meet certain thresholds. They must be cleared by the Commission before the deal takes place. These provisions can be found in the so-called Merger Regulation[11].

2.2. The definition of the relevant market and dominant position

The abovementioned instruments of competition law all have the following in common: the necessity to define the relevant market to determine, if the undertaking holds a dominant position. For example, in the United Brands case, the European Court of Justice defines a dominant position as

> "*a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers*"[12].

In the Volkswagen case the CJEU holds that the relevant market has to be defined in order to determine if an undertaking holds a dominant position:

> *" […] the proper definition of the relevant market is a necessary precondition for any judgement as to allegedly anti- competitive behaviour, since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market"*[13].

The next step in establishing, if an undertaking holds a dominant position, is to assess market power. I will discuss how a dominant position and market power are determined later in this paper, as defining the relevant market for online platforms and the market power is no simple task, as such requires spective focus.

[9]Treaty on the Functioning of the European Union, art 102 (d).
[10]Robert O'Donoghue and Jorge Padilla (n 5), 5.
[11]Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1.
[12]Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECR I 207, 65.
[13]Case T-62/98 *Volkswagen v. Commission* [2000] ECR II 2707, 230.

3. What is Data?

3.1. Types of Data

Data comes in many different forms and can be categorized in various ways. Firstly, one can distinguish data by the way it is acquired. Crémer, de Montjoye and Schweitzer argue that data can be volunteered, observed and inferred. Volunteering data means that a user intentionally contributes data, e.g. an e-mail, picture, calendar information or a social media post or liking of a song on a music platform. Observed data is data that is acquired by users leaving a digital trace, e.g. tracking on mobile phones, website logs, etc. Inferred data is obtained by transforming volunteered or observed data while still remaining related to the individual, e.g. categories resulting from clustering algorithms or predictions about the likelihood of a person to buy a certain product[14].

Secondly, one can distinguish data by its use. Non-anonymous use of individual-level data is any data that is used to provide a service to the individual, e.g. recommendations on a music app based on likes of the user. Anonymous use of individual-level data includes all cases where individual-level data is used anonymously. Access to the individual-level data is necessary but the goal is not to directly provide a service to the individual, who generated the data in the first place, e.g. cases of data being used to train machine-learning algorithms. Aggregated data refers to more standardized data that has been irreversibly aggregated, e.g. sales data or national statistics. Contextual data does not derive from individual level data, e.g. network information and satellite data[15].

Regarding data protection law, individual-level data, when it refers to a natural person, is personal data. However, if individual information is effectively protected, anonymous use of individual-level data would be considered anonymous data from the perspective of the user and is probably not protected under the GDPR. Similarly, aggregated data is usually anonymous and therefore non-personal data - even if the data that is aggregated was originally personal within the meaning of the GDPR. Contextual data would similarly be non-personal most of the time[16].

[14]Jaques Crémer, Yves-Alexandre de Montjoye, and Heike Schweitzer 'Competition Policy for the digital era' (European Union 2019), 24-25. <https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en> accessed 9 May 2023
[15]ibid, 24ff.
[16]ibid, 26.

Lastly, one must keep in mind that data is a non-rivalrous good. Non-rivalrous means that even if a certain data set is collected by one company, it can still be collected by another company and the value of the data set does not decline. Consumers usually provide their name, e-mail address, phone number etc. to more than one company[17]. As I will show later in this paper, this is an extremely important factor when assessing the influence of data on competition amongst online platforms.

3.2. Data Protection Regime in the EU - the GDPR

The General Data Protection Regulation (GDPR) was introduced in May 2016 and regulates the protection of personal data of natural persons. Its introduction achieved the long-envisaged goal of a harmonized standard of data protection across all EU member states. The introduction of the GDPR therefore enabled the free movement of personal data across the EU, since an equal level of protection is now ensured[18].

The scope of protection of the GDPR only includes (personal) data of natural persons and does not cover the data of legal persons[19], as the GDPR applies to *"identified or identifiable natural persons who can, in particular, be identified, directly or indirectly, by reference to an identification number or to one or more factors specific to their physical, physiological, mental, economic, cultural, or social identity."*[20]

The GDPR clearly lays out under which circumstances data may be processed (consent of the data subject, processing data for the conclusion or performance of a contract, processing of data for compliance with a legal obligation, processing of data for vital interests, processing of data in the public interest or the processing of data for the legitimate interests of the data controller)[21].

The abovementioned justifications to process data are listed in Art 6 GDPR and only apply to ordinary data. However, the GDPR also identifies special categories of personal data, such as sensitive data. The conditions for processing sensitive data are far more demanding. Its processing is generally prohibited and only allowed if one of the conditions named in Art 9(2) GDPR is met[22]. Moreover, the processing of data relating to criminal convictions and offences

[17]Inge Graef, 'Data as Essential Facility Competition and Innovation on Online Platforms' (Doctor of Laws thesis, KU Leuven 2016), 248.
[18]Mariusz Krzysztofek *GDPR: Personal Data Protection in the European Union* (2021 Kluwer Law International), 1ff.
[19]ibid, 3.
[20]Helena U. Vrabec *Data Subject Rights under the GDPR* (2021 Oxford University Press), 13.
[21]Krzysztofek (n 18), 72ff.
[22]ibid, 72.

is only allowed under the control of official authority or when processing is authorized by EU or member state law[23].

The GDPR contains six central rights on which the data subject can rely. They are the right to information, the right to access, the right to data portability, the right to erasure, the right to object, and the right not to be subject to automated decision-making[24]. I will discuss some of these rights later in this paper.

The Commission stated in its report on the GDPR in 2020 that two years after its implementation it has also encouraged other (non-EU) countries to consider following the example of the EU. The GDPR sets standards of data protection globally, especially with regards to the regulation of the digital economy. UN Secretary General António Guterres said that the GDPR "*sets an example […] inspiring similar measures elsewhere*[25]" and urged the EU and its members to continue this path[26].

Therefore, the EU strives to constantly improve their legislation on data protection and presented a new piece of legislation in early 2022: the Data Act. The Data Act clarifies who can create value from data and under which conditions, thereby ensuring fairness by setting up rules regarding the use of data generated by the "internet of things". The main difference to the GDPR is that the Data Act concerns all types of data and not only personal data.[27] This piece of legislation will also influence the behaviour of online platforms, especially the ones operating within ecosystems that combine hard- and software.

3.3. Data Collection by Online Platforms

Besides the competition law issues of online platforms, which I have discussed in brief earlier, online platforms also pose a challenge to data protection law. Data is as valuable as ever and goes hand in hand with the competitiveness of an online platform. As I will discuss later, with the help of data analytics, providers of online platforms offer accurate predictions about the preferences and behavior of individuals resulting in more innovative products being developed in a cost-effective way. However, due to the large amounts of data being collected from (almost)

[23]Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJL 119/1, art 10.
[24]Vrabec (n 20), 15.
[25]Communication from the commission to the European Parliament 'Data protection as a pillar of citizens' empowerment and the EU's approach to the digital transition - two years of application of the General Data Protection Regulation' [COM (2020) 264 final], 3.
[26]ibid, 3.
[27]European Commission 'Data Act' (2023) <https://digital-strategy.ec.europa.eu/en/policies/data-act> accessed 7 July 2023.

every member of society, there are increasing concerns about the loss of privacy as well as individual autonomy[28].

In the EU data protection is considered a fundamental right. According to Art 8 of the Charter of Fundamental rights *"everyone has the right to the protection of personal data concerning him or her"*[29]. As privacy is such an important concept for individuals – not only in the EU – it is not surprising that privacy issues have also played an important part in economic analysis.

Individuals are commonly confronted with incentives that get them to disclose their private data. As discussed above, consumers usually provide data in order to use online platforms for "free". According to Kerber, this behaviour can lead to price discrimination due to real time pricing based on the willingness of the consumer to buy certain products. Price discrimination, however, does not always have a positive effect for the companies applying such practices, as consumers will adapt their consumption patterns and become more careful with what they disclose. Moreover, marketing techniques and data intermediaries (online platforms) have also been important topics in ongoing academic discussions[30].

With regards to all the abovementioned issues, the main question for economists is whether economically efficient solutions occur or if these practices lead to market failures. However, there is no general answer, if privacy protection is beneficial or detrimental to individuals or society. Kerber suggests that a well-functioning market would offer different privacy policy options in the form of detailed opt-in and opt-out possibilities or even an option of using online platforms for a monthly subscription fee to prevent data collection or advertising[31].

4. Online Platforms

4.1. What are online platforms?

A general and simple definition of a platform (online or offline) proposed by Martens in the JRC Technical Reports in 2016 is that *'platforms can be narrowly defined as a place where two or more types of users can directly interact with each other, facilitated and observed by the platform operator.'*[32]

[28]Wolfgang Kerber 'Digital markets, data and privacy: competition law, consumer law and data protection' [2016] 11(11) Journal of Intellectual Property Law & Practice 856, 856-857.
[29] Charter of fundamental rights of the European Union [2012] OJ C 326/391, art 8.
[30] Kerber (n 28), 857-858.
[31]ibid, 858ff.
[32]Bertin Martens 'An Economic Policy Perspective on Online Platforms' [2016] 2016/05Institute for Prospective Technological Studies Digital Economy Working Paper JRC101501, 3 <https://joint-research-centre.ec.europa.eu/system/files/2016-05/JRC101501.pdf> accessed 22 April 2023.

As the definition of Martens is a very simple and general, one must bear in mind that online platforms are not always that simple. Yet, this definition is very useful to get a general understanding of the main characteristic of platforms: the ability to connect people (both retailers and consumers). The fact, that the occurrence of platforms where people meet to exchange goods and services is not a new (online) phenomenon, can also be derived from this definition. Platforms have existed for millennia, a good example being village markets. There sellers and buyers exchange their goods (and services) under supervision of a village chief (platform operator), who may levy a tax for the use of physical space. Other parties also benefit from the village market, such as street artists and pickpockets[33].

However, for the purpose of this paper, I will focus on online platforms, which of course have only developed in line with the expansion of the world wide web. According to Graef, online platforms take three main forms:

- The popularity of search engines grew rapidly since the mid-1990s. One search engine thereby stands out from the rest: Google. Due to Google's unique PageRank algorithm, which ranks search results according to their relative importance, it got widely popular and outlived other search engines that ranked their search results based on the number of times a search query was displayed on a certain website. Besides a distinction by algorithm, a distinction between horizontal and vertical search engines can also be made. Horizontal search engines only cover a certain type of service or content (e.g. TripAdvisor for hotels and restaurants) and vertical search engines cover a wide array of topics that span across large parts of the world wide web (e.g. Google)[34].

  Despite these differences, the business models of search engines are similar. They provide users access to their service for free and use contextual advertising to finance their business. Search engine providers also rely on algorithms to return relevant results to the search queries of users. In order to improve their search algorithm and the performance of the search for users, search engines also collect information on the users and store the search data. It is then used by search engines to improve the relevance of their search results. As users do not pay for search engines, the relevance of search results is vital to keep attracting users and therefore also advertisers, which fund the search engine[35].

[33]ibid, 10.
[34]Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility (*International Competition Law Series, Wolters Kluwer, 2016), 10-11.
[35]ibid, 11-12.

- Social networks are services that allow users to create a (semi) public profile and a list of friends and contacts, enabling them to communicate amongst each other. Today the most popular social network is Facebook. Social networks like Facebook target the general public but there are other social networks that focus on a certain userprofile (e.g. LinkedIn which targets business users). One can also distinguish between user oriented and content oriented social networks. An important characteristic of social networks is that they do not offer content themselves but provide users with the ability to create content in the form of messages, posts, pictures and videos[36].

  Like search engines, most social network providers give users free access to their services and finance their business with third party advertising. Social networks commonly improve their services through algorithms that determine what post is placed on the top of the user's newsfeed. Moreover, the user's content is analysed and utilized to place targeted advertising. Targeted advertising on social media platforms takes many forms, dependant on the type of social media network. Facebook for example utilizes the user's location, demographics, interests, behaviours, connections, custom audiences as well as look-alike audiences. What all advertising strategies of social networks have in common (and what distinguishes them from advertising of search engines) is that social network providers can sell advertisements containing social context[37].

- E-commerce platforms are usually intermediaries that bring buyers and sellers together. The biggest e-commerce platforms are Amazon and eBay. E-commerce platforms provide buyers with free access and charge the sellers for putting their goods up for sale on the platform. The fees can range from monthly subscription to individual transaction fees. Additional revenue is commonly gained by advertising. The platform usually collects information about the users purchase behaviour and can improve the recommendation systems, on which the e-commerce platform relies in order to attract buyers[38].

Search engines, social networks and e-commerce platforms all share one common characteristic – creating interactions between users and businesses. Notably, until the Digital Services Act was introduced, no statutory law defined the term online platform. However, within the scope of the DSA online platforms are defined as follows:

[36]ibid, 12-13.
[37]ibid, 14ff.
[38]ibid, 15-16.

> *"Online platform means a hosting service that, at the request of a recipient of the service, stores and disseminates information to the public, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of this Regulation".*[39]

As the definition shows, online platforms are characterised by the dissemination of information to the public at a user's request. The general remarks of the DSA clarify that online platforms are social networks that enable consumers to conclude distance contracts.[40] Based on the definition in the DSA, the term online platform is far wider than Graef described in 2016. This also shows that finding an accurate definition of a key term in a rapidly evolving sector is a difficult task.

In the light of the new Digital Markets Act, the European Commission did not use the term online platform but defined a limited number of core platform services. These core platform services are online intermediation services (e.g. e-commerce platforms and app stores), online search engines, social networking sites, video sharing platform services, numberindependent interpersonal electronic communication services, operating systems, cloud services and advertising services, including advertising networks, advertising exchanges and any other advertising intermediation services. Amongst those platforms competition issues are the most prominent. Therefore, the DMA only applies to these sectors for now[41]. However, in line with the demands of the evolving sector, the DMA contains possibilities for the Commission to extend the list to other core platform services.

4.2. Functioning of Online Platforms

4.2.1. Overview

To understand how online platforms function, one must look at economic theories regarding multi-sided businesses. The term two sided/multi-sided markets/businesses was first used by Rochet and Triole[42]. They define two sided markets as *"characterized by the presence of two distinct sides who's ultimate benefit stems from interacting through a common platform"*[43]. Evans established three criteria which must be met for a market to be multi-sided.

[39]Digital Markets Act, art 3(i).
[40]ibid, para 13.
[41]ibid, para 14.
[42]Martens (n 32), 11.
[43]Jean-Charles Rochet and Jean Tirole 'Platform Competition in tow-sided markets' [2003] Journal of the European Economic Association 990, 990.

Firstly, there must be two or more distinct groups of customers. These groups of customers can be different entities (e.g. shopping mall retailers and customers, software developers and software users) or can only be different for the purpose of a single transaction (e.g. eBay users who can be a buyer in one instance and a seller in another)[44].

Secondly, there must be externalities that occur when two customers become connected or coordinated[45]. This condition talks about the so-called network effects or network externalities that play a big part in the analysis of competition law aspects of online platforms. Therefore, I will discuss network effects in closer detail below.

Thirdly, an intermediary is necessary to internalize the network effects. This condition is necessary as groups hardly manage to organize themselves in a way that network effects occur[46]. For this paper, the intermediaries are online platforms. As previously discussed, online platforms connect different groups with different interests.

4.2.2. Network effects

Network effects are the most important feature of multi-sided markets[47]. According to Graef network effects occur *"when the utility that a consumer derives from consumption of a good increases with the number of others purchasing the good"*[48]. These network effects can be divided into direct and indirect network effects.

Direct network effects arise, if users on one side of the platform directly benefit from more users on the same side of the platform. A simple example of direct network effects is the fax machine: the more people own and use a fax machine, the more valuable the access to a fax machine becomes[49].

Indirect (cross-side) network effects arise, if the value of a service for one side of the platform increases with the number of users on the other side of the platform. An example is Apple's IOS operating system. The operating system attracts complementary products and services from

[44]David S. Evans, 'The Antitrust Economics of Multi-Sided Platform Markets' [2003] 20 Yale Journal on Regulation 325, 330-331.
[45]ibid, 332.
[46]ibid, 332-333.
[47]Jing Zeng, Zaheer Khan and Muthu De Silva, 'The emergence of multi-sided platform MNEs: Internalization theory and networks' [2019] 28 International Busines Review 1, 3.
[48] Graef, *EU Competition Law, Data Protection and Online Platforms* (n 34), 34.
[49]Zeng, Khan and De Silva (n 47), 3.

external app developers to be downloaded by a large number of customers, who benefit from the larger choice of apps[50].

Network effects lead to drastic developments on the market of online platforms. With network effects coming into play, there are many losers and only a handful of winners. Gasser pinpoints the following structures that commonly go hand in hand with network effects:

- Gasser describes the positive feedback loop as self-enhancement effects. Platforms that manage to generate more positive than negative network effects will acquire more and more users. The success of an online platform is dependent on the number of users on each side. As users mostly join online platforms based on the number of users the platform already has, this is an important factor of success. As soon as an online platform has acquired enough users, it can come to a suction effect leading to more and more users joining rapidly[51].

- The critical mass is the number of users a platform needs to create the above-described suction effect and therefore the positive feedback loop[52]. Multi-sided platforms must ensure that the critical mass is reached in all user groups and must also maintain a balance between the user groups. This problem is described in the literature as "hen and egg problem". If the requirement of the critical mass is met, it is likely that the platform advances to a dominant or even the only platform in the relevant business sector. Other businesses will then lose their users to the dominant online platform, whose suction effect draws in more users[53].

- Lock-In effects occur if the costs to switch platform override its potential use for a user. It goes without saying that a bigger platform has higher lock-in effects, reducing the likelihood of a user switching platforms once it has reached the critical mass[54].

- Multihoming describes the fact that at least a considerable number of users use a comparable platform at the same time. This can counteract the negative effects the lock-in effects have on competing platforms and balance the effects of a platform reaching the critical mass. If two platforms have a similar number of users, the critical mass is not the most dominant reason to gain new users, but also other performance criteria. The opposite of multi homing is singlehoming meaning that users only use one platform. Singlehoming predominantly occurs if the additional costs that come with the parallel use of two platforms is higher than

[50]Zeng, Khan and De Silva (n 47), 3.
[51]Lukas Gasser *Der Marktstrukturmissbrauch in der Plattformökonomie. Informationsasymmetrien als Ausgangspunkt eines Verstoßes gegen Art. 102 AEUV* (2021 Nomos), 49-50.
[52]ibid, 50.
[53]ibid, 51-52.
[54]ibid, 54-55.

using two platforms simultaneously. This is mostly the case, if the products differ in aspects relevant for the user. For example, if streaming sites like Amazon, Netflix and Disney+ all offered the same content, users would not sign up for all three streaming platforms[55].

As shown in this chapter, online platforms cleverly use the network effects to their advantage and thereby gain more power in the market. However, the goal of dominant online platforms to continue to benefit from network effects can lead to anticompetitive conduct and market imbalances which in return leads to consumers and competitors suffering.

4.3. Cost structure of online platforms

Online platforms not only use their network effects to generate greater user interest but also use network effects to make huge profits. Thereby most online platforms have a similar cost structure. Online platforms have relatively high fixed costs and low variable costs and meaning that a larger number of users leads to lower average costs per user. This phenomenon is called economies of scale[56].

This theory states that companies active in the network economy must make substantial investments in order to enter the market. Once these investments are made, the costs for expanding the network (creating additional units) decreases and can even become negligible. This is the case for search engines, social networks and e-commerce platforms as their creation requires substantial investments in server infrastructure, R&D and the development of a search algorithm, etc. Therefore, the setting up of these platforms require high fixed costs, however, low marginal costs (supply side economies of scale)[57]. It is not relevant for the cost of running a website, if a thousand or a hundred thousand people access a website[58]. The supply-side economies of scale combined with the direct network effects and lock-in effects are an important indicator to market dominance. The lock-in effects aggravate this development further and lead to cost disadvantages for (potential) competitors[59].

According to Crémer, de Montjoye and Schweitzer the economies of scale also influence the competition amongst ecosystems. Hardware and software are now often very interconnected and a few large tech companies offer a broad array of services. E.g. if one purchases a phone, one buys into a large ecosystem including the operating system, an app store, a payment system,

[55]ibid, 53ff.
[56]ibid, 55-56.
[57]Graef, *EU Competition Law, Data Protection and Online Platform* (n 34), 32-33.
[58]Gasser (n 51), 57.
[59]B6-22/16, Bundeskartellamt gegen Facebook Inc., Facebook Ireland Ltd., und Facebook Deutschland GmbH, 477.

a cloud service and also a range of smart devices to go along with your phone. Scholars argue that large multiservice platforms greatly benefit from the economies of scale: if a platform offers one service successfully, it becomes more likely to also offer other complementary services. This also comes from the possession of data, which facilitates the development of a new service[60].

5. Competition Law Challenges regarding online platforms

5.1. Overview

There are many approaches and doctrines, when it comes to competition policy on online platforms. This chapter does not cover all those approaches. Some more of these approaches and doctrines will be addressed in later chapters with a more case centred analysis. This subchapter merely points out some of the most prominent problems, that the Commission and CJEU are confronted with in their daily practice and promote better understanding of the case analysis below.

Before I get into the details, it is worth looking at the general aim and structure of competition law. Contrary to most other legal regimes, which are based on typified conflicts of interest and specifically target new problems, competition law has been designed to react to evolving markets and determine positions of power, which cannot be sufficiently disciplined by the market itself. This results in a very flexible legal system calling for many case-by-case approaches. This strength also has downsides: competition law can become very elaborative, costly and time consuming to implement. This regulatory process, which we are in the midst of, however, will lead to a better understanding of many of the features of the digital economy and help readjust the rules and approaches and step by step reform competition law approaches, like the redefinition of boundaries between different legal regimes. One must therefore keep in mind, that competition law and in particular Art 102 TFEU shall resort to its general function as background regime[61].

> *"Until then, the type of analysis that is so characteristic for competition law – namely the thorough analysis of markets and market failures – can help to redefine the legal framework for the digital economy and provide important guidance to firms, the legislator and the public debate. "*[62]

[60]Crémer, de Montjoye and Schweitzer Heike (n 14), 34-35.
[61]ibid, 51ff.
[62]ibid, 53.

5.2. Market definition

Defining the relevant market of online platforms is no simple task, due to their two and multisided nature. Mandrescu argues that the difficulties of defining the relevant market are substantive and instrumental. Substantive difficulties concern the necessity to determine the number of markets that need to be defined. As online platforms are usually two/multi-sided markets with at least two different customer groups, a single online platform often operates in more than one relevant market. Ecosystems of large online platforms also lead to them operating in more than one relevant market. Instrumental difficulties address the limited compatibility of the legal and economic tools used for the purpose of market definition[63].

In general, the definition of the relevant market is a tool to identify and define the boundaries of competition between undertakings. Therefore, it must be split into the relevant product market and the relevant geographic market. There are many methods to determine the relevant market, all of them having advantages and disadvantages, especially with regards to online platforms. Some of the most common methods are:

- What Patakyová calls the qualitative method, is basically the relevant market definition based on distinctive characteristics of products. This method was used in the United Brands case, where the question was, if bananas are a separate product market or if they belonged to the general fresh fruit market. The CJEU ruled that bananas have certain characteristics that other fruits lack (e.g. appearance, taste, softness, seedlessness, easy handling and the ability to satisfy the need of the very young, old and sick) and therefore form a separate product market. The geographic market was assessed from the standpoint of its homogeneousness. Three (at the time) ECC countries were excluded from the relevant market due to different custom duties and import agreements. All the other member states formed the relevant geographic market[64].

- The SSNIP ("small but significant non-transitory increase in price") test asks the question, if customers of one undertaking would switch to substitutes or other suppliers in response to a small but permanent price increase of 5-10%. If this hypothetical price increase would lead to so many switches making the increase unprofitable, additional substitutes are added to the

[63]Daniel Mandrescu, 'The SSNIP Test and Zero-Pricing Strategies: Considerations for Online Platforms' [2018] 2/4 Competition Review 244, 245.

[64]Mária T. Patakyová , 'Competition Law in Digital Era – How to Define the Relevant Market' in 4th International Scientific Conference (ed.) *Economics and Management: How to Cope With Disrupted Times (*Association of Economists and Managers of the Balkans 2020), 174.

relevant market and the SSNIP test is repeated until the increase is profitable[65]. The use of zero-pricing strategies by online platforms reduces the value of the SSNIP test, since this strategy removes the core aspect of the test itself: the positive price charged for the product or service. Consequently, the SSNIP test cannot be used when defining the relevant market for a zero price product. Therefore, alternative approaches have been developed[66].

- The SSNDQ ("small but significant non-transitory decrease in quality) test measures small but significant decreases in quality of a certain product instead of the SSNIP tests' increase in price. This test allows to eliminate the main disadvantage of the SSNIP test in zero price markets. Moreover, the lack of objectivity, which the SSNIP test is sometimes criticized for, can be counterbalanced by considering more than one factor. However, the test also has its flaws. For example, the test is useless, if there are no quantifiable measures of quality and a large amount of data is required to conduct the test. Even if there is data available, the decrease in quality is always subjective to some degree and it is not always given that the consumers would able to notice the decrease in quality and act accordingly[67].

- The SSNIC ("small but significant non-transitory increase in cost") test modifies the SSNIP test into a cost-oriented test, meaning that the purpose of the test is to assess, whether the concerned undertaking can impose a small but significant non-transitory increase in cost for customers in a profitable manner. The costs in a zero-price market are divided into information and attention costs. Information costs thereby refer to the amount of data that the customer must provide to use the "free" product or service. Attention costs refer to the customers exposure to advertisements, while using the zero-priced product or service. Even though this approach seems feasible, asking customers about information or attention costs is far less comprehensible for them compared to asking about price. Also, the abstract evaluation of the increase in costs is difficult to achieve because the SSNIC test – similarly to the SNNIP test – simulates the increase of cost with the sole purpose of maximising the profits of the concerned undertaking. However, in practice, the increase of information costs also adds value to the product. Considering the above, it can be concluded that even though the economic logic behind the SSNIC test appears to be theoretically sound, its application is unsuitable for cases concerning online platforms[68].

[65]ibid, 174.
[66]Mandrescu (n 63), 249-250.
[67]Patakyová (n 64), 174.
[68]Mandrescu (n 63), 250ff.

- Crémer, de Montjoye and Schweitzer suggest a less theoretical approach to market definition, namely a characteristics-based approach. They also argue that the Commission has turned to this approach in competition law and merger cases concerning multisided platforms. The emphasis of this approach lies on considering all the sides and how they interact. This resulted in the Commission commonly defining more than one relevant market because most platforms offer more than just matching services[69]. Therefore, the authors argue that *"in digital markets, less emphasis should be put on the market definition part of the analysis, and more importance attributed to the theories of harm and identification of anti-competitive strategies."*[70]

There is some case law, which discusses the difficulties in defining the relevant product market for search engines. In *Google Shopping*[71], the General Court found that Google had infringed Art 102 TFEU by abusing its dominant position on the market for online general search services by favouring its own comparison shopping service over competing comparison shopping services[72]. Comparison shopping services are websites that assist online shoppers by providing a comparison of different products, without the shopper having to visit the websites of each vendor[73]. In this decision the General Court held that Google's shopping services must be distinguished from their general search services and that they are two different product markets, as the products were not substitutable for internet users and Amazon and eBay must also be distinguished from Google Shopping[74]. In the Google Android decision, the General Court confirmed the Commission's decision that Google operated in four different relevant markets. They are the worldwide market (excluding China) for the licensing of smart mobile device operating systems, the worldwide market (excluding China) for Android app stores, the various national markets, within the EEA, for the provision of general search services and the worldwide market for non-operating-system-specific mobile web browsers. Yet, the Commission also pointed out, that these markets are not separate but complementary due to Google's overall strategy to promote its search engine by integrating it into an ecosystem[75].

[69]Crémer, de Montjoye and Schweitzer (n 14), 45-46.
[70]ibid, 46.
[71]Case T-612/17 *Google LLC and Alphabet, Inc. v European Commission* [2021] ECLI: 2021:763.
[72]Natalia Moreno Belloso 'Google v Commission (Google Shopping): A Case Summary' (European University Institute 2021), 1.
[73]Wan Yun *Comparison-Shopping Services and Agent Designs* (1st edition, Information Science Reference 2009), 2.
[74]Moreno Belloso (n 72), 1.
[75]Court of Justice of the European Union 'Press Release No 147/22' (2022) https://curia.europa.eu/jcms/upload/docs/application/pdf/2022-09/cp220147en.pdf accessed 22 April 2023.

This points towards the difficulties the authorities face when it comes to competition law cases involving online platforms.

5.3. Market power

The main goal of the assessment of market power in EU competition policy for traditional markets was to find a sieve large enough to prevent overshooting regulation of the market but also fine enough to enable the policing of infringements efficiently[76]. Although the assessment of market power has proven difficult in practice, some generalisations can be derived from case law: Very high market shares of over 70% raise a presumption of dominance, large market shares of 50-60% raise a weaker presumption of dominance and market shares between 40-50% require a close examination of the facts and in general do not raise presumptions of dominance. Market shares below 40% have mostly been regarded as incapable of being dominant[77]. Where there are network effects, however, prices do not represent the value of goods, so that looking at percentages of sale does not make much sense.

Therefore, to establish the dominance of an undertaking, the barriers to entry must also be taken into consideration. This is relevant because an undertaking with a high market share is much less likely to be able to behave independently of competitors and consumers in a market with low entry barriers, however, markets with high entry barriers make it easier for undertakings to increase prices or adopt other strategic exclusionary actions. Some of the entry barriers are state monopolies, authorisation or licensing requirements, intellectual property rights (e.g. patent protection of a pharmaceutical company), sunk costs of entry (costs that a firm must incur to enter a market and cannot be recovered upon exit), economies of scale/scope, network effects and switching costs for consumers[78].

6. How do data protection and competition law play together?

6.1. Overview

The discussion on the intersection between competition law and data protection law is a controversial academic debate. The debate includes several issues, such as the role of personal data in the digital economy and how to foster privacy as a competitive advantage. Also, it questions, if the traditional tools of competition law are suitable for the analysis of data.

[76]Crémer, de Montjoye and Schweitzer (n 14), 48.
[77]Robert O'Donoghue and Jorge Padilla (n 5), 159.
[78]ibid, 162 ff.

This discussion was started by a report published in 2014 by the European Data Protection Supervisor (EDPS) on the interplay of data protection, competition law and consumer protection law[79]. In the report he stated that the market for free services in an increasing number of sectors of the digital economy have yet to be analysed but digital giants create their power by controlling massive volumes of data of their users. The potential disregard of privacy standards due to this power may be a new concept of consumer harm for competition enforcement in the digital economy. The application of competition rules to digital markets could also promote privacy enhancing services and result in greater consumer control over their data[80]. Criticism of this report was mostly grounded on the assumption that digital markets are dynamic and that competition law and data protection law were two separate fields of law that must be preserved at all costs. However, nowadays (potential) competitors of the big players in the field struggle to raise capital, attract talent and therefore successfully enter the market[81]. One of the main factors that support this struggle is the lack of data to offer good quality services attracting and convincing users to switch or multihome.

The report highlights that data privacy and competition law share common concerns. They both have fairness at their centre[82] and aim to lessen unfairness by imposing obligations on those with information/market power to prevent power imbalances. Data protection rules of the GDPR thereby set a basic standard required of every data processor – no matter how big or small[83]. Graef, Clifford et al. suggest using the competition law principles to interpret the scale of controller and processor obligations under data protection law. As I have previously mentioned, under Art 102 TFEU companies that hold a dominant position in the market must adhere to special responsibilities that non-dominant companies do not have to apply. This approach could be put in line with the risk-based approach of the GDPR. Under the GDPR compliance is scalable depending on the risk of the specific data being processed. A strong market position of a company could be regarded as a bigger risk for processing personal data under the GDPR. To determine the market power, competition authorities could in return draw from assessments of data protection authorities. In this sense, a strong position of the data

[79]Orla Lynskey, 'At the crossroads of data protection and competition law: time to take stock' [2018] 8(3) International Data Privacy Law 179 ,179.

[80]European Data Protection Supervisor. Preliminary Opinion of the European Data Protection Supervisor Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy March [2014], 26. < https://edps.europa.eu/sites/default/files/publication/14-03-26_competitition_law_big_ data_ en.pdf> accessed 1st September 2023.

[81]Christian D'Cunha 'Best of frenemies? Reflections on privacy and competition four years after the EDPS Preliminary Opinion` [2018] 8(3) International Data Privacy Law 253, 254.

[82]Inge Graef, Damian Clifford et al. 'Fairness and enforcement: bridging competition, data protection, and consumer law' [2018] 8(3) International Data Privacy Law 200, 200.

[83] D'Cunha (n 81), 254ff.

controller or processor (and the lesser chance for data subjects to rely on another controller or processor), the stricter the principles of fairness and accountability would need to be applied. Therefore, market power would act as an indicator challenging the validity of consent as a legitimate ground to process data[84].

Competition law is an important tool as it holds dominant companies accountable[85] and enables consumers to make choices themselves and transact with companies of their own liking. Despite this overlap in the regimes of data protection and competition law, their rules and principles are still applied in isolation. As a result, there is room to apply the different regimes in a coherent way. However, there are boundaries to the application of competition law to data protection law issues. According to Art 102 TFEU holding a dominant position is not per se forbidden but only the abuse of this dominant position. This must also be the boundary when applying competition law rules to data protection issues[86].

This intersection of data protection and competition law was first approached by courts in the BKAs ruling against Facebook. As this case is ground-breaking, I will discuss this case in greater detail below. The jump from theoretical debates to the realization of this approach in court rooms was only achieved step by step. Therefore, in the following subchapters I will introduce some of the relevant cases.

6.2. Google/DoubleCklick decission

This case is presumably the first competition law case concerning data and the protection of user privacy. At the time of the merger notification, DoubleClick was in the ad server market and ensured that after an advertiser bought advertising space, the right ad appeared in the right place at the right time. Google was also already the most important player in the market of search engines and held an important role in the advertising market. As both companies had large datasets containing their users data, both the FTC and the Commission were concerned that the merge of the two companies would lead to an unprecedented aggregation of data. It was mostly feared that the purchase would have allowed Google to track the searches made by users and the pages accessed, allowing it to undertake an even more accurate user profiling[87].

[84]Graef, Clifford et al., 'Fairness and enforcement' (n 82), 206-207.
[85]D'Cunha (n 81), 254ff.
[86]Graef, Clifford et al., 'Fairness and enforcement' (n 82), 210.
[87]Andrea Giannaccari 'The Big Data Competition Story: Theoretical Approaches and the First Enforcement Cases' (2018) 2018/10 EUI Working Paper LAW, 9-10 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3244419> accessed 24 April 2023.

However, both the FTC and the Commission approved the merger. The FTC approved the merger because the parties were not competitors in any of the relevant markets and the combination of data would not lead to insurmountable entry barriers for competitors. Regarding damages to users' privacy, the FTC found that statutory law did not allow to block the merger on different grounds than typical competition law concerns but recognized that privacy can represent a non-price competition dimension[88].

A similar result was reached in the EU, however, the Commission decided to focus solely on some competitive effects that could occur, concluding that no harmful consequences could be expected for consumers in the relevant markets. It was argued that the data held by Google could also be found by other competitors, mentioning the non-rivalrous nature of data. Yet, the Commission decided not to engage in the assessment of user privacy and stated that the decision was to assess whether the merger was compatible with the rules of merger control[89] and argued that the decision was made *"[…] without prejudice to the obligations imposed onto the parties by Community legislation in relation to the protection of individuals and the protection of privacy with regard to the processing of personal data*"[90].

These approaches of both the Commission and the FTC are not surprising, as both authorities stuck to their "traditional" competences as competition authority. The oargument of the Commission that the data of both companies is still available on the market is theoretically not wrong, but does not make much sense in this case, as it is almost impossible for competitors to accumulate such amounts of data. Data collection by online platforms grows exponentially as soon as a critical mass of users is reached. Moreover, data is needed in order to offer high quality services with good algorithms to attract users.

6.3. Facebook/WhatsApp Merger Decision

Facebook acquired WhatsApp for USD 19 billion in February 2014. Therefore, the merger was examined by the Commission pursuant to Art 4 of the Merger Regulation[91].

During the market investigation, three relevant markets were identified by the Commission:

- When defining the relevant product market for consumer communication services the Commission suggests segmenting it by functionality, platform and operating system, pointing out that in this case the platform (e.g. usable on a computer, smartphone etc.) is the

[88]ibid, 9-10.
[89]ibid, 10.
[90]Case M.4731 *Google/ DoubleClick* [2008] OJ C184/10, para 398.
[91]Case M.7217 *Facebook/Whatsapp* [2014] OJ L24.

most relevant, as WhatsApp is only offered for smartphones[92]. With regards to the functionality, the Commission finds *"that, while different services may take different approaches to facilitating consumer communications [e.g., text messaging vs. photo or video messaging or calls], that does not put these services into different markets or market segments."*[93]

- Social networking services can be described as "*services, which enable users to connect, share, communicate and express themselves online or through a mobile app*"[94], which is also the core service offered by Facebook. The Commission notes that there is a certain overlap between social networks and consumer communication services and that the lines are becoming increasingly blurred. However, there are also important differences: Social networks offer a richer social experience, the adding of new contacts is facilitated by the visibility of a user's list of friends. Consumer communication apps, however, tend to focus on enabling basic communication between users. Also the style of communication is different: consumer communication apps tend to offer real time communication, while responses on social networks (e.g. by commenting on a posting) are not expected to happen in real time. Also, the messages on social networks are commonly meant for all the users contacts, whereas messages on consumer communication services are meant for one person or a small group of people[95].

- The last market is the market for online advertising services. With regards to Facebook, the Commission states that it only uses targeted advertising, as described above, for its users. However, Facebook does not sell any of their user's data or provides data analytic services to third parties. Also, Facebook does not offer advertising on its messenger service. WhatsApp on the other hand does not collect or stores users' data that would be valuable for advertising purposes[96].

The competitive assessment by the Commission took place for each of the individual relevant markets, however, many aspects are overlapping. For the purpose of this paper, I will therefore not discuss every competitive assessment separately but summarize the most important aspects.

With regards to the market for consumer communication services, the Commission stated that WhatsApp and Facebook's messenger service are not competitors. The main differences are

[92]ibid, para 34.
[93]ibid, para 25.
[94]ibid, para 49.
[95]ibid, para 51ff.
[96]ibid, para 69.

that WhatsApp uses telephone numbers and Facebook messenger is connected to Facebook accounts, therefore the source of contacts differs. Also, the user experience is different, as Facebook messenger is embedded in the Facebook experience. Moreover, the privacy policies differ greatly (contrary to WhatsApp, Facebook messenger collects data for Facebook) and the intensity with which the apps are used is different. Other considerations by the Commission are that in the market for consumer communication apps, one can see a significant degree of multihoming. This leads to the assumption, that the two consumer communication apps are complimentary and not in direct competition with each other[97].

With regards to the consumer's ability to switch providers, the Commissions market investigation suggested that there are no significant costs preventing consumers from switching consumer communication apps. This is due to most of them being offered for free, them being downloadable to the smartphone easily, users can switch between apps in no time and simple user interfaces lead to very low learning costs. All these factors benefit multi-homing. Users have installed on average three or more consumer communication apps on their smartphones and use two or more of them regularly. Another big consideration by the Commission is that neither Facebook nor WhatsApp are pre-installed on most hardware and do not have control over the operating systems enabling them to make it burdensome for users to switch by blocking the installation of certain alternative services[98].

With regards to network effects, the Commission accepts that more users increase the utility of the examined services, however, the sole existence of network effects does not a priori indicate a competition problem in the market. They only raise issues, if they allow the merged entity to foreclose competitors and make it increasingly difficult for competing providers to expand their customer base. In the present case, the Commission points out some mitigating factors (e.g. dynamic market, low switching costs, multihoming, no control over the operating environments). *"Therefore, the Commission considers that, while network effects exist in the market for consumer communications apps, in the present case, on balance, they are unlikely to shield the merged entity from competition from new and existing consumer communications apps."*[99]

The Commission also analysed a potential data concentration that could potentially strengthen Facebook's position in the online advertising market but disregarded any privacy-related

[97]ibid, para 101.
[98]ibid, para 134.
[99]ibid, para 135.

concerns flowing from the increased concentration of data, as that falls within the scope of data protection and not competition law. The Commission moreover argued that it is unlikely that WhatsApp will introduce advertisements but even if they did, the transaction would only raise competition concerns, if post-transaction there were not enough effective alternatives to Facebook for the purchase of online advertising space. The Commission further argues that it is very unlikely (and technically difficult to achieve) that Facebook will start to collect data from WhatsApp. A step like that would likely lead to WhatsApp users switching to other less intrusive consumer communication apps[100].

As shown above, the Commission recognized privacy as a form of a non-price competition parameter by stating that in the market for consumer communication apps, privacy and data security are key competition parameters. This case is particularly interesting because it is the first to recognize privacy as a non-price competition parameter with regards to digital services. Although the Commission identifies privacy as a key parameter of competition in the market for consumer communications, it only considers privacy in relation to its analysis of the advertising market. While investigating the impact of the merger on the advertising market, the Commission checked how (and if) privacy considerations constrain the merged entity from introducing targeted advertisements on WhatsApp[101].

One of the main shortcomings of this decision is that the Commission did not assess the impact of the merger on the incentives of the parties to compete on privacy policies in the market for consumer communication apps. Instead, it used the different privacy approaches to argue that the two messaging services are complementary and not competing. This means that the Commissions understanding is, that firms with identical privacy policies compete more fiercely. This opinion has flaws, as the adoption of better privacy policies or data security that are accepted by consumers may lead to other entities also adopting these policies and thereby exerting competitive pressure on others[102].

Moreover, it is important to note, that the Commission based this decision on the assumption that Facebook would be unable to match users' accounts with WhatsApp users' accounts, as Facebook provided this information to the Commission when notifying the acquisition. Prior to its acquisition, WhatsApp had a stronger commitment to privacy than Facebook, was known for its ad free services and its promises to maintain users' privacy. Facebook collected users'

[100]ibid, para 164ff.
[101]Samson Esayas 'Competition in Dissimilarity: Lessons in Privacy from the Facebook/WhatsApp Merger' [2017] 33 CPI Antitrust Chronicle 1, 1-2.
[102]ibid, 1ff.

data and allowed targeted advertising. These differences raised concerns whether Facebook would change WhatsApp's policies post-merger. Because WhatsApp announced to update its terms in 2016, which allowed users to link WhatsApp users' phone numbers with Facebook users' identities, Facebook was fined EUR 110 million for providing misleading information. Considering these developments, critics claim that the Commission should have paid better attention to the possible reduction of privacy due to the merger[103].

6.4. Microsoft/LinkedIn Merger Decision

In October 2016 the Commission reviewed the Microsoft/LinkedIn merger. According to the parties to the merger, the goal of the merger is for Microsoft to expand the standalone business of LinkedIn and integrate LinkedIn's products and services into Microsoft[104].

As Microsoft and LinkedIn are active in many different markets (not always the same), the Commission had to review the merger (horizontally and vertically) in many different relevant markets: PC operating systems, productivity software, customer relationship management (CRM) software solutions, sales intelligence solutions, online communication services, professional social networking services, online recruitment services and online advertising services[105]. The number of relevant markets alone suggests that the decision is quite expansive and many (for my paper irrelevant parts) will therefore not be discussed. The key issue of this decision, which is relevant for my paper, is the possible post merger combination of data with regards to online advertising[106].

Assuming that the combination of data would be allowed under applicable data protection laws, the Commission found that competition law issues may occur in two ways:

Firstly, the increase in market power (in a hypothetical market for such data) may increase entry barriers for competitors, who may need the data to operate effectively in the market. The Commission is concerned that the combination of the two datasets may require competitors to collect larger datasets to be able to compete effectively. Secondly, even if two pre-merger competitors based on this data were technically not able to combine the two datasets, the

[103]Shilpi Bhattacharya and Miriam C. Buiten *Privacy as a Competition Law Concern: Lessons from Facebook/WhatsApp* (2018). <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3785134> accessed 30 October 2021

[104]Case M.8124 *Microsoft / LinkedIn* [2016] OJ C388, 165.

[105]Esayas 'Competition in Dissimilarity: Lessons in Privacy from the Facebook/WhatsApp Merger' (n 101), 8ff.

[106]Graef, 'Data Concentration and Data Abuse under Competition Law' in Martin More and Damian Tambini (eds), *Digital Domiance: The Power of Google, Amazon, Facebook and Apple* (Oxford University Press 2018), 78.

Commission points out that this competition regarding the data would nevertheless be eliminated[107].

However, the Commission comes to the same conclusion for the market for online advertising services as in earlier cases, because Microsoft and LinkedIn did not make their data available to third parties for online advertising. Moreover, the entry barriers would not be raised for entities, as there would still be a large amount of valuable internet user data available, that is not in Microsoft's control. Also, Microsoft and LinkedIn were considered small market players and only competed to a very small extent in the online advertising sector[108].

This approach was also adopted in the Verizon/Yahoo decision, especially the way in which the combination of two datasets from different entities may raise competition concerns. It therefore seems like the Commission has adopted these two strategies as the relevant framewok to assess data concentration concerning merger review[109].

6.5. Conclusion

The Commission now regularly assesses data-related competition concerns in the merger review regime by analyzing a hypothetical market for data. However, an accurate analysis still requires the ability to identify the circumstances in which data amounts to a form of market power that would impede competition. The phrase that the Commission uses, that "*a large amount of internet user data valuable for advertising purposes is not within the merging parties exclusive control"* is problematic because this statement is not substantiated with an in depth analysis of the extent to which data from internet players can be regarded as substitutable to the combined dataset of the merged entity.

However, these three cases also show that the competitive power of data has become increasingly important for the Commission. It went from not mentioning the potential value of data in the Google/DoubleClick decision to acknowledging that the combination of two big data sets may raise competition concerns in the Microsoft/LinkedIn decision. These cases, however, only concern mergers and do not include any Art 102 TFEU decisions. Therefore, in the next chapter, I will introduce the essential facilities doctrine, which tackles refusal to deal cases and analyse, if the refusal to deal with data could be considered an anti-competitive conduct.

7. Essential Facilities Doctrine

[107]ibid, 78-79.
[108]ibid, 79.
[109]ibid, 81.

7.1. Overview

The essential facilities doctrine forms an important part of EU Competition law; however, the CJEU never declared it as the essential facilities doctrine but only used its concept and clarified its conditions quite extensively. Also, the Commission only mentioned the term essential facility in a few decisions regarding the access to railway and port infrastructures. However, the use of the essential facilities doctrine is widespread in the EU and received less criticism than in the US. The Commission and the CJEU applied the essential facilities doctrine in a wide array of cases (predominantly from the 1980s to the 2000s), for example Commercial Solvents, B&I/Sealink, Port of Rodby, Flughafen Frankfurt/Main AG, Alpha Flight Services/Aeroports de Paris, Night Services, Volvo v Veng, Renault v Maxicar, Magill, IMS Health and Microsoft[110].

Dacar defines the essential facilities doctrine as follows:

> *"According to the essential facilities doctrine, the owner of a facility which is not replicable by the ordinary process of innovation and investment, and without access to which competition on a market is impossible or seriously impeded, has to share it with a rival."*[111]

In other words, the company with a dominant position in the upstream market refuses to grant access to a product or service from the market that a non-dominant company needs to compete on the downstream market[112].

In the Magill case[113], three television broadcasters in Ireland published magazines weekly, which listed their own television and radio details for the coming week and were the only source of this information. A publisher wanted to create a TV program guide listing all the TV programs of the week. However, the broadcasters refused to hand over the intellectual property rights of the listings. The Commission and ultimately the CJEU found that this was an abuse of a dominant position, identifying three reasons: There was a demand for a weekly multi-channel TV magazine, there was no justification for the refusal and lastly, the broadcasters reserved the secondary market of weekly TV guides to themselves by denying access to the basic information necessary to create a TV guide[114].

[110]Rok Dacar, 'Is the Essential Facilities Doctrine Fit for Access to Data Cases? The Data Protection Aspect' [2022] Croatian Yearbook for European Law & Policy 61, 65-66.
[111]ibid, 64.
[112]ibid, 64.
[113]Joined Cases C-241/91P and 242/91P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [1995] ECR I-808.
[114]Barry Doherty, 'Just what are essential facilities?' [2001] 38 Common Market Law Review 397, 407-408.

In the Bronner case[115], the CJEU clarified the Magill test and held that the indispensability condition should remain strict[116]. Oscar Bronner, the publisher of the Austrian newspaper "Standard", wanted access to a nationwide home-delivery service of newspapers of a different publishing house (Mediaprint). The access to this home-delivery service was denied by Mediaprint. In this case, the CJEU established the following criteria to determine, if the denial of access was abusive. Firstly, one must ask if the facility is likely to eliminate all competition from an undertaking. The access to the essential facility must be indispensable. There is no objective justification for the denial of access. In the Bronner case, the CJEU argued that the access to the essential facility was not indispensable because there are substitutable services and therefore Bronner was not granted access to Mediaprint's newspaper home delivery service[117].

The General Court's Microsoft decision concerned the refusal to provide third party producers of workgroup server operating systems with the interoperability information with the Windows client PC operating systems. At first the Commission found this practice by Microsoft an infringement of Art 102 TFEU by refusing to supply interoperability information. Microsoft appealed this decision to the General Court, which dismissed the application[118]. This was again a chance to fine tune the essential facility test. The General Court agreed on widening certain conditions: the elimination of effective competition and the adaptation of the new product condition into a technical development condition[119].

Looking at all abovementioned cases, Bruc concludes that the essential facility test has the following requirements:

> *"It is necessary to distinguish two markets, the facility is indispensable in that no real or potential alternatives exist, the refusal of access to a facility must be liable or likely to eliminate all effective competition on the market and there is no objective justification for the refusal. If an IPR is involved, an additional condition appears: the refusal restrains technical improvement."* [120]

7.2. Data as essential facility

[115]Case C 7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG [1998] ECR I-07791.*
[116]Édouard Bruc 'Data as an essential facility in European law: how to define the "target" market and divert the data pipeline?' [2019] 15:2-3 European Competition Journal 177, 185.
[117]Andreas Wiebe et al. (n 8), 493.
[118]Liyang Hou 'The Essential Facilities Doctrine – What Was Wrong in Microsoft?' [2012] 43(4) IIC- International Review of Intellectual Property and Competition Law 251, 252.
[119]Bruc (n 116), 184-185.
[120]ibid, 185.

After the heavily discussed Microsoft decision, the Commission and the CJEU were reluctant to continue to apply the essential facilities doctrine. This was due to the uncertainty regarding the conditions under which the essential facility doctrine could be used. For this reason, the Commission also refrained from addressing the question, if data could be considered an essential facility. The Commission merely pointed out that even if one company controls a certain dataset, there is still a lot of data available for other companies to use and that the use of one specific dataset by one company does not restrain another company from using the same dataset, as the nature of data is non-rivalrous[121].

Data has several characteristics that make it different from traditional essential facilities. It has a decreasing marginalized value, meaning that it's value decreases over time, it is non-rivalrous and there are extreme network effects in data related industries. Therefore, in academia there is a great controversy, whether data can be considered an essential facility. Some argue that data can never be an essential facility, and some argue that data must be considered an essential facility, if certain criteria are met because to deny access to data can have the same effects for competition on a downstream market where the access to a traditional essential facility was denied[122].

Below I will reintroduce the essential facility test with regards to data and point out potential benefits and problems when applying the essential facility doctrine to data:

- Indispensability of data: In the Google/DoubleClick decision the Commission argues that the combination of information and data does not give Google a competitive advantage impossible to match by competitors. It thereby concludes that Google's data is not indispensable for providing advertising services in an online environment. As this decision shows, data can not easily be considered indispensable (for providing targeted advertising), especially because of its non-rivalrous nature. The picture changes when looking at the use of data for offering good quality services. For the provision of relevant search results when using search engines, a specific type of data is necessary that is not always readily available on the market. In most instances such data can only be obtained by serving large amounts of customers and other data is not substitutable[123].
- Exclusion of all effective competition on the downstream market: In previous essential facility cases in the EU, this condition is understood as a requirement of the holder of the

[121]Dacar (n 110), 65.
[122]Dacar (n 110), 69.
[123]Graef, 'Data as Essential Facility Competition and Innovation on Online Platforms' (n 17), 264ff.

facility to already be active on the downstream market and reserves this market to itself by refusal to deal. Therefore, a provider of an online platform cannot be forced to grant access to data to a competitor that wants to start a business in a market in which the provider is not present. This is especially relevant, when indirect competition occurs and companies want to enter a market that does not directly relate to the main service of the potential access provider[124]. Graef argues that

> *"if the current interpretation of the requirement of exclusion of effective competition is upheld, a provider of an online platform can legitimately prevent access seekers from opening up new markets in which it is not active itself by refusing to give access to its dataset."*[125]

- Prevention of the introduction of a new product: This condition must be met, if intellectual property is concerned. Data can also be intellectual property, as it may be protected under copyright or trade secret law. As a result, an access seeker must desire to develop a new product, once given access to the required information. The condition will not be easily met, if the two services are similar. If they are not similar, they will most likely not operate on the same market. However, the General Court held in Microsoft, that a mere technical development suffices. Graef argues, that as there is no reason why refusal to deal cases involving IP should be treated differently than those which do not. She suggests making that condition dependant on whether a market is characterized by external market failures[126] and argues:

> *„In situations where a dataset is protected by strong network effects or economies of scale and scope, the fact that an incumbent remains dominant in the market may merely result from the market situation grown around the dataset instead of from its competitive success. It is submitted that a competition law intervention is warranted under less strict conditions in these cases to guarantee a certain level of competition in the market and to prevent an incumbent from artificially extending its dominance by refusing to give access to its dataset."*[127]

- Absence of an objective justification: The obvious objective justification, that a dominant provider might invoke to offset the claims, could be based on data protection law, especially its obligation towards its users to protect their data. This however only, if personal data (that is protected under the GDPR) is involved. Graef argues, that even if a sector is regulated, it does not lead to its automatic immunity from competition law intervention. If the applicable law leaves room for autonomous decisions by the dominant company, an objective

[124]ibid, 268.
[125]ibid, 268.
[126]Ibid, 268-269.
[127]ibid, 269.

justification based on this legal regime shall not be accepted by the competition authorities[128].

However, even though the Commission and the court have yet to recognize data as essential facility, the German Act against Restraints of Competition introduced in its tenth amendment that data can be an essential facility (Sec 19(4) GWB)[129]. It reads:

> *"Abuse occurs in particular if a dominant company [...] refuses to supply another company with such goods or commercial services for a reasonable fee, in particular to grant it access to data, networks or other infrastructure facilities, and the delivery or the granting of access is objectively necessary to operate on an upstream or downstream market and the refusal threatens to eliminate effective competition on that market, unless the refusal is objectively justified;"*[130]

With this wording, the German legislator clarified that not only physical infrastructure but also data can and must be considered an essential facility[131]. The introduction of Sec 19(4) GWB was the first piece of legislation to confirm that data can be an essential facility. Even though this would be a big step in the regulation of online platforms, it is yet to be applied on an EU wide basis and details of the functioning of such an article in EU law are yet to be discussed.

8. Bundeskartellamt (BKA) v. Facebook

8.1. German Competition Law – a new approach?

Before getting into the case, it is important to explain the basic principles of the German approach to competition law with regards to online platforms. In 2017 Germany amended their competition law regime to improve the reaction to the challenges that digital platforms bring. Another amendment followed (10th amendment), which I mentioned above. It is not relevant for the Facebook case yet.

One of the main changes was the introduction of Sec 18 (3a) GWB. It mandates competition authorities to consider the economic features of multi-sided platforms when determining market power and potential dominant positions in such markets. For this purpose, the legislators included new platform-related market power criteria: direct and indirect network effects, the parallel use of several services (multi-homing) and the effects for users resulting from the

[128]ibid, 270-271.
[129]Dacar (n 110), 69.
[130]Gesetz gegen Wettbewerbsbeschränkungen (GER), Sec 19 (4).
[131]Harald Kahlenberg 'Die 10. GWB-Novelle: Mehr als eine Digitalisierungsnovelle' [2021] 10 Betriebsberater 579, 580.

change of services (switching costs), economies of scale connected to network effects, access to data relevant for competition and innovation-driven competitive pressure[132].

The German legislator also introduced in Sec 18(2a) GWB that it does not preclude the assumption of market dominance, if services are provided free of monetary charge, meaning that the presence of monetary flows is not a must have criteria. This is especially relevant for digital markets, as online platforms often collect and utilize personal data as a form of payment. However, to avoid the regulation of competitively unproblematic companies, minimum revenue thresholds were also introduced[133].

Moreover, the German legislator also included competences of the competition authorities in the field of consumer protection law (which Germany historically strictly separates from competition law). The BKA can now conduct so-called sector inquiries, if there is reasonable suspicion of significant, permanent or repeated breaches of consumer law, which may affect the interests of many consumers – unless these violations fall within the competence of another federal authority (Sec 32e(5) GWB). The goal of this provision is to gain knowledge about the examined markets and not to file claims against individual companies, which breach consumer protection standards[134].

8.2. Facts of the case

In February 2019 the BKA issued the long-awaited decision against Facebook[135]. In the decision B6-22/16 the BKA argues in over 300 pages that Facebook is abusing its dominant position in the market for social networks due to its misleading terms and conditions regarding user data. It links together issues of data protection and competition law amongst online platforms[136]. To date it is also the most prominent case, in which the amended German competition law was applied. Also, the BKA is the first national competition authority to launch a competition law investigation on the suspicion that data (or more precisely unlawful terms and conditions regarding the use of data) abuse a dominant position[137].

[132]Oliver Budzinski and Annika Stöhr 'Competition Policy Reform in Europe and Germany - Institutional Change in the Light of Digitization' [2019] 15(1) European Competition Journal 15, 33.
[133]ibid, 33-34.
[134]ibid, 35.
[135]B6-22/16.
[136]Giulia Schneider 'Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's investigation against Facebook' [2018] 9 Journal of European Competition Law & Practice 213, 213.
[137]Robert McLeod 'Novel But a Long Time Coming: The Bundeskartellamt Takes on Facebook' [2016] 7/6 Journal of European Competition Law & Practice 367, 368.

The BKA opened proceedings in 2016 against Facebook Inc. (USA), its Irish subsidiary and the Facebook Germany GmbH due to a suspicion that Facebook's conditions of use are violating data protection provisions and that these violations could be an abuse of a dominant position[138]. The BKA was suspicious about wether Facebook's terms that allowed it to excessively collect and process user data from other websites was an abuse of a dominant position. The implementation of Facebook's like button, the Facebook login and the tracking tool Facebook Pixel on third-party websites were in question[139]. The relevant passages in Facebooks terms and conditions, that enabled it to collect the data on third party websites , read as follows:

> *"Advertisers, app developers, and publishers [...] provide (by means of such tools) information about your activities off Facebook – including information about your device, websites you visit, purchases you make, the ads you see, and how you use their services – whether or not you have a Facebook account or are logged into Facebook."*[140]

It further states: *"We also receive information about your online and offline actions and purchases from third-party data providers."*[141] These terms enable Facebook to collect data without the explicit consent of the users, which would normally be required under the GDPR. Users can only avoid this data collection by not signing up for the service at all, as the terms are a precondition to use Facebook. The BKA argues that this practice is only possible because of Facebooks market position[142].

In the case, the BKA faced three main challenges. Firstly, the proof that Facebook holds a dominant position in the market, as zero price markets pose a challenge to classic approaches to assess market power[143]. Secondly, to show that Facebook's dominance has been abused by the terms and conditions it has imposed and thirdly how to tie the unlawful user terms and conditions to the abuse of its dominant position[144].

This decision is considered a pioneer decision, as it attempts to answer questions that are still unclear:

[138]ibid, 368.
[139]Hendrik Schulze *Exploring the Unchartered Waters of European Competition Law 4.0. An approach to the regulation of abusive data-related behaviours of dominant undertakings in the digital age* (Nomos 2021), 70.
[140]ibid, 71.
[141]ibid, 71.
[142]ibid, 71.
[143]Samson Esayas 'Competition in (data) privacy: "zero"-price markets, market power, and the role of competition law' [2018] 8(3) International Data Privacy Law 181, 182.
[144]McLeod (n 137), 368.

- Is there a relevant market for social media platforms and how can one define this market?
- Can unlawful general terms and conditions constitute a breach of competition law?
- Can a breach of data protection law constitute a breach of competition law?
- Do competition authorities have authorization to pursue data protection law breaches with the instruments of competition law or should this be solely within the competence of data protection authorities?[145]

The decision was legally based on Art 102(2a) TFEU as well as Sec 19(1) GWB, which regulates a breach of competition law, if an entity exploits its dominant position[146].

8.3. Ruling

8.3.1. Definition of the relevant market

The BKA holds that Facebook is doing business on the national German market for social networks for private users. This definition of the relevant market is very narrow as the BKA concluded that Facebook's different user groups (private users, advertisers) have different needs and therefore are to be separated into two relevant markets. In an additional step, other internet services such as Youtube, Snapchat, Instagram and Twitter were examined extensively, and the BKA found that they are not in the market for social networks. This approach ("Bedarfmarktkonzept") was applied correctly by the BKA, as it allows for a sensible definition of the relevant market. This narrow definition following a need related approach when defining the relevant market is also underlined by users commonly multihoming. If the users would not see benefits in using other internet platforms, they would refrain from doing so[147].

8.3.2. Market dominance

The BKA established in its ruling that Facebook is a dominant company in the national (german) market for social networks for private users according to Sec 18 GWB, because of its scope of action in a market that is not sufficiently controlled by competition[148]. The scope exists if *"its position in the market enables the company to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent*

[145]Thorsten Körber `Die Facebook-Entscheidung des Bundeskartellamtes – Machtmissbrauch durch Verletzung des Datenschutzrechts?' [2019] 4 Neue Zeitschrift für Kartellrecht 187, 187.
[146]ibid, 188.
[147]Nela Grothe, *Datenmacht in der kartellrechtlichen Missbrauchskontrolle* (Nomos 2019), 245.
[148]McLeod (n 137), 374.

independently of its competitors, customers and, ultimately, consumers."[149] The BKA argued that it is not relevant, if the harm caused by market power is due to the scope of price increase, as this parameter could not be applied for free services[150].

Sec 18(3) and (3a) GWB provide a list of factors that must be considered to determine market dominance. Under application of these provisions the BKA found that monopolisation due to market tipping can reasonably be assumed. The BKA assessed the following factors:

- Network effects: The BKA found that competition for social networks is threatened by the market tipping effect. The market tipping effect is based on the self-reinforcing feedback loops of direct network effects. Market tipping means that if the size of a network is exceeded due to a self-reinforcing feedback loop, almost no customers will be left for competing networks. This will lead to the switching of users from other networks to the dominant one. The then shrinking networks will become unattractive, which results in a (quasi-)monopoly situation[151].

  This user behavior played out in the relevant case. The BKA states that Facebook's competitors at the time of entry into the German market, such as StudiVZ, Google+ and MySpace all suffered an immense loss of users to Facebook and therefore had to discontinue their services. The BKA moreover claimed, that the market success of YouTube and Snapchat can not be used as an argument against the market's trend towards tipping as they are in different markets[152].

  Moreover, indirect network effects reinforced the trend of market tipping. As Facebook is part of a multi-sided market, the indirect market effects increase the market entry barriers for social networks even further. Also, Facebook is an advertising-financed service meaning that the benefit of the advertising side generated by the platform depends on the number and composition of users. Positive indirect network effects are created by Facebook's large and diverse user base, which attracts advertisers[153].

  However, for an advertising financed platform, market entry is very difficult as the company must be able to enter the market successfully in at least two sides of the market – in the case of Facebook the market for social networks and the online advertising market. Facebook

[149]ibid, 376.
[150]ibid, 377.
[151]ibid, 380ff.
[152]ibid, 389ff.
[153]ibid, 441-442.

monetizes its service for the user's free product by advertising, however entering the market with a paid product would prove difficult as users are not prepared to pay for a product, such as a social media platform. It is therefore very difficult for competitors to achieve a successful market entry due to the indirect network effects. This can be seen, when looking at the Facebook case: It is very attractive to big advertisers due to its wide user base[154] and the resulting high potential of advertisements being shared and viewed by many users[155].

Moreover, the BKA found that there is no significant parallel use of social networks. Therefore, there is no great potential for multi-homing which could counteract the tipping of the market, especially because Twitter, Instagram, WhatsApp and Snapchat belong to separate markets[156].

Additionally, the BKA also found that a lock-in-effect occurs, due to a high degree of (technological) incompatibility. Users that want to switch to a substitutable social network face barriers. Users will probably only switch, if they get their contacts and friends to switch to the same network as well[157]. *"The incentive to switch to another social network therefore decreases with higher intensity of use of the previous network."* [158] As Facebook is heavily used and friends (also friends of friends) are interconnected closely, the number of users that would have to be persuaded to switch in order to achieve a similar level of benefit is extremely high[159].

Switching is also made more difficult by the lack of data portability. Users must set up a new profile, re-enter all the information and regather all their "friends" again[160].

As the BKA has shown, unsurprisingly the network effects and lock in effects of Facebook are enormous and influence it's behaviour on the market[161].

- Economies of scale**:** As discussed earlier, the supply-side economies of scale combined with the direct network effects and lock-in effects support the assumption of market dominance and indicate a market tipping process. The BKA points out three ways, in which the economies of scale apply to Facebook.

[154]ibid, 443ff.
[155]Sophie Victoria Knebel *Die Drittwirkung der Grundrechte und -freiheiten gegenüber Privaten. Regulierungsmöglichkeiten sozialer Netzwerke* (2018 Nomos), 162.
[156]McLeod (n 137), 455ff.
[157]ibid, 460-461.
[158]ibid,462.
[159]ibid,463ff.
[160] ibid,469.
[161]Knebel (n 155), 162.

In combination with network effects, Facebook's lower average costs per user result in it gaining a significantly larger strategic scope for action than its competitors. The lock-in effect described above amplifies this development. As a result, it leads to cost disadvantages for competitors. Due to the high switching costs, the competitors' prices must compensate for the switching costs, if users are to be motivated to switch. This cost effect also provides Facebook with more scope of action vis-a-vis its competitors. As a result, the joint effect of network effects, lock-in effects and economies of scale ultimately lead to a situation, where Facebook becomes increasingly stronger, and its competitors become insignificant. This indicates further the ongoing market tipping process[162].

- Facebooks access to relevant data**:** Facebook has a very large and detailed database because of its access to various datasources. This creates an additional barrier to market entry, as the quality of a social network is driven by personal data and the algorithm used to utilize the data[163].

- Limited innovation-driven competitive pressure**:** In comparison to the points above, the question Section 18(3a)(5) GWB raises is not whether the innovation-driven competition between companies is threatened, but to what extent innovations can determine the market power of a company. As the internet is a dynamic and innovative space, products and services can become successful quickly, however, goods and services can lose their popularity as fast as they gained it[164].

  In the case of Facebook, there is no competitive pressure – also not from neighbouring markets. The dynamics of the internet, such as the introduction of smartphones have not harmed Facebook's market position. Also, the rise of other social networking sites in neighbouring markets could be counteracted by Facebook. This mostly by integrating them into their own ecosystem (e.g. WhatsApp and Instagram). However, the BKA states that it cannot be excluded that no new products and developments could challenge Facebooks market position. There were no such indications at the time of the decission[165].

8.3.3. Abuse of Dominant Position

As already mentioned, the BKA examined the abuse of a dominant position where the violation of data protection law was in question. Thereby, it found Facebook breached the GDPR, as

[162]McLeod (n 137), 477.
[163]ibid, 482ff.
[164]ibid, 501ff.
[165]ibid, 504ff.

users did not agree to the collection and use of data via Facebooks internal services and third parties. Even if Facebook users agree to the processing of data to the full extent, their consent is not voluntary as required by the GDPR. In markets that are financed by advertising, the consent pursuant to Art 7(4) GDPR must be looked at in more detail. Hereby the BKA rightfully states, that the agreement to the processing of data is the return service for services offered without monetary compensation, which is necessary for Facebook's business model to work. Therefore, the BKA only sees a violation of the GDPR with regards to the data collection by third parties, which are directly connected to the data Facebook collects, as this form of external data collection is not necessary for the success of Facebook's business model[166].

The opinion of the BKA does not go uncriticized by scholars. Groethe calls for a strict causality as it is hard to justify why the focus of Facebook's unlawful conduct lies within competition law and not data protection law. This was also one of Facebooks main arguments opposing the decision, as it is unclear to them why competition authorities and not data protection authorities sanction the (alleged) data protection law breach. This could have been avoided by the BKA, if it had assessed the strict causality in depth and argued, why the most relevant part of the unfair conduct lies in competition law and not data protection law[167].

The decision of the BKA was based on the VBL-Gegenwert II and Pechstein decisions of the German Federal Court of Justice (BGH). According to the VBL-Gegenwert decision, an abuse under Sec 19(1) GWB can lie in the implementation of exploitative business terms, if the imposition of such terms is a manifestation of market dominance and if the terms are also incompatible with other legal provisions. In the Pechstein decision, the BGH held that in cases where one party is powerful enough to almost dictate the terms and conditions, Sec 19 GWB must take account of the fundamental rights that might be infringed in such cases to secure the protection of those fundamental rights[168].

However, the breach of the GDPR alone is not enough to lead to the abuse of a dominant position according to German competition law rules. Besides the GDPR breach, a competitive relationship must exist, the causality between Facebook's market dominance and the enforcement of illegal terms of use must be sufficiently assumed and there must be potentially adverse effects on competition[169].

[166]Grothe (n 154), 249ff.
[167]ibid, 252-253.
[168]Schulze (n 139), 72.
[169]Grothe (n 154), 251.

The BKA did not assess the competitive relationship separately but assessed if there is reference to the market. This is done by establishing, if there are any unequal power positions in the market. The BKA concludes that this is the case with regards to data protection law, as there is unequal power between the organisations who collect data and the individual[170].

Regarding the causality, the BKA established a normative causality between the dominant market position of Facebook and the data protection law breach because the freedom of choice of the private users was limited and a connection with the dominant position of Facebook in the market can be seen. Moreover, the BKA also found a result related causality (Ergebniskausalität) in the form of an exclusionary conduct. The conditions that breach data protection law have negative effects on competitors because Facebook achieves a competitive advantage due to its unlawful data processing tactics[171]. Less successful undertakings could not compete.

That Facebook achieves this competitive advantage by unlawfully collecting data also does not go unquestioned by scholars. Grothe argues that the social network Google+ did not disappear from the market due to lack of data and the success of Facebook, network effects were beneficial as well as the quality of its services offered. The argument, that with Facebook's data collection strategy market barriers were created, is not sufficiently backed by the BKAs argument. Especially considering the Facebook/WhatsApp decision discussed above, where the Commission found after an extensive study, that Google collected around 30% of the data in the EU and Facebook only around 7%[172].

Lastly, the breach of the GDPR must also lead to adverse effects on competition. The BKA saw those adverse effects predominantly in disadvantages for the users. Despite there not being any financial damages, the damage for users lies in loss of control over their data and their freedom of decission. There are also adverse effects on competitors. Facebook utilizing unlawful means of data processing leads to an increase of entry barriers on the market for social media. Again, the BKA has not extensively assessed these points. Therefore, Facebook also argued against this in their appeal to the higher regional court of Düsseldorf[173].

Unsurprisingly, the loudest critic after the ruling of the BKA was Facebook itself. In a statement on their website titled "Why We Disagree with the Bundeskartellamt", it clarifies that

[170]ibid, 251-252.
[171]ibid, 252.
[172]Körber (n 145), 192.
[173]Grothe (n 154), 253ff.

"the Bundeskartellamt underestimates the fierce competition we face in Germany, misinterprets our compliance with GDPR and undermines the mechanisms European law provides for ensuring consistent data protection standards across the EU." [174]

8.4. Interim and Appleate Proceedings

Therefore, Facebook took further legal action and successfully applied for a temporary suspension of the decision by the way of an interim relief besides filing an appeal. Facebook appealed the decision of the Bundeskartellamt and requested the suspensive effect of the appeal to be restored. The Higher Regional Court of Düsseldorf decided in its preliminary decision that the suspensive effect of the BKA's decision is to be restored and further declared Facebooks appeal admissible. Rudohradska, Huckova and Dobrovicova argue that this preliminary decision was in favour of Facebook because the court stated in its reasoning that the annulment of the BKAs decision is very likely because there are serious doubts as to the legality of the resolutions of the BKA[175]. The doubts mainly concern data protection issues and stated:

„Entgegen der Auffassung des Bundeskartellamts lässt die von ihm beanstandete Datenverarbeitung durch Facebook keinen relevanten Wettbewerbsschaden und auch keine wettbewerbliche Fehlentwicklung besorgen. Dies gilt sowohl im Hinblick auf einen Ausbeutungsmissbrauch zum Nachteil der an dem sozialen Netzwerk von Facebook teilnehmenden Verbraucher […], als auch hinsichtlich eines aktuelle oder potentielle Wettbewerber von Facebook beeinträchtigenden Behinderungsmissbrauchs[…]".[176]

In other words, the Higher Regional Court of Düsseldorf argues that the causality between Facebooks dominant position and users agreeing to its terms and conditions cannot be proven, mostly because the users willingly and more importantly knowingly consent to the data processing[177].

In June 2020 the German Supreme Court (BGH) upheld the decision of the BKA in its KVR 69/19 ruling. The main argument regarding the abuse of a dominant position reads as follows:

"Die kartellrechtliche Relevanz dieser Leistungserweiterung ergibt sich daraus, dass die privaten Nachfrager der Leistung des Plattformanbieters eine für sie unverzichtbare Leistung nur zusammen mit einer weiteren unerwünschten Leistung erhalten […]. Ihnen wird keine Wahlmöglichkeit gelassen, ob sie das Netzwerk mit einer intensiveren "Personalisierung des Nutzungserlebnisses" verwenden wollen, die mit

[174] Meta, `Why we disagree with the Bundeskartellamt' (7 Feburary 2019) <https://about.fb.com /news/2019/02/bundeskartellamt-order/> accessed 9th May 2023.
[175] Simona Rudohradski, Regina Huckovi and Gabriela Dobrovicovi 'Present and Future – A Preview Study of Facebook in the Context of the submitted Proposal for Digital Markets Act' 6 EU and Comparative Law Issues and Challenges Series 489, 490-491.
[176] Kart 1/19 (V) (OLG Düsseldorf 2019), para 26.
[177] Simona Rudohradski, Regina Huckovi and Gabriela Dobrovicovi (n 175), 491.

> *einem potentiell unbeschränkten Zugriff auf Charakteristika auch ihrer "OffFacebook"-Internetnutzung durch Facebook verbunden ist, oder ob sie sich nur mit einer Personalisierung einverstanden erklären wollen, die auf den Daten beruht, die sie auf facebook.com selbst preisgeben […]. [Es] ergeben sich kartellrechtliche Bedenken Einzelfalls […] daraus, dass durch das Aufdrängen einer unerwünschten Leistung die Gegenleistung für die erwünschte Leistung (nämlich die Nutzung des sozialen Netzwerks) in Gestalt der Zurverfügungstellung personenbezogener Nutzerdaten, die einen wesentlichen Wettbewerbsparameter für die weitere Marktseite darstellen, erhöht wird.“*[178]

This argument differs from the BKA's argument in the original ruling. The approach of the BGH does not put data protection issues at the forefront of the decision but argues with a theory of harm, specifically the so called "aufgedrängte Leistungserweiterung". Wiedemann translates this as "imposed extension of services" and argues that the BGH introduced a two-tier structure of data (OnFacebook and OffFacebook data) that represents two different levels of personalisation of the user experience. The price users have to pay with regards to OffFacebook data is higher and the BGH argues that the use of the service is also possible with only OnFacebook data and that many users do not want to pay with OffFacebook data for an enhanced user experience. The theory of harm constitutes of the idea that there is a significant number of users that would prefer to use Facebook without the enhanced user experience but are forced to also accept the higher personalisation of the service with OffFacebook data[179]. *"In other words, the problem is that many users must use and ''pay'' for a service they do not want"*[180] and the BGH argues that in a competitive scenario the market would also cater for users that are not willing to provide OffFacebook data. The BGH sees two competition law infringements in this scenario: the users lack choice and that they must provide more data than they are willing to do and Facebook's competitors are also harmed because it becomes increasingly difficult to compete for advertising contracts[181].

In the main proceedings, the Higher Regional Court Düssseldorf stayed the proceedings due to questions on the interpretation of the GDPR pursuant to Art 267 TFEU. The referred questions mainly concern the interpretation of the GDPR and Art 4(3) TEU. In the first question the Higher Regional Court of Düsseldorf seeked clarification, if the BKA has the competence to assess contractual terms relating to data processing on Facebook within the scope of the GDPR and to issue an order to end the breach thereof. The Higher Regional Court of Düsseldorf further

[178] KVR 69/19, para 58-59.
[179] Klaus Wiedemann 'A Matter of Choice: The German Federal Supreme Court's Interim Decision in the Abuse-of-Dominance Proceedings Bundeskartellamt v. Facebook (Case KVR 69/19)' [2020] 51 International Review of Intellectual Property and Competition Law 1168, 1170.
[180] ibid, 1171.
[181] ibid, 1171.

seeks clarification, if this abovementioned approach is also in line with Art 4(3) TEU. It further questions whether consent pursuant to Art 6 GDPR can be given by users freely, if the recipient is a dominant undertaking like Facebook and if a national competition authority has the competence to assess the terms and conditions of a dominant undertaking[182].

Only recently, on July 3rd 2023, the CJEU issued its decision in the proceedings. With regards to the question, if the BKA (and national competition authorities in general) have the competence to issue decisions on breaches of the GDPR, the CJEU surprisingly states that a competition authority may assess, when necessary, within the scope of the assessment of an abusive conduct, if the conduct of a company is compatible with other legal regimes such as the GDPR. The CJEU further clarifies that the competition authority does not replace the data protection authority, when finding a GDPR breach while assessing abusive conduct. The CJEU, however, requires the competition authority and the data protection authority to collaborate to ensure a coherent application of the GDPR. The decision also clarifies that earlier decisions by data protection authorities may not be overruled by competition authorities but can be used and reinterpreted with regards to the relevant facts in competition law assessments[183].

With regards to this case, the CJEU also clarifies that the BKA contacted the relevant data protection authorities before issuing the decision to ensure that they would not issue a contradicting decision. As the data protection authorities did not see any problem with the BKA issuing the decision, it is in line with Art 4(3) TEU[184].

Regarding the question, if users can freely consent to dominant companies' terms and conditions the CJEU states that pursuant to the GDPR consent cannot be considered free, if the users have no real freedom of choice or are unable to deny consent without negative consequences. The CJEU further clarifies that consent is not to be deemed free, if - when there is more than one data processing process - not every individual process can be agreed to separately. This is to be ensured and monitored in greater detail, if there are power imbalances between the user and the company, who's terms and conditions are concerned[185]. The CJEU concludes:

> *"Daher müssen diese Nutzer die Freiheit haben, im Zuge des Vertragsabschlusses die Einwilligung in bestimmte Datenverarbeitungsvorgänge, die für die Erfüllung des Vertrags nicht erforderlich sind, einzeln*

[182] Simona Rudohradski, Regina Huckovi and Gabriela Dobrovicovi (n 175), 500 -501.
[183] Case C-252/21 *Meta Platforms Inc., formerly Facebook Inc., Meta Platforms Ireland Limited, formerly Facebook Ireland Ltd, Facebook Deutschland GmbH v Bundeskartellamt* [2023] ECL-I 537, para 47ff.
[184]ibid, para 54.
[185] ibid, para 140ff.

zu verweigern, ohne dazu gezwungen zu sein, auf die Nutzung des vom Betreiber des sozialen Online-Netzwerks angebotenen Dienstes vollständig zu verzichten, was bedingt, dass ihnen, gegebenenfalls gegen ein angemessenes Entgelt, eine gleichwertige Alternative angeboten wird, die nicht mit solchen Datenverarbeitungsvorgängen einhergeht. Außerdem ist es in Anbetracht des Umfangs der fraglichen Datenverarbeitung und ihrer erheblichen Auswirkungen auf die Nutzer dieses Netzwerks sowie angesichts des Umstands, dass diese Nutzer vernünftigerweise nicht damit rechnen können, dass andere Daten als die, die Verhalten innerhalb des sozialen Netzwerks betreffen, von dessen Betreiber verarbeitet werden, […] dass eine Einwilligung gesondert für die Verarbeitung der letztgenannten Daten einerseits und die Off-Facebook-Daten andererseits erteilt werden kann."[186]

8.5. Analysis

This case and especially the latest ruling of the CJEU can be considered one of the most important cases with regards to data protection and competition law. The decision opened the gateway to review compatibility with the GDPR also in competition law cases. This makes sense as now structural breaches of law in a cross-sectional area such as data protection law also play a role in other areas like competition law or consumer protection law[187].

The CJEU decision seems to answer the questions that demanded clarity in the previous years – the stance of the CJEU towards the intersection between competition and data protection law. The EU approach towards this issue has come a long way since the Google/DoubleClick merger decision in 2008, where the Commission argued that the decision was made without prejudice to data protection law, even though data protection law was a central issue in this case. The Commission and Courts have step by step distanced themselves from the findings, that data is freely available on the market and constitutes a non-rivalrous good, to pointing out the fact that data might lead to competition law concerns to finally recognizing the power of data not only in merger but also decision regarding abusive conduct.

This decision has also made apparent, that the BKA's approach is not just an approach that is possible under the amended and "modern" German competition law but also has space within the scope of the Competition law regime and the GDPR. I view the BKA decision and proceedings as the tool that clarified the European approach to this issue that obviously does not only concern Germany but the whole globe. It is also important that the CJEU finally took a stance on this issue, as an individual approaches of some member states, would have made it

[186] ibid, 150-151.

[187] Hannah Ruschemeier 'Competition law as a powerful tool for effective enforcement of the GDPR' (Verfassungsblog on Matters Constitutional 7 July 2023), https://verfassungsblog.de/competition-law-as-a-powerful-tool-for-effective-enforcement-of-the-gdpr/, accessed 1st September 2023.

more difficult for online platforms to adhere to certain country specific rules, making it less likely for online platforms to adhere to the stricter set of rules.

Nevertheless, even after the CJEU handing down the ruling to the Higher Regional Court of Düsseldorf, one must wait and see how it implements it. It can also be suspected that Facebook will fight this decision from every possible angle and another BGH ruling on this issue is in my opinion likely. This case and the discussion are far from over, however, the ruling of the CJEU brings some clarification on the stance of the EU on this issue. Seen together with the DMA, which I will introduce in the next chapter, the intention of the EU to attack this issue head on with innovative approaches becomes apparent.

9. Digital Markets Act

9.1. Overview

As discussed extensively earlier, large online platforms benefit from the characteristics of the online sector, such as network effects, which allow them to intermediate most of the transactions between end users and business users[188].

> These *"few large platforms increasingly act as gateways or gatekeepers between business users and end users and enjoy an entrenched and durable position, often as a result of the creation of conglomerate ecosystems around their core platform services, which reinforces existing entry barriers"*[189].

This allows them to control the access to digital markets, which may lead to dependencies and unfair behaviour vis-à-vis users. As regulatory initiatives by individual member states cannot fully address these effects, action on EU level was necessary[190].

Originally with the goal to introduce the Digital Services Act (DSA) and a new competition law instrument (the "New Competition Law Tool"), the Commission published the "Inception Impact assessment". The New Competition Law Tool was intended to have a greater reach than the recently introduced Digital Markets Act (DMA). The Commissions intention was to introduce a tool similar to the Competition & Markets Authority in the UK, giving it the power to undertake immediate targeted market interventions, if negative effects on competition are identified in the course of a market investigation. Due to the questionable compatibility of such

[188]Digital Markets Act, 1.
[189]ibid, 1.
[190]ibid, 1.

an approach with Art 103 TFEU and Art 114 TFEU, the Commission turned its attention to a different approach and the idea of the DMA was born[191].

The DMA entered into force after a long preparation and negotiation period. It aims to harmonize the rules for gatekeepers in the digital single market and counteracts the trend towards increased regulation by the member states and the resulting fragmentation of the internal market[192]. This should be achieved by creating a fair competition environment through regulating so-called gatekeepers and introducing a blacklist of prohibited business practices, giving the Commission the possibility to effectively combat market abuse by large online platforms[193].

9.2. Scope

The scope of the DMA is two-dimensional according to Art 1(2) DMA: On the one hand, the DMA aims to regulate the behaviour of core platform services. On the other hand, the DMA introduces the term "gatekeeper" to identify core platform services that have an important status and are defined by cumulative criteria, which I will discuss in greater detail below[194]. Art 1(2) DMA establishes that the rules set forth in the DMA shall only apply to "*core platform services provided or offered by gatekeepers"*[195].

9.2.1. Core Platform Services

Art 2(2) DMA defines the term core platform services by providing an exhaustive list of online platforms, which can be considered core platform services. These are online intermediation services (e.g. marketplaces, app stores, etc.), online search engines, social networking services, video sharing services, number independent interpersonal electronic communication services, operating systems, cloud services and advertising services. This list is not exhaustive and can be extended following a market investigation pursuant to Art 19 DMA[196].

It is striking that the DMA does not include an abstract definition of core platform services. This may cause problems due to the rapid developments in the platform and digital sector and

[191]Daniel Zimmer and Jan-Frederik Göhsl, `Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digitale Gatekeeper' [2021] Zeitschrift für Wettbewerbsrecht 29, 30.
[192]ibid, 31.
[193]Hendrik Zimmermann and Caroline Heinzel `Der Digital Markets Act. Platform-Regulierung für Demokratie und Nachhaltigkeit in der EU - aktueller Stand und Verbesserungspotenziale' Germanwatch, 8.
[194]Ibáñez Colomo, `The Draft Digital Markets Act: A Legal and Institutional Analysis' [2021] 12/7 Journal of European and Competition Law & Practice 561, 563.
[195]Digital Markets Act, art 1(2).
[196]ibid, art 2(2).

scholars fear that by only adding new core platform services to the list after an extensive investigation, the European legislator may not be able to keep up with the pace of this rapidly developing sector. An abstract definition, however, would allow for a timelier reaction to the evolving sector. The list could in parallel function as a non-exhaustive list of examples[197].

9.2.2. Gatekeepers

The definition of gatekeepers builds on Art 2(2) DMA. They are defined as a providers of core platform services that meet the requirements set forth in Art 3 DMA. Art 3(1) DMA states:

> *"An undertaking shall be designated as gatekeeper if:*
>
> *a) it has a significant impact on the internal market;*
>
> *b) it provides a core platform service which is as an important gateway for business users to reach end users; and*
>
> *c) it enjoys an entrenched and durable position in its operations or its is foreseeable that it will enjoy such a position in the near future."*[198]

The question whether a core platform provider meets these above-mentioned criteria can be established by two separate mechanisms. Colomo describes them as the default mechanism and the secondary mechanism[199]. The default mechanism are the quantitative thresholds for each of the three criteria in Art 3(2) DMA.

- The first criterion is deemed to be met by undertakings, if the undertaking to which the core platform service belongs to, achieves an annual EEA turnover of at least EUR 7.5 billion in the last three financial years or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year and it provides core platform services in at least three member states.
- The second criterion is deemed to be met, if core platform service providers have more than 45 million active end users in the EU and more than 10.000 yearly active business users established in the EU in the last financial year.
- The third criterion is met, where the thresholds mentioned above were met in each of the last three financial years.

[197]Zimmer and Göhsl (n 191), 39.
[198]Digital Markets Act, art 3(1).
[199]Colomo (n 194), 563-564.

When all these thresholds are surpassed by the provider, he is presumed to be a gatekeeper and is obligated to notify the Commission within two months (Art 3(3) DMA). However, the core platform provider has the chance to present sufficiently substantiated arguments to demonstrate that it does not satisfy the these criteria[200]. Here Zimmer and Göhsl add, that it would be desirable to provide the gatekeepers with a guide on which core platform services could rely, when trying to rebut the presumption of Art 3(2) DMA[201].

In 2021 Caffarra and Scott Morton pointed out that Google, Facebook, Amazon and Microsoft (GAFAM) but also a few other core platform services such as Oracle, SAP, AWS and Microsoft Azure are likely to meet these quantitative thresholds[202]. They also point out that

> *"Twitter, AirBnB, Bing, Linkedin, Xbox Netflix, Zoom and Expedia do not appear to meet the thresholds at present, and Booking.com, Spotify, Uber, Bytedance/TikTok, Salesforce, Google Cloud and IBM Cloud appear to meet some but not others at this point.[203]"*

As the authors point out themselves, this can only be seen as an approximation, because the numbers used for this conclusion are based on information the mentioned companies published themselves[204]. Moreover, the paper referenced was published in early 2021, so the numbers might have changed significantly in the meantime.

The secondary mechanism in Art 3(8) DMA is applicable, if the thresholds of Art 3(2) are not met. It allows the Commission to designate a provider of core platform services as a gatekeeper following a market investigation conducted in accordance with Art 17 DMA[205]. The assessment by the commission must take the following elements into consideration:

- the size of the core platform service provider;
- the number of business users depending on the core platform service to reach end users and the number of users;
- entry barriers derived from the network effects and data driven advantages;
- scale and scope effects the provider benefits from;

[200]Digital Markets Act, art 4(4).
[201]Zimmer and Göhsl (n 191), 38-39.
[202]Fiona Scott Morton and Cristina Caffarra, 'The European Commission Digital Market Act: A translation' (VOXEU, 5 January 2021) < https://cepr.org/voxeu/columns/european-commission-digital-markets-act-translation> accessed 9th May 2023.
[203]ibid.
[204]ibid.
[205]Colomo (n 194), 564.

- business or end user lock-in;
- a conglomerate corporate structure or vertical integration of that undertaking; and
- other structural market characteristics[206].

Notably, the market investigation can also lead to the conclusion that a gatekeeper does not yet enjoy an entrenched and durable position in its operations, but that it is 'foreseeable' that it will do so[207]. Then only certain provisions of the DMA, that are deemed appropriate and necessary, apply to the gatekeeper[208].

9.3. Obligations of gatekeepers

9.3.1. Provisions

The obligations of gatekeepers, which they must implement in their daily operations, are listed in Art 5, Art 6 and Art 7 DMA. These catalogs of prohibited practices can be seen as specific case examples of abusive behavior that gatekeepers are likely to show[209]. Art 5 DMA identifies duties that do not require any specification and Art 6 lists obligations that require further specification[210], meaning that regarding Art 6 DMA, the Commission was granted room to manoeuvre[211]. This is also reflected in Art 8(2) DMA, where the Commission is given the opportunity to specify the measures by decision that the gatekeeper concerned shall implement, if it finds that the measures, that the gatekeeper intends to implement, do not ensure effective compliance with an obligation laid down in Art 6 DMA[212]. The Commission argues that the possibility of a "regulatory dialouge" should facilitate compliance by gatekeepers and expedite the correct implementation of the regulation[213].

The obligations of Art 5 DMA are:

- Art 5(2) (a)-(d) DMA states that gatekeepers shall refrain from processing personal data of end users using services of third parties for the purpose of providing online advertising

[206]Digital Markets Act, art 4(8).
[207]Colomo (n 194), 564.
[208]Digital Markets Act, art 15(4).
[209]Matthias Leistner 'The Commission's vision for Europe's digital future: proposals for the Data Governance Act, the Digital Markets Act and the Digital Services Act - a critical primer' [2021] 16/8 Journal of Intellectaul Property law & Practive 778, 779.
[210]Colomo (n 194), 564.
[211]Zimmer and Göhsl (n 191), 42.
[212]Digital Markets Act, art 7.
[213]ibid, para 58.

services, combine or cross use personal data from the core platform service with their services of the gatekeeper or with data from third party services and sign in end users to other services of the gatekeeper in order to combine personal data unless the end user has been given consent under the rules of the GDPR[214]. Because the above-mentioned conduct gives gatekeepers potential advantages in terms of accumulation of data, this raises the barriers of entry[215]. Gatekeepers should offer end users the choice to opt-in to such data processing and sign-in practices by offering a less personalised but equivalent alternative, and without making the use of the core platform service or certain functionalities thereof conditional upon the end user's consent. The less personalized alternative should also not differ in quality[216].

- Art 5(3) DMA states that business users shall be allowed to offer the same products or services to end users through third party online intermediation services at prices or conditions that are different from those offered through gatekeeper[217]. In a nutshell, this provision grants business users the freedom to offer the same products or services to end users via third-party platforms. This gives companies greater leeway for their offerings, enables multi-homing for end users[218] and prevents the gatekeepers from imposing terms and conditions that restrict business users from offering their products and services elsewhere under more favourable conditions[219].

- Pursuant to Art 5(4) and (5) DMA gatekeepers shall allow business users to promote offers to end users and conclude contracts with end users outside of the core platform service. Moreover, gatekeepers shall allow end users to access and use, through the core platform service of the gatekeeper, content, subscriptions, features or other items by using the software application of a business user, even if these items were acquired by the end user from the relevant business user without using the core platform service[220]. To further prevent the dependence of business users on gatekeepers, this provision grants business users free promotion and choice of their distribution channel[221]. Zimmer and Göhsl criticize that this provision goes too far: The fact that gatekeepers must allow so-called "free-riding"

[214]ibid, art 5(2).
[215]ibid, para 36.
[216]ibid, para 37.
[217]ibid, art 5(3).
[218]Andreas Hienemann and Giulia Mara Meier `Der Digital Markets Act (DMA): Neues "Plattformrecht" für mehr Wettbewerb in der digitalen Wirtschaft' [2021] Zeitschrift für Europarecht 86, 92.
[219] Digital Markets Act, para 39.
[220]ibid, art 5(4).
[221]ibid, para 38.

unrestrictedly could harm their business, for example when the gatekeeper can charge close to no fees for mediated transactions, as they are mediated through the platform but finalized through other channels. Therefore, they suggest that this provision should be applied only where necessary and therefore be found in Art 6 DMA[222]. This would lessen the reach of this provision and allow for a more targeted application.

- Art 5(6) DMA prohibits gatekeepers to prevent or restrict business users from raising issues with public authorities relating to practices of gatekeepers[223]. Possible complaints of business users might concern discriminatory access conditions, unjustified closing of business user accounts or unclear grounds for product delistings[224]. This especially includes contractual confidentiality clauses; however, it is still possible to require calling upon conflict resolution bodies before raising issues with public authorities[225].

- Art 5(7) DMA prohibits gatekeepers from requiring end users to use and business users to use, offer or interoperate with a web browser, identification or payment service of the gatekeeper as a condition to use the gatekeeper's payment service, such as in-app payment services[226].

- Art 5(8) DMA contains a tying-in prohibition[227]: Gatekeepers shall refrain from requiring business or end users to subscribe to or register with any other core platform services (that meet the requirements of a gatekeeper) as a condition to access other core platform services of that gatekeeper[228].

- Art 5(9) and (10) DMA tackle transparency obligations of gatekeepers[229]. Gatekeepers shall upon request provide to advertisers and publishers, that they provide services to, with pricing information[230]. This provision is important because the conditions under which gatekeepers provide online advertising services to business users are often non-transparent. This is mostly linked to the practices of a few online platforms and the complexity of modern-day online advertising[231].

[222]Zimmer and Göhsl (n 191), 43.
[223]Digital Markets Act, art 5(6).
[224]ibid, para 39.
[225]Hienemann and Meier (n 218), 92.
[226]Digital Markets Act, art 5(7).
[227]Hienemann and Meier (n 218), 93.
[228]Digital Markets Act, art 5(8).
[229]Hienemann and Meier (n 218), 93.
[230]Digital Markets Act, art 5(9) and (10).
[231]ibid, para 42.

Art 6 contains the following obligations:

- Art 6(2) DMA is relevant for gatekeepers that run the platform and also appear as suppliers on that platform. Such platforms are called "hybrid platforms"[232]. This provision prohibits hybrid platforms to use data not publicly available (aggregated and non-aggregated data), which is generated by business users on the online platform, in competition with business users[233]. For example, this may be the case, where a gatekeeper provides an online marketplace or app store to business users and in parallel offers services as an online retailer or provider of application software[234].

- Gatekeepers commonly pre-install certain software applications on the operating system of gatekeepers to favour their own services or products of their core platform service[235]. However, Art 6(3) DMA requires the possibility of uninstalling preinstalled software unless it is essential for the functioning of the operating system or the device cannot be offered independently by third parties[236].

- As counterpart to Art 6(3) DMA, Art 6(4) requires gatekeepers to allow the installation and effective use of third-party software applications or software application stores using or interoperating with operating systems of that gatekeeper and allow these software applications to be accessed by means other than the core platform service of that gatekeeper. However, the gatekeeper may take proportionate measures to ensure that the third party software applications do not endanger the hardware or operating system of the core platform service[237]. This provision is especially important because the above-mentioned conduct may limit the ability of app developers to use alternative distribution channels and the ability of end users to choose between different apps from different app stores[238].

- Art 6(5) DMA prohibits self-preferencing[239]. Gatekeepers are prohibited from treating their own products and services or any third party belonging to the same undertaking more favorably compared to products and services of others regarding ranking, indexing and crawling, where gatekeepers shall apply fair and non-discriminatory conditions[240]. This

[232]Hienemann and Meier (n 218), 94.
[233]Digital Markets Act, art 6(2).
[234]ibid, para 43.
[235]ibid, para 46.
[236]ibid, art 6 (3).
[237]ibid, art 6(4).
[238]ibid, para 47.
[239]Hienemann and Meier (n 218), 94.
[240]Digital Markets Act, art 6(5).

provision is important because gatekeepers may be in a dual-role position as intermediaries for third party providers and as direct providers of products and services. Consequently, these gatekeepers can directly undermine the contestability of the products and services on the core platform service[241].

- Art 6(6) DMA prohibits gatekeepers to technically restrict the ability of end users to switch between different software applications and services that can be accessed using the operating system of the gatekeeper such as internet access services[242]. This provision has the goal of providing a greater choice for end users by not introducing artificial technical barriers[243].
- Art 6(7) DMA tackles the issue of vertical interoperability[244]: Gatekeepers shall allow business users and providers of ancillary services access to and interoperability with the same operating system, hardware or software features that are available or used in the provision by the gatekeeper of any ancillary service[245]. Put simply, this means that the obligation of interoperability only applies to ancillary services (e.g. payment, identification and advertising services) and not to core platform services. Therefore, within the scope of the DMA, gatekeepers must provide the same circumstances as for the platform, meaning for example that Meta would be obliged to allow third parties to offer payment services. However, the obligation of interoperability does not go so far that the gatekeeper must also involve other core platform services[246]. Art 7 DMA goes even further with regards to number independent interpersonal communication services.
- Art 6(8) DMA ensures that gatekeepers provide advertisers and publishers upon request access to their performance measuring tools and provide the information necessary for advertisers and publishers to verify this information[247].
- Pursuant to Art 6(9) DMA, gatekeepers shall provide effective portability of data generated by the activities of business and end users and provide tools that facilitate the exercise of data portability[248].

[241]ibid, para 48.
[242]ibid, art 6(6).
[243]ibid, para 50.
[244]Leistner (n 209), 780.
[245]Digital Markets Act, art 6(7).
[246]Zimmermann and Heinzel (n 193), 12.
[247]Digital Markets Act, art 6(8).
[248]ibid, art 6(9).

- Pursuant to Art 6(10) DMA, gatekeepers shall guarantee "*effective, high-quality and continuous"* real-time access to the relevant platform data. Regarding personal data, the caveat is added that the end user must have consented in accordance with the GDPR[249].
- Art 6(11) DMA establishes that the gatekeeper shall provide any third-party undertaking providing online search engines with access to fair, reasonable and non-discriminatory terms of ranking, query, click and view data in relation to free and paid search data generated by end users, with the condition that personal data is anonymized[250].
- Art 6(12) DMA requires the gatekeeper to apply fair, reasonable and non-discriminatory general conditions of access to its software application stores, online search engines and online social networking sites and therefore publish general conditions of access[251].
- Lastly, Art 6(13) DMA requires gatekeepers to have fair termination conditions that can be exercised without great difficulty[252].

Art 7 DMA addresses the issue of horizontal interoperability and corresponds to an obligation to grant access for gatekeepers that provide messaging services. The obligation reads as follows:

> *"Where a gatekeeper provides number-independent interpersonal communications services […], it shall make the basic functionalities of its number-independent interpersonal communications services interoperable with the number-independent interpersonal communications services of another provider offering or intending to offer such services […], by providing the necessary technical interfaces or similar solutions that facilitate interoperability, upon request, and free of charge.[253]"*

This obligation only concerns "basic" functionalities set forth in Art 7(2) DMA, namely end-to-end text messaging between two end users and in groups; sharing of images, voice messages, videos and other attached files in end-to-end communication between two end users and in groups as well as end to end voice and video calls between two end users or a group chat and end users that the gatekeeper itself provides[254]. Bourreau argues that the fact that some functionalities are not included, is a trade off between the provision's effectiveness and the complexity, implementation costs and possibilities of differentiation and therefore a general interoperability clause was not introduced. He, however, also voices the concern,

[249]ibid, art 6(10).
[250]ibid, art 6(11).
[251]ibid, art 6(12).
[252]ibid, art 6(13).
[253]Digital Markets Act, art 7(1).
[254]ibid, art 7(2).

that the legislator may not be able to keep up with implementing interoperability regarding new forms of communication making this provision de facto obsolete again[255].

Art 7(3) DMA states that the level of security (including end-to-end encryption) must be preserved across the interoperable services. Art 7(8) DMA further requires gatekeepers to only provide personal data of end users that is strictly necessary to provide effective interoperability[256]. Bourreau argues that achieving interoperability without affecting security and privacy is a difficult task and can only be achieved by adopting and implementing a universal open and secure encryption code (which the DMA today would not require the gatekeepers to use) or by providing access to application programming interfaces that the gatekeeper already uses. The second option does not seem feasible as it goes hand in hand with high costs for the gatekeepers and the potential to slow down innovation. Moreover, there are high security risks that come along with the second approach[257].

These risks are mitigated by the gatekeeper's obligation to only accept reasonable requests for interoperability (Art 7(5) DMA), however, a definition of the term "reasonable" cannot be found in the DMA and must therefore be evaluated on a case-by-case basis. Therefore, a general definition would be helpful, e.g. in the form of minimum security requirements that the access seeker must meet. The gatekeepers are also entitled to maintain the security, integrity and privacy of its network (Art 7(9) DMA). This seems to imply that the access giver – the gatekeeper - screens which access seekers are eligible for access, which might This may also raise new competition concerns[258].

9.3.2. Analysis

The DMA follows a one size fits all approach, which means that all the listed obligations must be applied by all gatekeepers. However, one must consider that the core platform services are very different regarding barriers to entry, general characteristics as well as possibilities for expansion. According to Kapusta, it may become a problem, that gatekeepers can not free themselves of some obligations, if they do not endanger the market. The mere possibility of Art 9 and 10 DMA of the Commission to rid gatekeepers from the obligations in circumstances that do not lie within their power and if their business is endangered does not do the diversity of the

[255]Marc Bourreau *DMA horizontal and vertical interoperability obligations* (issue paper, Cerre, 2022), 9-10.
[256]Digital Markets Act, art 7.
[257]Bourreau (n 255), 10-11.
[258]ibid, 11.

digital sector justice[259]. Kapusta however disregards the possibilities of Art 8 DMA, which gives the Commission the possibility to adopt implementing acts specifying the measures that a gatekeeper must implement in order to effectively comply with the obligations of Art 6 and 7 DMA[260].

Even with the strict one size fits all approach of the DMA, one can still categorize the obligations. One can identify platform specific obligations that only apply to certain gatekeepers due to their characteristics. Art 5(5) DMA, Art 5(4) DMA, Art 5(3) DMA, Art 6(2) and Art 6(5) DMA for example only apply to online intermediation services. The prohibition of self-preferencing pursuant to Art 6(5) DMA can only apply to hybrid gatekeepers that not only are a core platform service but also sell their own goods and services. Art 6(11) DMA and Art 6(12) DMA only apply to online search engines. Art 7 DMA explicitly states that it only applies to number independent interpersonal communication services and the obligations of Art 5(9) and (10) DMA only apply to online advertising services[261].

Obligations that apply to all gatekeepers are the notification obligations in Art 14 DMA (gatekeepers shall inform the Commission of any intended concentration within the meaning of the merger regulation), Art 15 DMA (provision of an independent audit containing a description of consumer profiling techniques) and Art 5(2) (b)-(d) DMA (restrictions to the use of personal data)[262].

Even though, at first glance Art 6 (2), (9) and (10) create a compulsory access and use regime of data generated by the business and end user on online platforms which should benefit business users[263], these provisions are also one main point of criticism[264, 265]. Leistner argues that Art 6 DMA fails to consider existing IP protection and also the protection of trade secrets and that therefore the Commission may have trouble enforcing the obligations under Art 6 DMA[266]. On this basis Lundquist also questions if *"the gateway for business users to access data is in fact such a revolutionary tool for creating interoperability, or whether the intellectual property legal system, trade secret rules or GDPR will in the end, de facto, prevent data access,*

[259]Ina Kapusta `Pflichten von Gatekeepern im Digital Markets Act' [2023] 20/2 Zeitschrift für das Privatrecht der Europäischen Union 83, 86.
[260] Digital Markets Act, art 8(2).
[261] Kapusta (n 259), 86ff.
[262]ibid, 88-89.
[263]Björn Lundquist 'The Proposed Digital Markets Act and Access to Data: A Revolution, or Not?' [2021] 52 IIC 239, 240.
[264]Leistner (n 209), 781.
[265]Lundquist (n 263), 240.
[266]Leistner (n 209), 780-781.

re-use and portability." [267] It would not be surprising, if gatekeepers tried to claim that the obligation to give access, and for business users to re-use the data generated on their platforms, should not be enforced because the data is protected by intellectual property rights, are trade secrets or are personal data and therefore protected by other directives and rules[268]. It is unclear, if those other regulations will override the DMA or not. Thus, it is likely that this uncertainty will probably bring gatekeepers to deny that the obligation to grant access to data is applicable. Nonetheless, Lundquist suggest that a simple clarification by the Commission or the legislator should be inserted[269].

All in all, the provisions in Art 5, 6 and 7 of the DMA are a step in the right direction. The immediate application of the rules in Art 5 DMA could lead to a control of conduct of gatekeepers without a long and time-consuming investigation as necessary to apply Art 102 TFEU. In case of non-compliance with the rules, the Commission can enforce them quicker and more efficiently[270].

9.4. Exceptions

The DMA contains exceptions and flexibility that are supposed to adapt the obligations of gatekeepers to certain circumstances[271].

The first exception can be found in Art 9 DMA, which reads:

> *"Where the gatekeeper demonstrates in a reasoned request that compliance with a specific obligation laid down in Article 5, 6 or 7 for a core platform […] would endanger, due to exceptional circumstances beyond the gatekeeper's control, the economic viability of its operation in the Union, the Commission may adopt an implementing act setting out its decision to exceptionally suspend, in whole or in part, the specific obligation referred to in that reasoned request."*[272]

It is important to note, that pursuant to Art 9(2) DMA, the Commission shall review the suspension every year[273].

The Commission, however, fails to specify, in what cases the suspension shall apply. In the explanatory remarks the legislator merely states that exceptional circumstances are ones that lie

[267] Lundquist (n 263),240.
[268] e.g. Art 6 InfoSoc Directive
[269] Lundquist (n 263),240-241.
[270] Zimmer and Göhsl (n 191), 44.
[271] Hienemann and Meier (n 218), 94.
[272] Digital Markets Act, art 9 para 1.
[273] ibid, art 8 para 2.

beyond the control of the gatekeeper, such as an unforseen external shock that has temporarily eliminated a significant part of end user demand for the relevant core platform service[274].

Moreover, pursuant to Art 10 DMA the Commission may - based on a reasoned request by a gatekeeper or on its own initiative - exempt a gatekeeper (in whole or in part) from an obligation, if such exemption is justified on the grounds of public morality, public health or public security. When assessing these grounds, the Commission shall consider the impact of the compliance with the specific obligation as well as the effects on the gatekeeper concerned and on third parties[275]. The explanatory remarks do not provide any specific examples of such grounds for exemption but merely state that the above-mentioned grounds of public interest can indicate the cost to society as a whole of enforcing a certain obligation would in a certain exceptional case be too high and therefore disproportionate[276].

9.5. Criticism

As I made critical remarks regarding specific provisions of the DMA, when discussing the relevant provisions, I will only briefly discuss the overall appearance of the DMA here.

In general, the DMA is welcomed and many aspects of it are seen as positive[277]. For example, Wojciech Wieiórowski, the European Data Protection Supervisor, stated the following in his opinion of the EDPS:

> *"The EDPS welcomes the Proposal, as it seeks to promote fair and open markets and the fair processing of personal data. Already in 2014, the EDPS pointed out how competition, consumer protection and data protection law are three inextricably linked policy areas in the context of the online platform economy.[278]".*

However, one point of criticism is regarding the enforcement of the DMA. Contrary to the GDPR, which is enforced by national data protection authorities and introduced the criticized "one-stop-shop mechanism"[279], the DMA puts more power into the Commissions hands,

[274]ibid, para 59.
[275]ibid, art 9.
[276]ibid, para 60.
[277]Zimmermann and Heinzel (n 193), 13.
[278]European Data Protection Supervisor (n 85), 3.
[279] This means a lead supervisory national data protection authority of the country where a company has its main establishment must coordinate cross-border complaints and investigations regarding the compliance with the GDPR.

thereby enabling the investigation, monitoring and enforcement of the DMA, and only allowing for minimal involvement of the member states[280].

Vergnolle argues that even if the DMA avoids some issues of the GDPR, especially its cross-border enforcement system, the centralisation of power within the DMA should be viewed critically. She goes as far as arguing that the enforcement powers that the Commission was provided with put the separation of powers at stake. Normally the Commission acts as the executive arm of the EU, however, its powers have been expanded also into the legislative and judicial branches. This has especially become problematic regarding the enforcement of the DMA (and the DSA). The DMA's enforcement is highly reliant on the Commission and hardly grants any power to national judiciaries. It basically allowed itself to make non-compliance decisions granting them to impose heavy fines. This makes the Commission more than the executive arm of the EU – it is enforcing EU law and punishing breaches. Vergnolle goes as far as saying:

> *"To sum up, the Commission drafted the two initiatives (as the executive branch), will contribute to the legislative discussions (as an involved negotiator), and will be a key actor of their enforcements (as a judge). Such centralisation of power can cause long-term democratic problems. As Montesquieu put it: "power curbs power" and its of the utmost importance to make sure that power is distributed between institutions so they can operate checks and balances and make sure there is no abuse or corruption of power. Unfortunately, the current system does not enable this."* [281]

Germanwatch further points out, that one of the main problems of the DMA is that end users are not in the centre of the DMA. This is problematic because some platforms not only simply function as economical gatekeepers but also as "human right gatekeepers" and are able to influence how users exercise their rights in the digital world. They do this by dictating quality standards, which drastically influence the freedom of speech of end users, data protection as well as non-discrimination rights[282]. Also end users are not sufficiently engaged in the processes of the DMA via consumer protection organisations, human rights organisations and organisations that protect digital rights of consumers. Germanwatch especially wants for abovementioned organisations to be able to report DMA breaches and actively participate in market investigations[283].

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[280] Suzanne Vergnolle 'Enforcement of the DAS and the DMA – What did we learn from the GDPR?' in Heiko Richter, Marlene Straub and Eric Tuchtfeld (eds.) *To Break Up or Regulate Big Tech? Avenues to Constrain Private Power in the DSA/DMA Package* (Max Plank Institute for Innovation and Competition 2021), 103ff.
[281] ibid, 107.
[282] Zimmermann and Heinzel (n 193), 15.
[283] ibid, 17.

Moreover, NGOs criticize that the DMA does not question the power concentration in the hands of only a few gatekeepers. A promotion of possibilities for alternative platforms to develop was called for. In this regard Art 6(7), which regulates interoperability was especially criticized, as it maintains the systemic dependency of business and end users on the few large gatekeepers. Also, Art 14 DMA, which merely provides for an information obligation regarding mergers, is heavily critizized, as negative effects of mergers in the digital sector are not addressed sufficiently[284].

10. Comparison of Approaches

10.1. Competition amongst online platforms

Even though already addressed multiple times in this paper, I want to briefly summarize and expand on how competition amongst online platforms works. In this chapter, I will take a closer look at how online platforms compete with new market entrants. If there are extreme network effects and returns to scale in a specific market, economic theory predicts that there may only be a handful of platforms to provide a certain service. The focus of the competition in the market turns into competition for the market, meaning that competition will focus on new entrants that could replace dominant platforms. However, to achieve that, a new entrant must not only offer better quality and lower prices but also convince the users to migrate to the new service. This becomes more difficult, if the current dominant platform is part of an ecosystem. As shown, dominant platforms are very difficult to dislodge, nevertheless there is still fear that the market could tilt against the dominant platforms and they therefore have strong incentives to engage in anti-competitive behaviour to avoid that. However, new platforms rarely compete directly with a dominant platform but more commonly start in a niche market and expand from there to the service the dominant platform offers, once the new platform has acquired enough users. For this reason, it is not uncommon for dominant platforms to acquire tech start-ups and incorporate them into their network/ecosystem. The same dynamic becomes visible, when dominant platforms launch new services in response to the threat of a new entrant, often without increasing the price of the basic service. This turns the work of competition authorities into a balancing act: consumers may profit from efficiency advantages by bundling services at low prices. On the flip side, the abovementioned strategy by dominant firms may result in the early elimination of potential competitors and increase the barriers to entry[285].

[284]ibid, 15-16.
[285]Crémer, de Montjoye and Schweitzer (n 14), 36-37.

One must also keep in mind that some platforms also take on the role as regulators and dedicate how competition on the platform itself is regulated. This rule setting by platforms can take on many different forms, e.g., the regulatory function of a search engine will depend greatly on the search algorithm it uses and other platforms may shape the market on both sides by regulating access and exclusion from the platform or imposing price controls. This adds a new perspective to our current understanding of online platforms that can not be disregarded when looking at competition law issues amongst online platforms and points to the fact that platform operators have the responsibility to ensure that competition on their platform remains fair[286]. The DMA tackles this issue partially by prohibiting self-preferencing.

In my opinion, it is not only about how platforms regulate the competition on their platform but also how it ensures that it keeps and improves its value to society. O'Connor argues that this factor also plays an important role for an online platform to safeguard its dominant position. In comparison to other social networks, Facebook for example always intended to eliminate to the best of their abilities fake profiles and enforced their terms and conditions, which enable them to delete hate speech or implicit images from their service and also ban users that behave inappropriately[287]. So even though, for example Facebooks terms and conditions are viewed as highly controversial, they also keep up standards of user conduct and introduce a complex multi-layer reporting and analysing system to filter out either illegal or inappropriate user conduct with the intention to continue to ensure and not censor freedom of speech. This is clearly no easy task, as the terms and conditions can also be viewed as violation of freedom of speech, dependant on under which national legislation this question is reviewed. Safeguarding this quality of social networks takes a big effort. This might also speak to the reason, that many start-ups after they gain popularity join an existing ecosystem to draw from existing technical and organisational structures of well-established online platforms.

10.2. Influence of Data on Competition Law

10.2.1. Overview

The DMA is often viewed as a new approach to the regulation of the Digital Sector in the EU. This new approach is necessary because the instruments of competition law are currently unable to address most issues arising in the changing dynamics of the world wide web[288].

[286]ibid, 54.
[287] Daniel O'Connor 'Understanding Online Platform Competition: Common Misunderstandings' [2016] Internet Competition and Regulation of Online Platforms, 14.
[288]Colomo (n 194), 561.

For the purpose of this paper, it is especially important to mention, how data can influence competition law and vice-versa, because data access has become a key issue in the debate about competitiveness of companies. Crémer, de Montjoye and Schweitzer

> *"want to raise awareness that the role of competition law in ensuring access to data will depend on how different legal regimes relevant to data interact. Whether and how firms will be able to access personal data through the normal functioning of the marketplace will depend heavily on the way data protection law is interpreted and on the institutions that will evolve to help individuals exercise their rights to data control. Similarly, whether and how firms will be able to access non-personal data will turn on the allocation of rights of data control."*[289]

To understand how this subject is viewed in the EU, one must take a closer look at some cases. In the Asnef-Equifax judgment, the Court stated that *'any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection'*[290]. Moreover, the Commission followed this position in its Facebook/WhatsApp and Google/DoubleClick merger decisions. It stated that *'any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules'*. Even if the EU's stance on the intersection between competition and privacy law seemed hard, its position was in fact much more moderate. The phrase 'as such' in Asnef-Equifax pointed towards the fact that questions related to the protection of personal information were only irrelevant in competition law assessments, if they apply merely to the protection of personal information. As soon as the protection of personal information had any impact on competition on the market, it can (and must) be considered in competition law assessments[291].

This approach was also confirmed by the CJEU in the Facebook decision, when the CJEU stated that a competition authority may assess GDPR breaches, if it concerns competition law issues and the authority collaborates with the data protection authority. This is in essence, what Dacar claimed before the CJEU issued the Facebook decision. However, the CJEU clarifies the under which conditions the competition authorities may do so. This shows that the CJEU did not allow the competition authorities at random to "interfere" with the data protection authorities' business but only give them the competences to check GDPR breaches if necessary and under strict rules. As mentioned earlier, the CJEU based its argument on Art 4(3) TEU, that states that

[289]Crémer, de Montjoye and Schweitzer (n 14), 76.
[290]C-238/05 *Asnef-Equifax* [2006] ECRI 11125, 734.
[291]Dacar (n 110), 70.

based on the principle of sincere cooperation, the union and the member states shall assist each other in fulfilling tasks which stem from the treaty[292]. In my opinion, this step towards cooperation that the CJEU clarified in its judgement could also be argued in other fields of law, which are affected by the growing pressures to regulate the online world. The CJEU suggest so itself by arguing that

> *„in the context of the examination of an abuse of a dominant position by an undertaking on a particular market, 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, such as the rules on the protection of personal data laid down by the GDPR."*[293]

The wording "other than those relating to competition law" point towards a broader reach of the CJEU ruling. This is especially interesting, when looking at the intersection of consumer protection law and competition law, which is not topic of this paper. However, I wanted to point out this fact, to further highlight the importance of this ruling.

10.2.2. Intersection between the GDPR and DMA

Taking a closer look at the DMA, it becomes clear that the DMA ties in to the GDPR, e.g., when it refers to some definitions in the GDPR and clarifies that the DMA should not undermine provisions of data protection law. Etteldorf argues that this is still very vague, as the legislator does not clarify what law to apply in the case of the collision of two laws and argues that the legislator did not see any danger in conflicts of law when it comes to the GDPR, national competition laws and the DMA[294].

Contrary to the legislator's assumption, Etteldorf points out that there are certain areas where a collision of laws could arise:

- Art 5(2) DMA addresses the core issue of the GDPR, where three subparagraphs attempt to clarify the relation between the two regulations. Firstly, the provision shall not apply when the consumer has had the opportunity to give consent pursuant to the GDPR, secondly where the consent has been withdrawn or not given at all, the gatekeeper shall not continuously promote the service – and only promote it once a year, as otherwise it is uncertain, if this would still be considered free and voluntary consent pursuant to Art 7 GDPR.[295]

[292] Treaty of the European Union [2007] OJC 326/1, art 4(3).
[293] Case C-252/21, para 48.
[294]Christina Etteldorf 'DMA – Digital Markets Act or Data Markets Act?' [2022] EDPL 255, 255-256.
[295]ibid, 256-257.

> *So already at this point, one could raise the question of what the explicit rule in the DMA, which by itself draws a connection to consent under the GDPR, means for compliance under data protection law. Would consent based on continuous prompting be invalid in principle? Would this only affect gatekeepers or, to be fair, all data processors? Could data protection authorities impose sanctions based on this data protection breach by invoking a DMA-compliant interpretation? More specifically, is Art. 5(2) subparagraph 2 a concretisation of the GDPR (for gatekeepers)?*[296]

The term consent thereby must be interpreted pursuant to Art 6 GDPR. This is not surprising because consent is a well-established concept especially in data protection law and therefore all the standards set forth in the GDPR in this regard, remain applicable to the DMA. Consent under the GDPR must be freely given, specific, informed and unambiguous[297].

As discussed earlier, for consent to be freely given, the user must be granted real choice and control, meaning that if consent is bundled up as a non-negotiable part of terms and conditions, it can be presumed that it was not freely given. Especially with regards to the DMA concerns have been voiced, that the grant of GDPR-compliant consent is an unrealistic scenario, due to the power imbalances between users and gatekeepers. These power imbalances would automatically lead to the presumption, that users did not freely agree to the terms and conditions of gatekeepers because they are faced with a take it or leave it scenario[298]. This was also one of the core problems in the Facebook decision, where the CJEU pointed out that pursuant to the GDPR consent cannot be considered free, if the users have no real freedom of choice or are not able to deny their consent without negative consequences. The CJEU further clarifies that consent is not to be deemed free, if not every individual process can be agreed to separately [299]. This core issue of the Facebook decision (even though it was not discussed by the courts yet) also inspired Art 5(2) DMA, which includes safeguards that give more power to users by offering a less personalized but equivalent alternative to their service. Moreover, the DMA requires gatekeepers to come up with and offer user-friendly ways to give, modify and withdraw consent in an explicit straight-forward and clear manner[300].

[296]ibid, 257.
[297] Damien Geradin, Konstantina Bania and Theano Karanikioti 'The interplay between the Digital Markets Act and the General Data Protection Regulation' [2022], 8. < https://papers.ssrn.com/sol3/papers.cfm?abstract_id =4203907>, accessed 1st September 2023.
[298]ibid, 10.
[299] Case C-252/21, para 140ff.
[300] Damien Geradin, Konstantina Bania and Theano Karanikioti (n 297), 10-11.

Taking the clarification of the CJEU in the Facebook case into regards, in my eyes a clear-cut scenario appears. The CJEU offered a clarification on consent pursuant to Art 6 GDPR[301], which logically applies to all data processors and not only to gatekeepers. In my opinion this is because the questions two to six asked by the Higher Regional Court of Düsseldorf (and the clarification by the CJEU) explicitly only address the GDPR and not the DMA[302]. As pointed out the explicit rules set forth in the DMA, can logically only apply to gatekeepers, as the DMA itself only applies to gatekeepers. The stricter rules of the DMA therefore only apply to companies that meet certain thresholds, where power imbalances between end users and the companies are likely to occur. However, analysing the DMA and the CJEU's Facebook decision, it also becomes apparent that the CJEU brought the interpretation of the GDPR (for all data processors) closer to the rules and standards of the DMA. The closeness of the Facebook decision to Art 5(2) DMA is not surprising, as Art 5(2) DMA was evidently inspired by the Facebook decision. It is also not surprising, that the CJEU stuck to the Commissions overall opinion regarding consent when gatekeepers are involved, as this clarifies and simplifies the situation. From a practical point of view, this scenario also makes sense: smaller companies that do not meet the thresholds of the DMA yet, might do so in future and then do not have to adapt as drastically in this regard, if stricter rules also apply to all data processors.

- Also, data portability (and interoperability) play(s) a big role. Data portability is the ability of a data subject or machine user to export their data from one service to another. This can be done directly by the user, or the user can have a third-party exercise this right. The concept of data interoperability is like data portability but with real time access for the user or entities acting on the user's behalf. It, however, has bigger implications on competition, as data interoperability allows for complementary services for platforms to be developed and enables multi-homing, but it can also result in anti-competitive behaviour[303].

  Art 20 GDPR regulates the issue of data portability and reads as follows:

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

[301] Case C-252/21, para 86-87.
[302] Case C-252/21, para 35.
[303] Crémer, de Montjoye and Schweitzer (n 14), 58ff.

the processing is based on consent pursuant to point (a) of Article 6(1) or point (a) of Article 9(2) or on a contract pursuant to point (b) of Article 6(1); and

the processing is carried out by automated means."[304]

The goal of Art 20 GDPR is to facilitate the switching between data-driven services and therefore protects data subjects from data induced lock-ins. However, Art 20 GDPR has not been designed as a right to continuous data access or to request interoperability between two services but as a right to copy accumulated data which might facilitate switching. Therefore, the purpose is not to facilitate multi homing as it cannot provide for continuous and real time data access. Considering this, Art 20 GDPR should be interpreted with a view to ensuring individual control of the data subject over the data. More demanding regimes of data interoperability should only be imposed by sector specific regulations (e.g. PSD2 Directive)[305].

According to Art 6(9) DMA the gatekeeper shall provide end users (when requested) with effective portability of data provided by the end user. As made visible, the DMA goes further than the GDPR, because it also includes the provision of tools that facilitate the exercise of the data portability free of charge. Moreover, the DMA also includes non-personal data[306].

Bania argues that the Recital of the DMA reads as Art 20 GDPR and Art 6(9) DMA being reciprocal, but the DMA does not only enhance the GDPR but also expands it. Firstly, because there are big differences in the two provisions, e.g. the type of data being covered, the legal basis and the transactional and technical conditions under which the transaction should take place[307]. This makes it complicated for gatekeepers to comply with both sets of rules at the same time. It must be seen in the future, if gatekeepers will adhere to both those requirements with one mechanism or have two different mechanisms in place[308]. Secondly the DMA is a sector specific legislation (lex specialis), which might prevail over the GDPR[309]. In this respect, Art 7 DMA should also not be disregarded, as it concerns a very wide-reaching provision of data

[304] General Data Protection Regulation, art 20.
[305] Crémer, de Montjoye and Schweitzer (n 14), 82.
[306] Crémer, de Montjoye and Schweitzer (n 14), 82.
[307] Konstantina Bania 'Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice" clause' [2023] 19/1 European Competition Journal 116, 131.
[308] Etteldorf (n 294), 258.
[309] Konstantina Bania 'Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice" clause' (n 307), 131.

portability for number independent messaging services and will require a well-functioning mechanism.

- Gatekeepers might also infringe the GDPR by implementing Art 6(10) and (11) DMA, as gatekeepers are obligated to provide business users with *"effective, high-quality, continuous and real-time access to, and use of, aggregated and non-aggregated data, including personal data*[310]*"* generated by the business user. However, the legislator introduced a safeguard that, with regards to personal data of the end users, requires their consent. Art 6(11) DMA obligates online search engine providers give access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data in relation to free and paid search data generated by end users. However, this provision requires the anonymisation of the data provided, meaning that the provision of data under Art 6(11) DMA does not fall within the scope of the GDPR[311].

As this subchapter shows, the GDPR and the DMA are intertwined and cannot be clearly separated when it comes to gatekeepers and companies that are on the way to meeting the gatekeeper thresholds of the DMA. This also speaks to the fact that competition law and data protection law must be equally considered to tackle the issue of the increasing power of online platforms. However, the DMA fails to provide clarity on how the two pieces of legislation work together and how the DMA should be implemented.

10.3. Competition Law vs. DMA

10.3.1. Differences

Before looking at the finer differences of traditional competition law instruments and the DMA, it is important to note that those two regimes mostly take a completely different approach. It must be differentiated, if a regime intervenes ex ante or ex post. Merger control for example intervenes ex-ante, because it protects the future competitiveness of the market and competition authorities take a forward-looking approach, if the merger is likely to impede future competition. In abuse cases, the story is different: the definition of the relevant market is meant to determine the market power at the time the questionable conduct took place and if it was used to raise the market barriers. This is an ex-post approach[312]. With regards to the DMA, Recital 9 points out that competition law requires the assessment of the individual case and the

[310]Digital Markets Act, art 6(10).
[311]Etteldorf (n 294), 259.
[312]Crémer, de Montjoye and Schweitzer (n 14), 47.

likely effects of the questioned conduct[313]. However, the DMA avoids such rigid rules and takes more of an ex ante approach[314] by introducing a list of obligations[315] (that are somewhat inspired by relevant cartel cases[316]) and must be fulfilled by core platform services that fall under the gatekeeper threshold. This can be considered as a "reversal of the burden of intervention"[317].

Colomo argues that many of the proposed attempts to regulate the digital sector all have the following "ingredients": they contain ad hoc rules, minimize the need for context-specific fact (finding that commonly characterizes competition law systems) and remedies that are far reaching and contain a restorative element. The DMA contains all those elements and can therefore be considered more than just a mere tweak to the competition law regime[318].

As discussed above, acting under the traditional EU competition law system comes with some hurdles. The Commission mostly assesses on a case-by-case basis, if the required hurdles are surpassed. Firstly, it is necessary to assess if the required pre-condition is present. The pre-condition for Art 102 TFEU is that there needs to be a dominant position which requires the definition of the relevant market and an analysis of the relevant market. In the Microsoft/Skype[319] case, the Commission concluded that the newly formed entity would have a market share of more than 80% in an area where network effects also occur, the entity still lacks a dominant position in the market. This case shows, that even though a platform provider has many business and end users as well as a large turnover, it would not automatically be considered to hold a dominant position. However, with the DMA, which is based on an ex-ante approach, the assessment of the dominant position is no longer necessary[320] and the difficulties of defining the relevant market and the dominant position become less prominent.

Moreover, for authorities to be able to act, the competition law system demands evidence that the practices in question either have the object or effect of restricting competition. Case law shows that it is necessary to evaluate the objective of practice, particularly the relevant legal and economic context[321]. This is also no longer necessary when applying the DMA.

[313]Digital Markets Act, para 9.
[314]Hienemann and Meier (n 218), 95.
[315]Colomo (n 194), 561.
[316]Hienemann and Meier (n 218), 95.
[317]Colomo (n 194), 561-562.
[318]ibid, 561.
[319]*Microsoft/Skype* (Case M.6281) Commission Decision [2011] OJ C7279.
[320]Colomo (n 194), 566.
[321]ibid, 567.

10.3.2. Parallel Applicability

Disregarding how the DMA circumvents some of the problems of competition law with regards to online platforms, these difficulties can still not be ignored completely. One must keep in mind that the traditional competition law approaches still exist and Art 1(6) DMA states:

> *"This Regulation is without prejudice to the application of Articles 101 and 102 TFEU. It is also without prejudice to the application of national rules prohibiting anticompetitive agreements, decisions by associations of undertakings, concerted practices and abuses of dominant positions; national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to imposing additional obligations on gatekeepers […]."* [322]

Art 1(6) shows that the DMA is not supposed to supersede the provisions of competition law but to complement them, which leads to a parallel applicability of the DMA and the competition law rules. Hienemann and Meier call this the "platform related two barrier theory" ("platformbezogene Zwei-Schranken-Theorie")[323]. However, Recital 9 of the DMA restricts Art 1(6) by stating that *"the application of the latter rules [Art 101 and 102 TFEU and national competition rules] should not affect the obligations imposed on gatekeepers under this Regulation and their uniform and effective application in the internal market."*[324]

Besides this clarification, which is yet to be seen how it translates into practice, the DMA does not cover all competition law cases concerning online platforms, e.g. online platforms that are exempt or do not meet the thresholds.

Similarly, Art 1(5) DMA also orders member states to not impose further obligations such as laws, regulations or administrative actions on gatekeepers for the purpose of ensuring contestable and fair markets without prejudice to rules pursuing other legitimate interests[325], such as consumer protection laws or laws against unfair competition[326].

Before I get to the problems caused by the parallel applicability, I will briefly discuss why the legislator introduced the abovementioned provisions. One must look at the legal basis of the DMA, which is Art 114 TFEU[327]. Directives and regulations based on Art 114 TFEU all have one common goal: the harmonisation of EU law to grant a better functioning of the internal market. The DMA is not based on Art 103 TFEU, on which regulations and directives, that

[322]Digital Markets Act, art 1(6).
[323]Hienemann and Meier (n 218), 95.
[324]Digital Markets Act, para 9.
[325]ibid, art 1(5).
[326]Hienemann and Meier (n 218), 95.
[327]Leistner (n 209), 781.

realize and complement Art 101 and 102 TFEU, are usually based. However, the EU competition law cannot be extended by regulations or directives solely based on Art 103 TFEU. To extend the EU competition law regime, the legislator would have to base the directive or regulation on Art 352 TFEU[328]. Supposedly to avoid the complicated legislative procedure of Art 352 TFEU, the DMA is not anchored in competition law but exists in parallel to competition law and complements it[329]. Besides not needing consensus of every member state, basing the DMA on Art 114 TFEU also means that the Commission had great freedom in drafting the DMA. This results in a higher flexibility in the application of the DMA, which was one of the main aims of the Commission[330].

However, it should not be disregarded that basing the DMA on Art 114 TFEU is a balancing act: The ex-ante rules that are supposed to grant a fair and contestable access to the market should apply without touching upon issues of competition and competition law rules. Yet, the access to the market also involves an indirect access to competition issues. Zimmer and Göhsl argue, that the separation between the access to the market and competition issues is only arguable by introducing the concept of gatekeepers: the companies are not addressed as competitors in the DMA but as gatekeepers (granters of market access), which justifies the parallel existence of the DMA and the competition law rules[331]. Along that line, Leistner also argues that the DMA is a "hybrid sector-specific regulatory approach for core platform services" which has characteristics of both competition and unfair practices law. Basing the DMA on Art 114 TFEU may be due to certain elements of unfair competition law in its objectives, but the contextual closeness of many characteristics of the DMA based on the objectives and instruments of EU competition law cannot be disguised[332]. Therefore, he notes that it would be *"strongly advisable to acknowledge that hybrid character expressly and hence to base the proposal also on Art 103 TFEU"*[333].

The parallel applicability of the DMA and the competition law rules seems to have practical implications. For example, there are still some uncertainties regarding the precedence of the DMA in relation to the competition law rules. It seems like the parallel applicability of the DMA only applies partially. If competition law is applied to platforms, the uniform application

[328]A competence expansion pursuant to Art 354 is not subject to the legislative procedure pursuant to Art 294 TFEU but requires the consent of all member states.
[329]Zimmer and Göhsl, (n 191), 32-33.
[330]ibid, 33.
[331]ibid, 34.
[332]Leistner (n 209), 781.
[333]ibid, 781.

of the DMA requirements in the internal market pursuant to Art 1(6) DMA must be taken into account. Regarding European competition law, one must consider that primary law, like Articles 101 and 102 TFEU, take precedence over secondary law, such as the DMA. Therefore, the reminder in Art 1(6) DMA can from the outset only apply to national competition law of member states. And then clarification in each individual case is necessary to what extent the application of national competition law to central platform services pursues different objectives than the DMA and is therefore permissible (Art 1(5) DMA) or must take a back seat due to the identity of the objective[334].

Van den Boom argues that the harmonisation standard of the DMA must be interpreted broadly to avoid further market fragmentation. After a teleological interpretation of Art 1(5) and 1(6) DMA, member states are limited to imposing additional rules if they are purely complimentary (in areas that the DMA does not regulate) or when stricter rules do not threaten the harmonizing effects or the effective enforcement of the DMA[335].

Similar to the intersection between the GDPR and the DMA, there are also some uncertainties within the intersection of the traditional competition law rules and the DMA. Again, it will be interesting to see how the Commission and courts will deal with these uncertainties in the future and how the new approach of the DMA will evolve.

10.3.3. Justification of the different approaches

As this paper shows, there are many different approaches and (economic/academic) opinions towards regulating the growing competitive power of online platforms. A multitude of legislators and scholars argue that the "traditional" approaches of Art 101 and 102 TFEU towards regulating competition do not function effectively amongst online platforms. This is mostly due to the strict definitions and conditions necessary for the application of Art 102 TFEU. In my opinion, the difficulty lies in the problems with defining the relevant market of online platforms. Looking at the multitude of tests (SSNIC, SSNIC, SSNDQ), none of them are fully convincing and functional. As the case law presented in this paper has shown, the definition of the relevant market for online platforms was mostly a case-by case assessment, that is very time consuming and leads to extensive judgements. Moreover, I could not pinpoint any real structure, when it comes to the definition of the relevant market. As already mentioned, the DMA circumvents this problem amongst gatekeepers, as its application does not require the

[334]Hienemann and Meier (n 218), 95.
[335]Jasper van den Boom 'What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws' [2023] 19/1 European Competition Journal 57, 58.

definition of the relevant market. This is the main difference between these two regulations when it comes to online platforms.

Many of the obligations listed in the DMA reflect issues of past or ongoing competition issues. This means that the goal of the DMA is not to fill gaps that could not be filled with Art 102 TFEU, but to address certain weaknesses of competition law[336]. In my opinion the circumvention of the necessity to define the relevant market has made it easier for the Commission to tackle anti-competitive behaviour of online platforms. However, one must also bear in mind that with the DMA being necessary to fill gaps, inevitably the interaction of the two regulations is far from straight forward. The ex ante approach of the DMA and the ex-post approach of Art 102 TFEU are two different approaches, that exist side by side. Scholars fear that in practice the same platform could be subject to proceedings under different rules for the same conduct.

Bania examines this issue more closely by applying the ne bis in idem principle to the DMA and Art 102 TFEU. He argues that it is unlikely that both proceedings (under the DMA and national or EU competition law) will be brought by the Commission but that national competition authorities may want to apply competition rules to a conduct that was already sanctioned under the DMA or vice-versa and concludes that it is unclear if duplicate proceedings will trigger the ne bis in idem principle[337].

This also triggers the debate regarding the scope of harmonisation the DMA should offer. Following Van den Boom's argument, a broad interpretation of the standard of harmonisation does not prevent member states from conducting proceedings under Art 101 and 102 TFEU or the national equivalent Similarly, this interpretation does not prevent Member States from creating complementary or stricter rules, when these obligations are in line with the spirit of the DMA. Taking the German competition law as an example, Germany would be able to impose ex ante remedies on undertakings to resolve issues related to the use of collected data to raise barriers to entry or introduce remedies regarding exploitative terms for the collection of data[338].

However, the latest amendment of the German competition law discussed above might pose a challenge to the broad harmonisation standards of the DMA. The introduction of section 19a GWB allows the BKA to designate undertakings with a status of paramount significance across

[336] Konstantina Bania 'Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice" clause' (n 307), 140.
[337] Konstantina Bania 'Fitting the Digital Markets Act in the existing legal framework: the myth of the "without prejudice" clause' (n 307), 141ff.
[338] Jasper van den Boom (n 335), 77.

market for a period of 5 years and impose ex ante additional obligations. Notably, the assessment used by the BKA differs from the assessment under the DMA. The GWB does not rely on quantitative thresholds, but looks e.g., at dominance in one or more markets, financial strength and access to resources, vertical integration and access to data relevant for competition. The determination of the status requires an in-depth investigation into the company itself. Despite these differences, the status of paramount significance and the gatekeeper status are likely to target the same undertakings. Even if the criteria for determining paramount significance across markets differ from those introduced in the DMA, they also overlap in many instances[339]. Van den Boom therefore argues that a narrow interpretation of the standard of harmonisation, which could lead to more examples such as the German on, could result in the following:

> *"The question then is whether the total harmonization on matters of law is not easily subverted by Member States by dressing up the regulation as an ex-ante competition law framework. When Member States are able to circumvent the total harmonization of laws in this manner, the part of the DMA which includes total harmonization is not effective."*[340]

All in all, the different approaches of the DMA and the traditional competition law rules is justified because especially the DMA contains a list of conducts that have mostly been seen by online platforms in the past. In my eyes, the circumvention of the criteria of the relevant market and the ex-ante approach that comes with it, is not too strict or direct. Whit this approach in place, gatekeepers have a clear list of abusive conduct that applies to the entire EU, so it should also make conducting business in the EU more predictable and uniform for online platforms. How the application of the DMA will play out in practice and what difficulties will arise, when applying it with regards to Art 102 TFEU, cannot be fully predicted yet, but a broad standard of harmonisation would make sense with regards to the efficiency of the DMA. Taking Vergnolle's argument regarding the growing power of the Commission into regard, one must bear in mind that a broad standard of harmonisation would empower the Commission to the maximum capacity of the DMA, whereby granting the individual member states more power would balance out the power of the Commission to some degree[341]. As I could hopefully show, the implementation of the DMA walks a thin line between being circumvented by member states by granting them power or giving the Commission to much legislative and judicial power. How the DMA is implemented and interpreted in practice will be seen soon.

[339] Jasper van den Boom (n 335), 74-75.
[340] Jasper van den Boom (n 335), 75.
[341] Suzanne Vergnolle (n 280), 103ff.

Even though not topic of this paper, I also want to raise the question if it only makes sense in the sector of online platforms to skip the definition of the relevant market, or if it also makes sense in other sectors. In my opinion, the new approach in the DMA will be a test to see if competition issues can also be tackled in a more dynamic and efficient way. I believe if the DMA proves to be successful, this might be a gateway to introducing similar rules in other dynamic and rapidly changing sectors.

11. Conclusion

As discussed in the first chapters of the paper, there are three key characteristics of the digital economy: extreme economies of scale, network externalities and the role of data plays. Together these three factors favour the development of ecosystems, where large online platforms have a competitive advantage, which makes it difficult to dislodge them. From a competition law stance, scholars and EU institutions worry that dominant online platforms may engage in anti-competitive behaviour to secure their position in the market. These unfavourable developments in the digital economy cannot be tackled with traditional competition law approaches or national laws but require EU wide legislative action[342]. Especially when taking the power that data has on competition law into consideration, the existing EU competition law approaches reach their limits.

The main weakness of Art 102 TFEU is the necessity to define the relevant market. As shown in numerous cases, the definition of the relevant market for online platforms is not an easy task. Several modifications of the SSNIP test fail to meet the necessities of the complex demands of the markets online platforms operate in. The analysis of case law has also not shown any cohesive method, that the Commission and courts developed to define the relevant market for online platforms. Also, the essential facilities doctrine has many disadvantages in tackling refusal to deal cases. The main problem one encounters is the ongoing discussion about the criteria of the essential facilities test, which also lead the courts to not use this approach in more recent cases. Another big problem is the question, if data (in the amounts collected by large online platforms) can be considered indispensable. Notably, in the Google/DoubleClick decision the Commission was of the opinion, that Google's data does not give it a competitive advantage, which cannot be met by competitors.

[342]Crémer, de Montjoye and Schweitzer (n 14), 2.

The traditional competition law approaches, even though they are a *"solid basis for protecting competition in a broad variety of market settings"*[343] and Art 101 TFEU and Art 102 TFEU are a *"sound and sufficiently flexible basis for protecting competition in the digital era"*[344], certain concepts and doctrines must be refined.

This paper further shows that data protection and competition law can no longer be treated as two different fields of law because they are entangled when it comes to online platforms. The German competition law approach and the BKA have shown that data protection and competition law can be seen as interactive fields of law. This was finally also recognized by the CJEU in its Facebook ruling, stating that competition authorities may assess, when necessary, within the scope of the assessment of an abusive conduct, if the conduct of a company is compatible with other legal regimes such as the GDPR.

Arguably the introduction of the DMA in 2022 was a big step in the right direction regarding the control of the position of gatekeeps in the market as well as the intersection between data and competition law.

Firstly, it acknowledges the power of online platforms in the form of gatekeepers and aims to regulate the conduct of gatekeepers (also with the introduction of some provisions on data protection) to ensure a competitive environment amongst and on online platforms. It is more effective than the traditional approaches as it circumvents the necessity to define the relevant market but its implementation within the scope of EU and national competition law poses many questions and raises concerns amongst scholars. Especially, its position amongst existing competition law and the standard of harmonisation, which should be applied is discussed.

Secondly, the DMA also follows the same principle, the CJEU also addressed in the Facebook case. Art 5(2) further clarifies that gatekeepers shall refrain from processing personal data of end users without their consent. The DMA thereby relies on the GDPR, especially with regards to the question "what is consent". As consent must be freely given, questions were raised if end users could even validly consent to terms and conditions of dominant companies. The CJEU clarified that pursuant to the GDPR consent cannot be considered free, if the users have no real freedom of choice or are not able to deny their consent without negative consequences. Consent is not to be deemed free, if - when there is more than one data processing process - not every

[343] ibid, 3.
[344] ibid, 3.

individual process can be agreed to separately. This is also interesting with regards to Art 5(2) DMA, as it is likely that all gatekeepers are dominant companies.

This paper shows that the differences between the approaches to regulate the growing market power of online platforms is justified. The fact that the DMA does not replace or fill in gaps of national and competition law leads to difficulties with its implementation, but these difficulties would not justify not introducing it. In this paper the traditional approaches were examined extensively and concluded that they are not suited to effectively combat the market power of large online platforms, as the existing mechanisms are not flexible enough to adapt to this rapidly developing sector.

With regards to the intersection between the DMA and the GDPR, the introduction of the GDPR into the DMA makes sense. This approach offers greater stability and allows to apply common interpretations of terms such as consent according to the DMA. However, tying these two regulations together, will also cause uncertainty and raise new questions, yet the in my opinion the introduction of completely new term would raise even more questions.

To conclude, it will be interesting to see, how the DMA works in practice and how it deals with new issues in the rapidly developing sector of online platforms. Also, it is clear that by putting the DMA to use more practical issues will arise and will show, if the intended flexibility of the DMA will hold up to the expectations the Commission set. Time will also show if the introduction of the a new competition law approach in the sector of online platforms, will lead to the introduction of similar tools in other dynamic and rapidly changing sectors.

12. Bibliography

12.1.Table of Cases

CJEU and Court

Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECR I-00207

Joined Cases C-241/91P and 242/91P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [1995] ECR I-808

Case C 7/97, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG [1998]* ECR I-07791.

Case T-62/98 *Volkswagen v. Commission* [2000] ECR II 2707

Case C-238/05 *Asnef-Equifax* [2006] ECL I 11125

Case T-612/17 *Google LLC and Alphabet, Inc. v European Commission* [2021] ECL I 763

Case C-252/21 *Meta Platforms Inc., formerly Facebook Inc., Meta Platforms Ireland Limited, formerly Facebook Ireland Ltd, Facebook Deutschland GmbH v Bundeskartellamt* [2023] ECL I 537

Commission

Case M.4731 *Google/ DoubleClick* [2008] OJ C184/10

Case M.7217 *Facebook/Whatsapp* [2014] OJ L24

Case M.6281 *Microsoft/Skype* [2011] OJ C7279

Case M.8124 *Microsoft / LinkedIn* [2016] OJ C388

German Cases

B6-22/16, Bundeskartellamt gegen Facebook Inc., Facebook Ireland Ltd., und Facebook Deutschland GmbH

KVR 69/19, Beschluss des Bundesgerichthofs vom 23.06.2020

Kart 1/19 (V) (OLG Düsseldorf 2019)

Other institutional documents

Commission to the European Parliament, Communication from the 'Data protection as a pillar of citizens' empowerment and the EU's approach to the digital transition - two years of application of the General Data Protection Regulation' [COM (2020) 264 final]

Court of Justice of the European Union 'Press Release No 147/22' (2022) https://curia.europa.eu/jcms/ upload/docs/application/pdf/2022-09/cp220147en.pdf accessed 22 April 2023.

European Commission 'Data Act' (2023) <https://digital-strategy.ec.europa.eu/en/policies/data-act> accessed 7th July 2023

European Data Protection Supervisor, 'Opinion 2/2021 on the Proposal for a digital markets Act' <https://edps.europa.eu/system/files/2021-02/21-02-10-opinion_on_digital_markets _act _en.pdf> accessed 9th May 2021

European Data Protection Supervisor 'Preliminary Opinion of the European Data Protection Supervisor Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy' [2014] < https://edps.europa.eu/sites/default/files/publication/14-03-26_competitition_law_big_ data_ en.pdf> accessed 1st September 2023

European Parliament, 'Competition Policy' (Fact Sheets of the European Union) <https://www.europarl.europa. eu/ftu/pdf/en/FTU_2.6.12.pdf> accessed 4 May 2023

12.2. Table of legislation

European Union

Regulation (EU) 2022/192 5 of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [2022] OJ L265/1

Treaty on the Functioning of the European Union [2007] OJ C 326/49

Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119/1

Charter of fundamental rights of the European Union [2012] OJ C 326/391

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1

Others

Gesetz gegen Wettbewerbsbeschränkungen (GER)

12.3. Secondary literature

Bania, Konstantina ‘Fitting the Digital Markets Act in the existing legal framework: the myth of the “without prejudice” clause’ [2023] 19/1 European Competition Journal 116

Bhattacharya, Shilpi and Miriam C. Buiten *Privacy as a Competition Law Concern: Lessons from Facebook/WhatsApp* (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id =3785134> accessed 30 October 2021

Boom van den, Jasper ‘What does the Digital Markets Act harmonize? – exploring interactions between the DMA and national competition laws’ [2023] 19/1 European Competition Journal 57

Bourreau, Marc *DMA horizontal and vertical interoperability obligations* (issue paper, Cerre, 2022)

Bruc, Édouard 'Data as an essential facility in European law: how to define the "target" market and divert the data pipeline?' (2019) 15:2-3 European Competition Journal 177

Budzinski, Oliver and Stöhr, Annika 'Competition Policy Reform in Europe and Germany - Institutional Change in the Light of Digitization' [2019] 15(1) European Competition Journal 15

Colomo, Ibáñez `The Draft Digital Markets Act: A Legal and Institutional Analysis' [2021] 12/7 Journal of European and Competition Law & Practice 561

Connor O', Daniel 'Understanding Online Platform Competition: Common Misunderstandings' [2016] Internet Competition and Regulation of Online Platforms

Crémer, Jaques, de Montjoye, Yves-Alexandre and Schweitzer Heike 'Competition Policy for the digital era'(European Union 2019), 24-25. <https://op.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en> accessed 9 May 2023

Cunha, D' Christian 'Best of frenemies? Refelctions on privacy and competition four years after the EDPS Preliminary Opinion` [2018] 8(3) International Data Privacy Law 253

Dacar, Rok 'Is the Essential Facilities Doctrine Fit for Access to Data Cases? The Data Protection Aspect' [2022] Croatian Yearbook for European Law & Policy 61

Doherty, Barry 'Just what are essential facilities?' [2001] 38 Common Market Law Review 397

Esayas, Samson 'Competition in (data) privacy: "zero"-price markets, market power, and the role of competition law' [2018] 8(3) International Data Privacy Law 181

Esayas, Samson 'Competition in Dissimilarity: Lessons in Privacy from the Facebook/WhatsApp Merger' [2017] 33 CPI Antitrust Chronicle 1

Etteldorf, Christina 'DMA – Digital Markets Act or Data Markets Act?' [2022] EDPL 255

Evans, David S. 'The Antitrust Economics of Multi-Sided Platform Markets' [2003] 20 Yale Journal on Regulation 325

Gasser, Lukas *Der Marktstrukturmissbrauch in der Plattformökonomie. Informationsasymmetrien als Ausgangspunkt eines Verstoßes gegen Art. 102 AEUV* (2021 Nomos)

Geradin, Damien, Bania, Konstantina and Karanikioti, Theano 'The interplay between the Digital Markets Act and the General Data Protection Regulation' [2022] < https://papers.ssrn.com/sol3/papers.cfm?abstract_id =4203907>, accessed 1st September 2023

Giannaccari, Andrea 'The Big Data Competition Story: Theoretical Approaches and the First Enforcement Cases' (2018) EUI Working Paper LAW 2018/10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id= 3244419> accessed 24 April 2023

Graef, Inge 'Data as Essential Facility Competition and Innovation on Online Platforms' (Doctor of Laws thesis, KU Leuven 2016)

Graef, Inge 'Data Concentration and Data Abuse under Competition Law' in Martin More and Damian Tambini (eds), *Digital Domiance: The Power of Google, Amazon, Facebook and Apple* (Oxford University Press 2018)

Graef, Inge *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility (*International Competition Law Series, Wolters Kluwer, 2016)

Graef, Inge, Clifford, Damian et al. 'Fairness and enforcement: bridging competition, data protection, and consumer law' [2018] 8(3) International Data Privacy Law 200

Grothe, Nela, *Datenmacht in der kartellrechtlichen Missbrauchskontrolle* (Nomos 2019)

Hienemann, Andreas and Meier, Giulia Mara `Der Digital Markets Act (DMA): Neues "Plattformrecht" für mehr Wettbewerb in der digitalen Wirtschaft' [2021] Zeitschrift für Europarecht 86

Hou, Liyang ‘The Essential Facilities Doctrine – What Was Wrong in Microsoft?’ [2012] 43(4) IIC- International Review of Intellectual Property and Competition Law 251

Kahlenberg, Harald ‘Die 10. GWB-Novelle: Mehr als eine Digitalisierungsnovelle‘ [2021] 10 Betriebsberater 579

Kapusta, Ina `Pflichten von Gatekeepern im Digital Markets Act‘ [2023] 20/2 Zeitschrift für das Privatrecht der Europäischen Union 83

Kerber, Wolfgang ‘Digital markets, data and privacy: competition law, consumer law and data protection’ [2016] 11(11) Journal of Intellectual Property Law & Practice, 856

Knebel, Sophie Victoria *Die Drittwirkung der Grundrechte und -freiheiten gegenüber Privaten. Regulierungsmöglichkeiten sozialer Netzwerke* (2018 Nomos)

Körber, Thorsten `Die Facebook-Entscheidung des Bundeskartellamtes – Machtmissbrauch durch Verletzung des Datenschutzrechts?‘ [2019] 4 Neue Zeitschrift für Kartellrecht 187

Krzysztofek Mariusz *GDPR: Personal Data Protection in the European Union* (2021 Kluwer Law International

Leistner Matthias ‘The Commission’s vision for Europe’s digital future: proposals for the Data Governance Act, the Digital Markets Act and the Digital Services Act - a critical primer’ [2021] 16/8 Journal of Intellectaul Property law & Practive 778

Lundquist, Björn ‘The Proposed Digital Markets Act and Access to Data: A Revolution, or Not?’ [2021] 52 IIC 239

Lynskey, Orla ‘At the crossroads of data protection and competition law: time to take stock’ [2018] International Data Privacy Law 8(3) 179

Mandrescu, Daniel ‘The SSNIP Test and Zero-Pricing Strategies: Considerations for Online Platforms’ [2018] 2/4 Competition Review 244

Martens, Bertin 'An Economic Policy Perspective on Online Platforms' (2016) Institute for Prospective Technological Studies Digital Economy Working Paper 2016/05, JRC101501 <https://joint-research-centre.ec.europa.eu/system/files/2016-05/JRC101501.pdf> accessed 22 April 2023

McLeod, Robert 'Novel But a Long Time Coming: The Bundeskartellamt Takes on Facebook' [2016] 7/6 Journal of European Competition Law & Practice 367

Meta, `Why we disagree with the Bundeskartellamt' (7 Feburary 2019) <https://about.fb.com /news/2019/02/bundeskartellamt-order/> accessed 9th May 2023

Moreno Belloso Natalia 'Google v Commission (Google Shopping): A Case Summary' (European University Institute 2021)

O'Donoghue, Robert and Padilla, Jorge, *The law and economics of Article 102 TFEU* (3rd edition, Hart Publishing 2014)

Patakyová, Mária T. 'Competition Law in Digital Era – How to Define the Relevant Market' in 4th International Scientific Conference (ed.) *Economics and Management: How to Cope With Disrupted Times, (*Association of Economists and Managers of the Balkans 2020)

Rochet, Jean-Charles and Tirole, Jean 'Platform Competition in tow-sided markets' [2003] 1(4) Journal of the European Economic Association 990

Rudohradski, Simona, Huckovi, Regina and Dobrovicovi, Gabriela 'Present and Future – A Preview Study of Facebook in the Context of the submitted Proposal for Digital Markets Act' 6 EU and Comparative Law Issues and Challenges Series 489

Ruschemeier, Hannah 'Competition law as a powerful tool for effective enforcement of the GDPR' (Verfassungsblog on Matters Constitutional 7 July 2023), https://verfassungsblog.de/competition-law-as-a-powerful-tool-for-effective-enforcement-of-the-gdpr/, accessed 1st September 2023

Schneider, Giulia '*Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's investigation against Facebook*' [2018] 9 Journal of European Competition Law & Practice 213

Schulze, Hendrik *Exploring the Unchartered Waters of European Competition Law 4.0. An approach to the regulation of abusive data-related behaviours of dominant undertakings in the digital age* (Nomos 2021)

Scott Morton, Fiona and Caffarra, Cristina 'The European Commission Digital Market Act: A translation' (VOXEU, 5 January 2021) < https://cepr.org/voxeu/columns/european-commission-digital-markets-act-translation> accessed 9th May 2023

Vergnolle, Suzanne 'Enforcement of the DAS and the DMA – What did we learn from the GDPR?' in Heiko Richter, Marlene Straub and Eric Tuchtfeld (eds.) *To Break Up or Regulate Big Tech? Avenues to Constrain Private Power in the DSA/DMA Package* (Max Plank Institute for Innovation and Competition 2021)

Vrabec, Helena U. *Data Subject Rights under the GDPR* (2021 Oxford University Press)

Wiebe, Andreas et al. *Wettbewerbs- und Immaterialgüterrecht* (4th edition, Facultas 2018)

Wiedemann, Klaus 'A Matter of Choice: The German Federal Supreme Court's Interim Decision in the Abuse-of-Dominance Proceedings Bundeskartellamt v. Facebook (Case KVR 69/19)' [2020] 51 International Review of Intellectual Property and Competition Law 1168

Yun, Wan *Comparison-Shopping Services and Agent Designs* (Information Science Reference 2009)

Zeng, Jing, Khan, Zaheer and De Silva, Muthu 'The emergence of multi-sided platform MNEs: Internalization theory and networks' [2019] 28 International Business Review 1

Zimmer, Daniel and Göhsl, Jan-Frederik `Vom New Competition Tool zum Digital Markets Act: Die geplante EU-Regulierung für digitale Gatekeeper' [2021] Zeitschrift für Wettbewerbsrecht 29

Zimmermann, Hendrik and Heinzel, Caroline `Der Digital Markets Act. Platform-Regulierung für Demokratie und Nachhaltigkeit in der EU - aktueller Stand und Verbesserungspotenziale' Germanwatch