

Facebook's Exploitative and Exclusionary Abuses in the Two-Sided Market for Social Networks and Display Advertising

Abstract

The German Facebook case has directly addressed the contentious interplay between data protection and competition law for the first time. The *Bundeskartellamt's* theory of harm, which directly linked privacy violations to the strengthening of Facebook's market power, proved controversial: it elicited strong criticism from the appeals court, but then was partially endorsed by the *Bundesgerichtshof* (German Federal Supreme Court). This article shows that an enforcement action against Facebook under Article 102 TFEU need not be controversial. We present empirical evidence confirming that Facebook's 'envelopment by privacy policy tying' strategy exploits consumers, as it causes clear consumer harm on the market for social networks in the form of lack of choice and degradation of quality. In turn, such consumer harm on the 'free' side leads to a weakening of the competitive market structure and foreclosure of competitors on the 'paid' market for display advertising and other adjacent markets. This strategy falls neatly within the scope of Article 102 TFEU, irrespective of whether it also violates EU data protection law. In addition, the enveloping by privacy policy tying forms part of an overall anti-competitive strategy over which the Commission can assert jurisdiction and prosecute as a single and continuous infringement.

I. Introduction

On 6 February 2019, the *Bundeskartellamt* ('BKA') issued a decision finding that Facebook had abused its dominant position in the German market for social networks (the 'BKA Decision').¹ The BKA Decision was based on the German equivalent of Article 102 TFEU.² It constituted the first attempt by a national competition authority in the EU to address the interface between data protection and competition law. It showed how data-driven firms like Facebook gain and amass market power in multi-sided markets where consumers pay no monetary price, but instead pay with their personal data, the fundamental raw material that advertising-funded platforms require for the successful operation of their revenue-making segment (that is, targeted advertising). The BKA's theory of harm proved controversial, eliciting a substantial amount of commentary both in support of³ and in disagreement with⁴ the BKA's approach. On 26 August 2019, the

¹ Decision in Case B6-22/16, *Verwaltungsverfahren GEM § 32 ABS. 1 GWB*.

² German Act against Restraints on Competition, s. 19(1).

³ Viktoria Robertson, 'Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data' (2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3408971> accessed 18 November 2020; Marco Botta and Klaus Wiedemann, 'EU Competition Law Enforcement Vis-À-Vis Exploitative Conducts in the Data Economy Exploring the Terra Incognita' (2018) Max Planck Institute for Innovation and Competition Research Paper No. 18-08; Maximilian N Volmar and Katharina O Helmdach, 'Protecting Consumers and Their Data through Competition Law? Rethinking Abuse of Dominance in Light of the Federal Cartel Office's Facebook Investigation' (2018) 14 *European Competition Journal* 195; Wouter PJ Wils, 'The Obligation for the Competition Authorities of the EU Member States to Apply EU Antitrust Law and the Facebook Decision of the Bundeskartellamt' (2019) *Concurrences* No. 3-2019.

⁴ Giuseppe Colangelo and Mariateresa Maggiolino, 'Big Data, Data Protection and Antitrust in the Wake of the Bundeskartellamt Case Against Facebook' (2017) *Italian Antitrust Review* No.1; Renato Nazzini, 'Privacy and Antitrust: Searching for the (Hopefully Not yet Lost) Soul of Competition Law in the EU after the German Facebook Decision' (2019) *CPI EU News Presents*; Giuseppe Colangelo and Mariateresa Maggiolino, 'Data Accumulation and the Privacy-Antitrust Interface: Insights from the Facebook Case for the EU and the U.S.' (2018) *TTLF Working Paper* No.31 <<https://papers.ssrn.com/abstract=3125490>> accessed 18 November 2020.

Oberlandesgericht Düsseldorf (the ‘Düsseldorf Court’) overturned the BKA Decision involving an order of suspensive effect, levelling strong criticisms against the BKA’s approach.⁵ However, on 23 June 2020, the *Bundesgerichtshof* (the ‘Federal Supreme Court’) upheld the BKA’s prohibition decision against Facebook by summary proceedings.⁶ The Federal Supreme Court confirmed the BKA’s findings that Facebook holds a dominant position in the German market for social networks and has abused that dominant position, although based on reasons other than those the BKA relied upon.⁷

This article explores the key aspects that should lie at the centre of a competition enforcement action against Facebook under Article 102 TFEU, based on empirical evidence showing consumer harm. It uses the German Facebook case as a point of reference, but relies on a different theory of harm: ‘envelopment by privacy policy tying’, a strategy whereby a dominant platform (the ‘enveloper’) links its privacy policies in one platform market (the origin market) and another platform market (the target market) to extract users’ consent to the combination of their data generated in both markets for commercial purposes. The BKA found that data protection law infringements, including privacy violations, were directly linked to the strengthening of Facebook’s market power.⁸ While it is important to have a proper understanding of the dynamics and structure

⁵ Judgment of the *Oberlandesgericht* (Higher Regional Court of) Düsseldorf in *Facebook v Bundeskartellamt*, VI-Kart 1/19 (V) (the ‘Düsseldorf Court Judgment’). A non-official, but nevertheless, English version of the judgment can be found here: <<https://www.d-kart.de/wp-content/uploads/2019/08/OLG-Düsseldorf-Facebook-2019-English-1.pdf>> accessed 18 November 2020

⁶ German Federal Supreme Court (*Bundesgerichtshof*), ‘Der Bundesgerichtshof - Presse : Pressemitteilungen - Bundesgerichtshof Bestätigt Vorläufig Den Vorwurf Der Missbräuchlichen Ausnutzung Einer Marktbeherrschenden Stellung Durch Facebook’ (23 June 2020) <<https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020080.html?nn=10690868>>.

⁷ Judgment of the *Bundesgerichtshof* in *Facebook v Bundeskartellamt*, KVR 69/19 (23 June 2020) (the ‘Federal Supreme Court Judgment’) <<https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=bedd4af3c9d89a4dcaa64fc85d244e9e&nr=109506&pos=0&anz=107>> accessed 18 November 2020

⁸ The existence of anticompetitive behaviour based on the violation of privacy is widely acknowledged. See Organisation for Economic Co-operation and Development, ‘Big Data: Bringing Competition Policy to the Digital Era’ (2016) <[https://one.oecd.org/document/DAF/COMP\(2016\)14/en/pdf](https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf)> accessed 18 November 2020: “Once example requiring the attention of the competition authority is where the privacy violation is reasonably capable of helping a company attain or maintain its monopoly power (especially in markets with strong data-driven network effects); Eric Clemons, ‘Written Evidence Submitted to the House of Lords for the Report “Online Platforms and the Digital Single Market”’ (2015) <<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/eu-internal-market-subcommittee/online-platforms-and-the-eu-digital-single-market/written/25630.html>> accessed 18 November 2020: ‘[S]ome anti-competitive activities are subsidized through revenues gained through violation of privacy law [...] rather than through violation of competition law itself.’; Anca D Chirita, ‘The Rise of Big Data and the Loss of Privacy’ (2016) Durham Law School Research Paper: ‘This paper acknowledges that a potential misuse of personal data by dominant undertakings has no precedent line of case law. While its novelty could trigger this particular form of abuse to be affixed with an exotic label, as it sits outside the confines of traditional competition practice under Article 102 TFEU, it is never to be under-estimated by dominant undertakings that actively engage in the sharing, transferring, or selling of such data’; Maurice Stucke and Allen Grunes, ‘Big Data and Competition Policy’ (Oxford University Press, 2016) 155: ‘Companies may use traditional measures (such as mergers, tying, exclusive dealing) to maintain or attain market power. Dominant firms may engage in otherwise illegal practices (such as deceiving the public on their privacy policies) or violating citizens’ legal rights regarding the privacy of their personal data’; Monopolkommission, ‘Special Report 68: Competition Policy: The Challenge of Digital Markets’ (2015) 117 <<http://www.monopolkommission.de/index.php/en/reports/special-reports/284-special-report-68>> accessed

of data-driven and multi-sided markets, including the extent to which data protection and competition law overlap, relying on a violation of data protection law is not necessary to establish an infringement of Article 102 TFEU. This article shows that Facebook's envelopment strategy (i) has caused clear consumer harm on the market for social networks⁹ in the form of lack of choice and degradation of quality, and (ii) such consumer harm on the 'free' side leads to a weakening of the competitive market structure and foreclosure of competitors on the 'paid' market for display advertising¹⁰ and other adjacent markets. This envelopment strategy falls neatly within the scope of Article 102 TFEU, irrespective of whether it also breaches EU data protection law.

This article presents the results of a choice modelling exercise providing empirical evidence on the existence of consumer harm and the fact that Facebook would not be able to impose forced online tracking under competitive conditions. In turn, in agreement with the findings of the Federal Supreme Court, we show that the imposition of unfair terms allows Facebook to increase the quality and effectiveness of its data use, this being the ultimate enabler of Facebook's ability to foreclose competitors, to the detriment of consumers. In particular, improved ad-targeting resulting from Facebook's exploitative conduct impairs competing display advertisers' ability and incentive to compete. As a result of Facebook's access to additional data without proper consent, a quality gap between Facebook's and its competitors' advertising services emerges. Without access to similar data, whether by reason of their smaller scale, their more limited or lack of vertical or horizontal integration, or their adherence to competition on the merits, Facebook's competitors' ability and incentive to compete is effectively reduced. At the same time, released from effective competitive pressure, Facebook's incentive to innovate and improve its services in the interests of consumers is greatly diminished.

Moreover, the enveloping by privacy policy tying is not a standalone form of conduct. Instead, it forms part of an overall scheme consisting of multiple forms of abusive conduct that pursue an identical aim: the strengthening of Facebook's dominant position in the worldwide market for social networks, and the concomitant protection of its advertising revenues. Specifically, since the acquisition of Instagram in 2012 Facebook has implemented a 'Snap up or Squash' strategy: it buys out undertakings it considers a nascent competitive threat, or alternatively it takes active steps to prevent them from gaining scale. Whilst some forms of conduct comprising the Snap up or Squash strategy have been implemented outside the EU, they are liable to have 'immediate, substantial and foreseeable' effects in the internal market. Therefore, the Commission is able to assert jurisdiction to apply Article 102 TFEU to those practices. Moreover, given that all forms of conduct seek to attain the same anti-competitive aim, the Commission is entitled to view them 'as a whole' and prosecute them as a single and continuous infringement. The procedural advantages

18 November 2020: '[T]he rules of fair competition and the privacy rules can be violated by [...] commercial operations on the internet. Companies with market power can use this kind of conduct to entrench their market position'.

⁹ Facebook is a multi-sided platform that caters to at least four sides (users, advertisers, app developers and content publishers), enabling interactions that would not be possible but for its intermediation. For the sake of simplicity, in this article Facebook will be assessed as if it were a two-sided platform, connecting the users of its social network with advertisers. For a good overview of multi-sided platforms, see David S Evans, 'Some Empirical Aspects of Multi-Sided Platform Industries', in David S. Evans (ed), *Platform Economics: Essays on Multi-sided Businesses* (Competition Policy International, 2011).

¹⁰ Competition and Markets Authority, 'Online Platforms and Digital Advertising - Market Study Final Report' (2020) 258, where the CMA presents evidence of Facebook's exploitation of market power in the display advertising market, including "the changes over time in Facebook's monetisation of its display platforms and how this compares with other platforms; evidence from advertisers and other third parties; and evidence of the use of defaults to change advertisers' behaviour."

derived from this concept can greatly assist the Commission in the assessment of an exemplary, dissuasive fine.

The remainder of this article is structured as follows. Section II shows that data processing that is unlawful under the General Data Protection Regulation (“GDPR”) ¹¹ is not the type of conduct with which competition law is concerned. Article 102 TFEU is triggered when a dominant undertaking departs from competition on the merits, thereby impairing competition, irrespective of whether such departure breaches other bodies of law. Section III explains the first anti-competitive prong of Facebook’s privacy policy tying strategy: an exploitative abuse under Article TFEU(a) – i.e. imposition of unfair trading terms. We rely on the evolution of the social network market to illustrate that under competitive conditions Facebook would have not been able to impose on consumers onerous terms of service that enable pervasive online tracking. Also, we present the results of a choice modelling exercise which confirm that Facebook’s unfair terms both impair consumer choice and amount to a degradation of quality of the Facebook social network platform for privacy-sensitive users, whose number is substantial. Section IV clarifies the role of traditional and data-driven network effects in the two-sided market for social networks and display advertising. This explanation serves to clarify that, contrary to the Düsseldorf Court’s poor understanding of such market, the accumulation of data is well capable of raising barriers to entry. The European Commission (the ‘Commission’) and EU Courts must be aware of this reality to carry out correct assessments and impose adequate remedies in a much-needed Article 102 TFEU case against Facebook. Section V illustrates the second anti-competitive prong of Facebook’s privacy policy tying strategy: the monopolisation of target markets – such as the market for the provision of display advertising in third-party properties and the classified ads market – and the entrenchment of its dominant position in the origin (i.e. social network) market. Thus, although the sheer exploitation of consumers in the social network market is enough for the Commission to launch an enforcement procedure against Facebook under Article 102(a) TFEU, there is also enough evidence for the Commission to also pursue an exclusionary case under Article 102(b) TFEU. Traditionally, enforcement actions under Article 102(a) TFEU have been about excessive pricing, which is an excessively narrow interpretation of this provision. It is time to enforce this provision to its fullest extent. Section VI explains that the enveloping by privacy policy tying forms part of an overall scheme to protect and strengthen Facebook’s dominant position in the social networking market. Given that all forms of conduct pursue the same aim and are bound to have immediate, substantial and foreseeable effects in the EU, the Commission can readily apply Article 102 TFEU to all of them, viewed as a whole. Also, the Commission can rely on the concept of single and continuous infringement to enjoy its procedural advantages and thereby ensure effective enforcement of Article 102 TFEU. Finally, some conclusions draw up the discussion.

II. The Germany Facebook case and why Enforcement Action under Article 102 TFEU would be different

This section argues that data processing in contravention of the GDPR, as outlined in the BKA Decision, is not the type of conduct that Article 102 TFEU is called upon to address. The BKA’s Facebook case was the first attempt of a national competition authority in the EU to address the interplay between competition and data protection law, putting forward a theory of harm designed to prevent Facebook from strengthening its market power and impeding competition through the violation of users’ fundamental right to data protection. It was a commendable effort, but according to the Düsseldorf Court, the BKA went too far, effectively clashing two regulatory

¹¹ 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 L119/1 2016.

frameworks into one. The Federal Supreme Court did not fully endorse the BKA's approach either; instead it placed emphasis on the impairment of consumer choice arising from Facebook's imposition of unfair trading terms. To avoid the tension in the BKA Decision, an Article 102 TFEU case must be concerned only with exploitative and exclusionary effects, irrespective of whether or not Facebook's conduct violates the GDPR.

The BKA found that Facebook was dominant on the German social network market for private users,¹² and held that the use and actual implementation of Facebook's data policy constitutes an abuse of a dominant position in the form of exploitative business terms pursuant to Section 19(1) of the German Act against Restraints on Competition ('GWB', the German equivalent to Article 102 TFEU). In particular, the BKA established that the abuse consisted in Facebook making the use of the Facebook social network conditional on users agreeing to the collection of user- and device-related data off Facebook (i.e. gathered from third-party websites and smartphone and tablet apps embedded with 'Facebook Business Tools' or which are part of the 'Facebook Audience Network', as well as from Facebook-owned services such as WhatsApp, Instagram and Messenger) and the combination of that data with data saved on Facebook user accounts (i.e. data gathered on Facebook), without users' consent.¹³ According to the BKA, '[t]here is no effective consent to the users' information being collected if their consent is a prerequisite for using the Facebook.com service in the first place.'¹⁴

In order to determine whether Facebook's terms of service are exploitative and therefore abusive, the BKA relied on the *VBL Gegenwert* and *Pechstein* case-law of the *Bundesgerichtshof*. According to that case-law, terms are exploitative and consequently amount to an abuse within the meaning of Section 19(1) GWB where they are a manifestation of market power or superior power of the party imposing such terms. To reach a finding of abuse, it is necessary to balance all interests of the parties involved, including constitutional rights. In this context, the BKA explains that 'Section 19 GWB must be applied in cases where one contractual party is so powerful that it is practically able to dictate the terms of the contract and the contractual autonomy of the other party is abolished',¹⁵ and if a dominant company handles the constitutional rights of its counterparts, the law must step in to uphold the protection of said rights. Transposing these principles to the Facebook Case, the

¹² Bundeskartellamt, 'Case Summary - Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing' (15 February 2019) 3–7 <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/AktuelleMeldungen/2019/15_02_2019_Fallbericht_Facebook.html> accessed 18 November 2020.

¹³ *ibid* 7; Clarifying the scope of the abuse, the BKA reported that 'private use of the network is subject to Facebook being able to collect an almost unlimited amount of any type of user data from third party sources, allocate these to the users' Facebook accounts and use them for numerous data processing processes. Third-party sources are Facebook-owned services such as Instagram or WhatsApp, but also third party websites which include interfaces such as the "Like" or "Share" buttons. Where such visible interfaces are embedded in websites and apps, the data flow to Facebook will already start when these are called up or installed. It is not even necessary, e.g., to scroll over or click on a "Like" button. Calling up a website with an embedded "Like" button will start the data flow. Millions of such interfaces can be encountered on German websites and on apps. Even if no Facebook symbol is visible to users of a website, user data will flow from many websites to Facebook. This happens, for example, if the website operator uses the "Facebook Analytics" service in the background in order to carry out user analyses.' Bundeskartellamt, 'Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources' (7 February 2019) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html> accessed 18 November 2020.

¹⁴ See fn 12, above.

¹⁵ *ibid* 8.

BKA assessed the ‘appropriateness’ of Facebook’s terms under data protection principles,¹⁶ as such terms concerned an unbalanced negotiation between Facebook, a dominant undertaking, and its users, whose constitutional rights to informational self-determination were at stake.

The BKA found that Facebook has no legal basis to collect its users’ personal data off Facebook and combine such data with data collected on facebook.com for the following reasons: (i) there is no effective user consent pursuant to Art. 6(1a) GDPR;¹⁷ (ii) the processing is not required for the fulfilment of a contract within the meaning of Art. 6(1b) GDPR; (iii) a comprehensive assessment of Facebook’s and data subjects’ interests does not lead to the conclusion that Facebook’s legitimate interests in processing personal data outweigh the interests and fundamental rights and freedoms of the involved data subjects pursuant to Art. 6 (1f) GDPR; and (iv) none of the provisions set out in Art. 6(c-e) GDPR are applicable to the processing at hand.¹⁸ The BKA concluded that Facebook’s unlawful data processing was a manifestation of its market power, and that there was normative causality between the impairment of its private users’ right to self-determination and Facebook’s dominant position.¹⁹ In essence, Facebook’s terms of service were found abusive because, being a reflection of its dominant position, they enable Facebook to engage in unlawful data processing, thereby impinging upon its users’ fundamental right to data protection.

Whilst the BKA’s conclusion may be correct under German law, a violation of the GDPR - or of other bodies of law - is not a necessary requirement for a finding of an infringement under Article 102 TFEU. Rather, according to settled case law, an infringement of Article 102 TFEU occurs when a dominant undertaking departs from competition on the merits, thereby causing anti-competitive effects. This is the approach followed in *AstraZeneca*,²⁰ where the EU Courts had to determine whether specific behaviour consisting in the misuse of the patent system infringed Article 102 TFEU.²¹ Noting that Article 102 TFEU bans dominant undertakings from eliminating competition through ‘methods other than those which come within the scope of competition on the merits’,²² the CJEU held that having recourse to highly misleading representations in order to lead public authorities into error (for the purposes of improperly obtaining exclusive rights) was ‘manifestly not consistent with competition on the merits and the specific responsibility on such undertaking not to prejudice, by its conduct, effective and undistorted competition.’²³ The CJEU concluded that it was an abuse ‘to lead the public authorities [to] wrongly [...] create regulatory obstacles to competition, for example by the unlawful grant of exclusive rights to the dominant undertaking.’²⁴ However, the CJEU also held that this conduct, in and of itself, was not enough

¹⁶ Ibid. ‘The Bundeskartellamt holds that as far as the appropriateness of conditions agreed in an unbalanced negotiation is concerned, these decisions of the highest court apply to all other areas of the law as well [...] which includes] data protection law’.

¹⁷ This is on account of Facebook’s dominant position and the provision of its social networking service conditioned upon users’ consenting to personal data collection on and off Facebook, in accordance with the General Data Protection Regulation, Article 7(4): ‘[w]hen assessing whether consent is freely given, utmost account shall be taken of whether, *inter alia*, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of the contract.’

¹⁸ See fn 12, above. 10.

¹⁹ Ibid 11.

²⁰ *Case C-457/10 P, AstraZeneca v Commission* [2012] ECLI:EU:C:2012:770.

²¹ Alison Jones, ‘Standard-Essential Patents: FRAND Commitments, Injunctions and the Smartphone Wars’ (2014) 10 European Competition Journal 1, 21–22.

²² *Case C-457/10 P, AstraZeneca v Commission* [2012] ECLI:EU:C:2012:770 (n 20) para 75.

²³ Ibid 98.

²⁴ Ibid 105.

to constitute an abuse; rather, actual or potential anticompetitive effects were required.²⁵ Importantly, the CJEU maintained that the illegality of abusive conduct under Article 102 TFEU is ‘unrelated to its compliance or non-compliance with other legal rules.’²⁶

No doubt Facebook’s market power and its ability to erect barriers to entry in the market for display advertising is due to the scope of its personal data collection practices taking place in the social network market, but whether or not these practices violate the GDPR is not in itself important for the analysis under Article 102 TFEU. The criteria that trigger the application of Article 102 TFEU would be met by proving that Facebook imposes unfair trading terms on consumers and avails itself of such terms to enjoy a data advantage that both protects its position in the social network segment and creates barriers to entry and expansion in the market for display advertising. Although the sheer exploitation of consumers on the paid said should be sufficient for the Commission to open infringement procedure against Facebook under Article 102(a) TFEU, there is enough evidence for the Commission to also pursue an exclusionary case under Article 102(b) TFEU, as shown in Section 4 below.

III. Enveloping Part 1: Exploitative Abuse in the Social Network Market

According to Eisenmann *et al.*:

‘Through envelopment, a provider in one platform market [the origin market] can enter another platform market [the target market] and combine its own functionality with that of the target in a multi-platform bundle that leverages shared user relationships. Envelopers capture market share by foreclosing an incumbent’s access to users; in doing so, they harness the network effects that previously had protected the incumbent.’²⁷

A good example of platform envelopment is Google’s entry into the mobile operating systems market by combining Android with Google Search – two distinct platforms – with a view to *inter alia* leverage the data generated by users of both platforms. Google was able to process and monetise this data through its advertising platforms, thereby funding its entry in a way that competitors could not replicate and reinforcing its position in multiple data-driven segments (e.g. search, maps, mobile OS, search and display advertising).

Platform envelopment can take different forms,²⁸ including by ‘privacy policy tying’, a strategy Facebook has relied upon to cement and protect its dominance in the social network market and leverage its market power onto other data-driven markets. In particular, after monopolising a multi-sided market where user data is monetised (the ‘origin’ or ‘social network’ market), Facebook has profitably enveloped other platform markets with overlapping users (the ‘target’ markets²⁹) by tying its privacy policies in all such platform markets in order to (i) extract users’ consent so that

²⁵ Ibid,112. The CJEU held that the anticompetitive effect ‘does not necessarily have to be concrete, and it is sufficient to demonstrate that there is a potential anti-competitive effect (see to that effect TeliaSonera Sverige, paragraph 64).’

²⁶ Ibid 132.

²⁷ Thomas Eisenmann, Geoffrey Parker and Marshall Van Alstyne, ‘Platform Envelopment’ (2011) 32 Strategic Management Journal 1270, 1270.

²⁸ See Daniele Condorelli and Jorge Padilla, ‘Harnessing Platform Envelopment in the Digital World’ [2020] SSRN Electronic Journal, 9

²⁹ These markets include *inter alia* the market for the provision of display advertising in third-party websites and apps (through the Facebook Audience Network), the classified ads market (Facebook Marketplace), the online gaming market (Facebook Gaming), the retail banking market (Facebook Pay) and the online dating market (Facebook Dating).

it can combine the data the common users generate and (ii) monetise such data advantage in the origin market where it is dominant.

Whilst platform envelopment strategies need not be anti-competitive,³⁰ Facebook's privacy policy tying causes consumer harm and distorts competition. In this Section, we show that Facebook's conduct amounts to an exploitative abuse under Article 102(a) TFEU consisting of the imposition of unfair trading terms on consumers. In particular, we illustrate that Facebook's dominance has enabled it to impose trading conditions which are significantly more onerous than those that would prevail under conditions of effective competition (A). Then, we provide conclusive evidence – i.e. the results of a choice modelling exercise conducted on a recent and rich sample of German social network users – of clear consumer harm arising from the imposition of said unfair terms in the form of lack of consumer choice and degradation of quality (B). The foreclosure effects of Facebook's strategy are detailed in Section 4 below.

III.1 Unfair Trading Terms – the Counterfactual

Harm to the competitive process is not a requirement that must be met for the application of Article 102(a) TFEU. Rather, direct damage to consumers enabled by dominance is what matters.³¹ While exploitative abuses do not involve a restriction of competition *per se*, they are nevertheless the outcome of an exercise of market power unrestrained by effective competition. In the absence of a restriction of competition *strictu sensu*, 'the harm addressed is still competitive harm in the form of prices significantly and persistently above the competitive level or, more rarely, trading conditions significantly and persistently more onerous than those that would prevail under conditions of effective competition.'³²

If it is claimed that Facebook is exploiting its users by imposing trading terms affording a level of data protection that is inferior to that which would prevail under competitive conditions, then the 'competitive level' of privacy (i.e. the counterfactual) must be identified. To this end, one can rely on the evolution of the social network market since its inception. As we explain in detail elsewhere,³³ the history of this market is fraught with examples of privacy intrusions that Facebook had to abort or conceal with deception to avoid consumer switching, when competitive pressure was still exerted upon it. When Facebook's dominance was entrenched, however, such intrusions became the norm.

At the time Facebook entered the social network market (2004) MySpace was the market leader. By 2006, MySpace became the most visited website in the US, and the biggest US Internet companies at the time (Google, Yahoo and AOL) had all launched competing services in a bid to convince MySpace's over 108 million users to switch.³⁴ The market, however, had not reached the

³⁰ For example, consumers may experience lower transactions costs when enveloped products are sold by a single firm.

³¹ *Case 6-72, Europemballage Corporation and Continental Can Company Inc v Commission of the European Communities [1973] ECR 215 [para 26].*

³² Cf Nazzini, fn 4, 4.

³³ This section draws on Liza Lovdahl Gormsen and Jose Tomas Llanos, 'Facebook's Anticompetitive Lean in Strategies' (Social Science Research Network 2019) SSRN Scholarly Paper ID 3400204 22–35 <<https://papers.ssrn.com/abstract=3400204>> accessed 18 November 2020.

³⁴ 'Hanging with the In-Crowd' *The Economist* (2006) <<https://www.economist.com/business/2006/09/14/hanging-with-the-in-crowd>> accessed 18 November 2020.

tipping point yet,³⁵ and MySpace's open design, which was increasingly blamed for sexual predation,³⁶ suicides³⁷ and other unfortunate incidents,³⁸ provided newcomers and competitors with an opportunity to launch a successful challenge against the then incumbent. Facebook fully embraced that opportunity. Whilst MySpace featured an open architecture where anybody could join, Facebook's network was closed,³⁹ as it required new users to use their real names and to validate their identities with a university (.edu) email address. These privacy features made Facebook 'fundamentally different from just about everything else that had come before on the Internet, including Friendster and MySpace.'⁴⁰ MySpace allowed users to choose between making their profiles accessible to either the 'public' or to 'Friends only'.⁴¹ Facebook, conversely, had privacy options that allowed users to determine exactly who could see their information (for example, current students, people in their class or only people in their residential house,⁴² and later on 'No one', 'Friends', 'Friends-of-Friends' or a specific 'Network').⁴³ Moreover, whilst MySpace user profiles were by default publicly accessible to anyone,⁴⁴ Facebook user profiles could not be made public to all users.⁴⁵ In this way, Facebook addressed the mounting privacy concerns surrounding MySpace to offer a 'more exclusive, secure and trusting environment,'⁴⁶ representing itself as a secure, privacy-driven alternative social network.

Facebook embodied its commitment to privacy in a short, easy-to-read privacy policy, carefully drafted to elicit consumer trust.⁴⁷ Crucially, whilst explaining Facebook's data collection practices

³⁵ In 2007 the market was highly competitive, with many social networks striving to displace MySpace, including LiveJournal, LunarStorm, AsianAvenue, Cyworld, Ryze, Fotolog, MiGente, BlackPlanet, Friendster, Skyblog, Xing, Hi5, Orkut, Dogster, Flickr, Mixi, Hyves, Yahoo 360, Bebo, Windows Live Spaces and Facebook. See Danah Boyd and Nicole Ellison, 'Social Network Sites: Definition, History, and Scholarship' (2007) 13 *Journal of Computer-Mediated Communication* 210, 212.

³⁶ Susanna Schrobsdorff, 'Predator's Playground' (2006) <<https://www.newsweek.com/predators-playground-108471>> accessed 18 November 2020.

³⁷ Jennifer Steinhauer, 'Verdict in MySpace Suicide Case' *The New York Times* (26 November 2008) <<https://www.nytimes.com/2008/11/27/us/27myspace.html>> accessed 18 November 2020.

³⁸ Noah Shachtman, 'Murder on MySpace' (2006) <<https://www.wired.com/2006/12/murderblog/>> accessed 18 November 2020; --, 'MySpace Murder: An Epilogue' (2006) <<https://www.wired.com/2006/11/myspace-murder-an-epilogue/>> accessed 18 November 2020.

³⁹ Facebook started allowing only participants with a university (.edu) email address. High school and corporate networks were subsequently allowed in 2005, and then in September 2006 Facebook was opened to the general public. However, '[t]he change to open signup did not mean that new users could easily access users in closed networks - gaining access to corporate networks still required the appropriate .com address, while gaining access to high school networks required administrator approval.' See, Boyd and Ellison, fn 35 above, 218.

⁴⁰ David Kirkpatrick, *The Facebook Effect: The Inside Story of the Company That Is Connecting the World* (Simon & Schuster, 2011) 31.

⁴¹ Boyd and Ellison, fn 35, 213.

⁴² Kirkpatrick, fn 40, 31.

⁴³ Danah Boyd and Eszter Hargittai, 'Facebook Privacy Settings: Who Cares?' (2010) <<https://firstmonday.org/ojs/index.php/fm/article/view/3086>> Accessed 18 November 2020.

⁴⁴ Danah Boyd, 'Why Youth (Heart) Social Network Sites: The Role of Networked Publics in Teenage Social Life', *David Buckingham (ed.) The John D. and Catherine T. MacArthur Foundation Series on Digital Media and Learning* (The MIT Press, 2007) 6.

⁴⁵ Boyd and Ellison, fn 35, 218.

⁴⁶ *The Economist*, fn 34.

⁴⁷ The privacy policy was under 1000 words long, and stressed Facebook's commitment to privacy in its opening sentence: 'Because we want to demonstrate our commitment to our users' privacy, we will disclose our information and privacy practices below.' See Facebook Privacy Policy

with a reasonable degree of detail, the privacy policy enshrined Facebook's commitment not to interfere with its users' privacy with the aid of tracking technology (i.e. cookies).⁴⁸ Facebook's privacy-centred approach, as disclosed in its privacy policy, was instrumental to its successful market penetration, given that numerous studies commissioned at that time revealed that Internet users were (already) concerned about online privacy.⁴⁹ By 2007, however, Facebook's growth began to slow down. To reverse this trend, Mark Zuckerberg created the 'growth team', which would use data analytics to increase consumer engagement. The growth team was entrusted with 'developing a deep understanding of user behaviour to re-engineer the site. They had a simple aim: more users and more of their time.'⁵⁰ This aim was extremely reliant on user data, gathered through the tracking of users' activities online. Data analytics proved effective: Facebook reached 145 million users in 2008,⁵¹ year in which MySpace's number of users began to rapidly decline.⁵² Yet, Facebook's newly gained incentive to track user behaviour clashed with its original privacy-driven approach and users' privacy preferences. From this point on, Facebook progressively back-tracked from its privacy-centred approach. Firstly, it launched the advertising solution 'Beacon', which enabled Facebook to track both users and non-users across the Internet, without their consent. Later on, Facebook launched the 'Like' button and other 'Social plugins', which were also secretly used to track users. When privacy-intrusive features were uncovered, a consumer backlash ensued. Fearing consumer switching at times the social network market was still competitive, Facebook blatantly denied its privacy violations.⁵³

However, when Facebook's dominance was cemented, the fear of consumer switching disappeared. In June 2014, empowered by over 1.31 billion monthly average users⁵⁴ and

<<https://web.archive.org/web/20050107221705/http://www.thefacebook.com/policy.php>> Accessed 18 November 2020.

⁴⁸ Ibid. 'We do not and will not use cookies to collect private information from any user.'

⁴⁹ For example, a March 2000 BusinessWeek/Harris Poll showed that 86 percent of users wanted a web site to obtain opt-in consent before collecting users' names, address, phone number, or financial information. The same poll showed that 88 percent of users supported opt-in as the standard before a web site shares personal information with others. See Electronic Privacy Information Center, 'EPIC - Public Opinion on Privacy' <<https://epic.org/privacy/survey/>> accessed 18 November 2020; Similarly, a 2001 survey conducted in the US found that 67 percent of Americans identified online privacy as a big concern. John Schwartz, 'Giving Web a Memory Cost Its Users Privacy' *The New York Times* (4 September 2001) <<https://www.nytimes.com/2001/09/04/business/giving-web-a-memory-cost-its-users-privacy.html>> accessed 18 November 2020; In the same vein, a March 2000 BusinessWeek/Harris Poll found that 89 percent of respondents were uncomfortable with web tracking schemes where data was combined with an individual's identity. The same poll found that 63 percent of respondents were uncomfortable with web tracking even where the clickstream data was not linked to personally-identifiable information. Also, an August 2000 study conducted by the Pew Internet and American Life Project found that 54 percent of Internet users objected to tracking, and a July 2000 USA Weekend Poll showed that 65 percent of respondents thought that tracking computer use was an invasion of privacy. See, Electronic Privacy Information Center, fn 49 above.

⁵⁰ Hannah Kuchler, 'How Facebook Grew Too Big to Handle' *Financial Times* (28 March 2019) <<https://www.ft.com/content/be723754-501c-11e9-9c76-bf4a0ce37d49>> accessed 18 November 2020.

⁵¹ Ami Sedghi, 'Facebook: 10 Years of Social Networking, in Numbers' *the Guardian* (February 2012) <<http://www.theguardian.com/news/datablog/2014/feb/04/facebook-in-numbers-statistics>> accessed 18 November 2020.

⁵² Emma Barnett, 'MySpace by Numbers: How It Compares to Its Rivals' *The Telegraph* (6 January 2011) <<https://www.telegraph.co.uk/technology/myspace/8243403/MySpace-by-numbers-how-it-compares-to-its-rivals.html>>.

⁵³ See Lovdahl Gormsen and Llanos, fn 33 above, 25–35.

⁵⁴ Statista, 'Facebook Users Worldwide 2018' (*Statista*) <<https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/>> accessed 18 November 2020.

widespread adoption of Social Plugins across the Internet,⁵⁵ shielded by direct and indirect network effects⁵⁶ and facing virtually no meaningful competition,⁵⁷ Facebook finally backtracked for good on its promise not to track its users' activities on third party websites and apps for commercial purposes.⁵⁸ Soon thereafter, Facebook announced on 13 November 2014 a new update of its terms of service, including its privacy policy.⁵⁹ This update, which came into force on 1 January 2015, included explicit descriptions of user tracking for commercial purposes, to which now consumers had to agree or close their accounts.

To sum up, Facebook entered the social network market satisfying the latent demand for a privacy-centred social network. However, Facebook subsequently decided to follow a data-driven approach, but in a competitive market, competitive pressure prevented Facebook from successfully implementing user tracking. Yet, as the social network market became less competitive, Facebook progressively backtracked on its privacy commitment, concealing this change of heart with deceptive statements aimed at retaining user trust. Then, after the majority of Facebook's competitors exited the social network market and Facebook dominance was entrenched, Facebook forced consumers to accept exactly what it promised not to do to successfully penetrate the market, that is, to track users off Facebook as a precondition to using its social networking service.

The evolution of the social network market presented above allows to determine the 'competitive level' of online privacy on it. That 'competitive' level of privacy is no other than the level of privacy protection afforded by the market leader when it was constrained by competitive pressure, that is, a scenario where consumers were not bound to agree to be tracked off Facebook for advertising purposes as a precondition to use its social networking service.

III.2 Consumer Harm – Lack of Consumer Choice and Choice Modelling Exercise

The imposition of unfair trading terms by Facebook causes consumer harm in the social network market in the form of impaired consumer choice and degradation of quality. Thus, Facebook's behaviour gives rise to the type of consumer harm that Article 102(a) TFEU is meant to remedy. Empirical results from a choice modelling exercise confirm the existence of this harm.

As noted above, the Federal Supreme Court agreed with the BKA in that Facebook's terms of service are abusive, but based on considerations other than violations of the GDPR. For the Federal Supreme Court, Facebook's terms are abusive because they leave Facebook users no choice as to

⁵⁵ Built With, 'Facebook Like Usage Statistics' <<https://trends.builtwith.com/widgets/Facebook-Like>> accessed 18 November 2020.

⁵⁶ See below Section IV.

⁵⁷ Rivals such as MySpace, BlackPlanet, Yahoo's 360, Bebo and Friendster had already exited the market, and Facebook had already acquired its closest competitor, Instagram.

⁵⁸ Facebook Newsroom, 'Making Ads Better and Giving People More Control Over the Ads They See' (2014) <<https://newsroom.fb.com/news/2014/06/making-ads-better-and-giving-people-more-control-over-the-ads-they-see/>> accessed 18 November 2020.

⁵⁹ Facebook, 'Updating Our Terms and Policies: Helping You Understand How Facebook Works and How to Control Your Information' (2014) <<https://newsroom.fb.com/news/2014/11/updating-our-terms-and-policies-helping-you-understand-how-facebook-works-and-how-to-control-your-information/>> Accessed 18 November 2020.

- whether they want to use the network with a more personalised user experience, which is associated with potentially unlimited access to characteristics of even their “off-Facebook” Internet browsing behaviour through Facebook, or
- whether they only want personalisation based on the data they disclose on facebook.com themselves.⁶⁰

In short, the essence of Facebook’s exploitative abuse is that Facebook’s ‘personalised user experience’ amounts to an ‘extended service’ that is imposed on consumers: consumers must accept access by Facebook to their ‘off-Facebook’ data, irrespective of whether the extended service is worth the consideration.⁶¹ If competition in the market for social networks were working properly, the Federal Supreme Court reasoned, a more privacy-friendly option would be on offer.⁶² In particular, ‘the social networking market would provide a service that would take account of user preferences for greater autonomy in providing data that broadly reflects their overall use of the Internet, and would *give users the choice as to whether they want to use the network with a more intensive personalisation of the user experience, such as based on the processing of “off-Facebook” data, or whether they only want to agree to personalisation based on data that they disclose when using the platform operator’s network.*’⁶³ Users for whom the extent of data disclosure would be an important decision criterion could make use of this offer.⁶⁴

The preponderant role the Federal Supreme Court gave to the concept of consumer choice is in line with consistent case-law by the EU Courts where the reduction in the choice opportunities that are available to consumers was decisive to reaching a finding of an abuse of a dominant position. For example, in *France Telecom*, a case on predatory pricing, the CJEU held that the lack of possibility of recoupment of losses is not sufficient to prevent the dominant undertaking from reinforcing its position, given that following the exit from the market of one or more competitors, the degree of competition existing on the market ‘is further reduced and customers suffer loss as a result of *the limitation of the choices available to them.*’⁶⁵ (emphasis added) Similarly, in *Deutsche Telekom*, the CJEU observed that the margin squeeze at hand harmed consumers when the reduction of competition exerted by competitors who are at least as efficient as the dominant undertaking result in ‘the limitation of the choices available to them.’⁶⁶ Crucially, the availability of choices has such significance that it is not limited to final consumers. Rather, it encompasses any economic actor involved in choices of products and services offered by a dominant undertaking, including, customers, contractors or buyers.⁶⁷

⁶⁰ German Federal Supreme Court (Bundesgerichtshof), fn 6).

⁶¹ Federal Supreme Court Judgment, fn 7, para. 97

⁶² German Federal Supreme Court (Bundesgerichtshof), fn 6.

⁶³ Federal Supreme Court Judgment, fn 7, para. 87.

⁶⁴ German Federal Supreme Court (Bundesgerichtshof), fn 6.

⁶⁵ *Case C-202/07, France Télécom SA v Commission [2009] ECLI:EU:C:2009:214 [para 112].*

⁶⁶ *Case C-280/08 P, Deutsche Telekom AG v Commission [2010] ECLI:EU:C:2010:603 [para 182].*

⁶⁷ For example, in *Michelin I*, the CJEU held that “[i]n deciding whether Michelin NV abused its dominant position [...] it is therefore necessary to [...] to investigate whether, in providing an advantage not based on any economic service justifying it, the discount tends to remove or restrict the buyer’s freedom to choose his sources of supply”. *Case 322/81, Nederlandsche Banden Industrie Michelin v Commission (Michelin I) [1983] ECLI:EU:C:1983:313 [para 73]*; Similarly, in *Deutsche Telekom*, the CJEU argued that Article 102 TFEU prohibits a dominant undertaking from ‘making it more difficult or impossible for [the dominant firms’] co-contractors to choose between various sources of supply or commercial partners’ *Case C-280/08 P, Deutsche Telekom AG v Commission [2010] ECLI:EU:C:2010:603 (n 66) para para 177*; Also, in *Intel*, the Commission argued that ‘the Intel rebates were aimed at influencing [Dell’s] choice and actually were one of the factors behind Dell’s choice, and more precisely “an important part”’. *Case COMP/C-3/37990 - Intel, Commission Decision of 13 May 2009 [para 932]*.

In addition to consumer harm in the form of lack of choice, for privacy-sensitive consumers, a reduction in the level of data protection afforded by the products and services of a dominant player entails a degradation of quality, which is a standard category of consumer harm that results from market power.⁶⁸ The foregoing requires that there is a segment of privacy-sensitive consumers that Facebook is harming.

Some have questioned the lack of consumer choice⁶⁹ and the significance of privacy-sensitive consumers⁷⁰ noted above. We disagree with these mistaken views. In order to determine Facebook users' attitudes towards online tracking and combination of first- and third-party data by Facebook to build consumer profiles for advertising purposes, the British Institute of International and Comparative Law commissioned from Compass Lexecon a choice modelling exercise using a rich representative sample of German social network users. The results of this exercise confirm that the portion of privacy-sensitive Facebook users is substantial, and that they would prefer to have the choice not to give away their privacy unless in exchange for certain monetary incentive, which Facebook does not offer.

Choice modelling is the methodology which most closely mirrors the situation that people face in real life when choosing between products. Consumers' decisions usually consist of a choice made from a finite set of alternatives, for example, different social networks, defined by different attributes such as the type of data they collect and how they use it. Choice modelling allows for the estimation of consumers' willingness to pay for or to be paid to accept each attribute, or put in other words, the amount of money an individual is willing to pay for, or for which he/she is willing to accept a given attribute. In the choice modelling experiment concerning the German social network market, 1002 respondents were given a number of choices to assess and quantify their willingness to accept the use of their data in exchange for better targeted advertisement.

In each choice experiment, respondents were given a choice of five alternatives, each depicting a different social network. As seen in Figure 1 below, social networks differed along a number of attributes.⁷¹

⁶⁸ Peter Swire, 'Protecting Consumers: Privacy Matters in Antitrust Analysis' (*Center for American Progress*, 2007) <<https://www.americanprogress.org/issues/economy/news/2007/10/19/3564/protecting-consumers-privacy-matters-in-antitrust-analysis/>> accessed 18 November 2020; See, fn 10, 69–70, the CMA notes that weak competition in online platform markets leads 'lower quality of service', regard being had to factors such as 'the extent to which [platforms] protect consumers' privacy'.

⁶⁹ For example, the Düsseldorf Court argued: "The fact that the use of the Facebook network is linked to the consent to the use of additional data *does not mean a loss of control* on the part of the user and does not constitute a predicament for the user. It merely makes it necessary to balance the advantages resulting from the use of an advertising-financed (and thus free) social network against the consequences associated with the use of the additional data by Facebook. The user can make this assessment uninfluenced and completely autonomously according to his personal preferences and values." (emphasis added). See fn 5, Düsseldorf Court Judgment, (3.1) p. 10. This argument is mistaken for two reasons. First, the information asymmetries and impediments to rational-decision making affecting the choices of online users are well-documented. See José Tomás Llanos, 'A Close Look on Privacy Protection as a Non-Price Parameter of Competition' (2019) 15 *European Competition Journal* 225, 13–17; Lovdahl Gormsen and Llanos, fn 33, 55–61. Second, Facebook offers neither choice as to the extent to which users are tracked nor monetary compensation in this connection.

⁷⁰ Colangelo and Maggolino, 'Data Accumulation and the Privacy-Antitrust Interface', fn 4, 35–36.

⁷¹ The reminder of this Section draws on Patricia Lorenzo, Jorge Padilla and Alejandro Requejo, 'Consumer Preferences for Personal Data Protection in Social Networks: A Choice Modelling Exercise' (2020) *SSRN Electronic Journal*, 7–19.

Figure 1. Social Network Attributes

Type of collected data	1 st -party data	Yes					
	3 rd -party data	Yes	No				
	1 st and 3 rd data is combined to create a superprofile	Yes	No				
Use of collected data	For targeted ads.	High quality targeted ads.	Low quality targeted ads.	No targeted ads.			
	Data sold to 3 rd parties	Disaggregated data	Aggregated data	No data sold to 3 rd parties			
	Type of consent to collect and use data	Opt-out	Opt-in				
	Monetary incentives per month	0 €	5 €	10 €	20 €	50 €	100 €

Firstly, the network may collect first-party data, third-party data or both first- and third-party data. Secondly, the network may combine first- and third-party data to create user super-profiles. Thirdly, the network may offer no targeted ads, low-quality targeted ads or high-quality targeted ads. Fourthly, the network may not sell data to third parties, sell aggregated data (so no individual can be identified) or disaggregated data. Fifthly, users may be given the possibility to either opt-out or opt-in to data collection. Lastly, the network may not pay any sum for network use or pay a monthly fee ranging between €5 and €100.

As illustrated in Figure 2 below, respondents were presented with five alternatives, and were asked to select their most preferred one from amongst them. 100 different sets with combinations of 5 alternatives featuring different combinations of attributes were designed using the general method for efficient choice designs (“ChoiceEff” SAS macro) developed by Zwerina *et al.*⁷² Each respondent faced 5 out of these 100 different sets. Specifically, respondents were asked to choose their most preferred alternative for each of these 5 sets.

Each set contained a privacy-friendly alternative (the ‘fifth alternative’) depicting a social network which only collects the first-party data necessary to provide its social networking services, which are of the same quality as those provided by the alternative networks. The data collected is not used for the delivery of targeted ads and/or sold to third parties, and this network does not pay monetary incentives. The other four alternatives varied across choice sets. For example, in these other alternatives the social network always collects first-party data necessary to provide its services, but may also collect third-party data. Third-party data can be combined with first-party data to create user super-profiles. In turn, the collected data may be used for the provision of – high or low quality - targeted ads and/or to be sold to third-parties (in either aggregated or disaggregated form). These alternatives may also include monetary incentives for users.

Figure 2. An Example of Choice Experiment

⁷² Zwerina, K., Huber, J. and Kuhfeld W.F. (2005), “A General Method for Constructing Efficient Choice Designs”, SAS Technical Papers, <<http://support.sas.com/techsup/technote/mr2010e.pdf>> accessed 18 November 2020.

Please, select the preferred option. [Click here if you want to read the definitions again](#)

	Alternative 1	Alternative 2	Alternative 3	Alternative 4	Alternative 5
Source of collected data	1st-party 3rd-party Superprofile	1st-party - -	1st-party - -	1st-party 3rd-party -	<p>Under this alternative the social network only collects the minimum amount of 1st-party data necessary to provide the service.</p> <p>Collected data are never used for targeted ads and collected data are never sold to third parties.</p> <p>NO monthly income under this alternative.</p>
Type of targeted ads	- Low quality	- Low quality		High quality -	
Type of data sold to 3rd parties	- Disaggregated data		- Disaggregated data	Aggregated data -	
Type of consent	- Opt-out	- Opt-out	Opt-in -	Opt-in -	
Monthly income for the user of the social network	10 €	0 €	20 €	100 €	

On average, respondents disliked networks which collect third-party data; combine first- and third-party data to create super-profiles; show low-quality targeted ads; and sell data in either aggregated or disaggregated form. Importantly, respondents preferred a social network which does not collect more first-party data than strictly necessary to provide its social networking services, and required monetary compensation for any other option. In particular, as seen in Table 1 below, the average respondent was willing to accept €43.15 per month to allow the social network to collect third-party data; €23.51 per month to allow the social network to create user ‘super-profiles’; €22.80 per month to allow the social network to display low quality targeted ads; €27.78 per month to allow the social network to sell disaggregated data to third parties; and €18.37 per month to allow the social network to sell aggregated data to third parties. The average respondent was indifferent between a social network which only collects and sells data if users “opt-in” and another one where data is collected and sold unless users “opt-out”.⁷³ The average respondent was also indifferent between a social network that displays high-quality targeted ads and one which does not display any ads.

Table 1. Estimated Willingness to Accept for each Relevant Attribute

⁷³ This sheds light on the fact that the ‘notice and consent’ mechanism embedded in the GDPR does not work in practice, as consumers understand they have no control over their personal data to begin with.

Attribute	Level	Relative to	Estimated WTA (€)
Source of collected data	3rd-party data	1st-party data	43.15 €
	Superprofile	No Super-profile	23.51 €
Type of targeted ads	High quality	No targeted ads	3.48 €
	Low quality		22.80 €
Type of data sold to 3 rd parties	Disaggregated data	No data is sold to 3rd parties	27.78 €
	Aggregated data		18.37 €
Type of consent	Opt-in	Opt-out	-0.02 €

Crucially, as seen in Table 2 below, the average respondent was willing to accept a whopping monthly sum of €150.38 to become indifferent between a privacy-preserving social network (the ‘fifth alternative’) and a social network that engages in practices such as those championed by Facebook - i.e. collection of first- and third-party data, combination of that data to create user ‘super-profiles’, selling of disaggregated data to third parties and affording users the right to opt-out instead of opting-in (‘social network 1’).

Table 2. Average Willingness to Accept a Social Network affording Limited Privacy (‘Social Network 1’)

	Social network 1
Source of collected data	1 st -party data 3 rd -party data Superprofile
Type of targeted ads	Low quality targeted ads
Type of data sold to 3 rd parties	Disaggregated data
Type of consent	Opt-out
Monetary incentives (per month) that leave consumers indifferent to a social network that does not use collected data for ads or to be sold to third parties	150.38 €

Overall, the respondents’ stated willingness to accept above shows that the average Facebook user is dissatisfied with Facebook’s user tracking and combination of data from different sources, and consequently would like to be able to choose between a ‘highly personalised’ social networking experience (i.e. the ‘extended service’ pointed out by the Federal Supreme Court) and another where they are able to disclose less personal data. Indeed, more than 90% of the respondents

demanded a positive monetary incentive to relinquish this choice.⁷⁴ Moreover, the positive monetary incentive demanded combined with the fact that the majority of respondents disliked the ‘social network 1’ (which resembles Facebook’s *modus operandi* after the imposition of its unfair terms) and preferred instead a privacy-preserving social network (similar to Facebook in its early days) proves that data privacy is a highly relevant dimension of quality in social networks. Accordingly, Facebook’s imposition of unfair trading terms – which lowered the data privacy standards Facebook used to afford – can be readily equated to a degradation of quality of the Facebook social network for the substantial amount of Facebook privacy-sensitive users which had no choice but to accept such abusive terms.⁷⁵

IV. Barriers to Entry in Form of Data-driven Network Effects

The Düsseldorf Court considered it ‘incomprehensible’ that large volumes of data raise barriers to entry in the social network market.⁷⁶ This Court seemed to have relied on the significance of direct network effects to undermine this notion.⁷⁷ It maintained that the ‘fact that, and to what extent, the processing and linking of the multiple data in dispute is capable of hindering or hinders market entry by Facebook competitors is not self-evident’.⁷⁸ In particular, the Düsseldorf Court reproached the BKA for not specifying ‘concrete additional data’ the linking and processing of which by Facebook raises barriers to entry for competing social network providers.⁷⁹

The Düsseldorf Court showed a very poor understanding of data-driven markets, as it assessed direct network effects without considering their interaction with indirect network effects and data-driven externalities. As a result, it failed to appreciate that the combined effect of these externalities on the display advertising market can be significant. In order to arrive at sound conclusions and impose suitable remedies capable of restoring competition, the Commission and the EU Courts must be careful not to make the same mistakes in an Article 102 TFEU case against Facebook.

Direct network effects arise where there is interaction between the users of a product, and having more users makes the product more useful and valuable for all users. In Facebook, the more users are on the network, the more attractive the network will be, since the audience with whom they can interact is larger. As a matter of fact, it is reported that every new Facebook user brings in 200 friends on average.⁸⁰ As a result, networks with a large use base tend to grow bigger, as they attract more users, all else being equal. Conversely, indirect network effects arise where the increasing use of a product increases its attractiveness to another economic group. In Facebook, a larger number

⁷⁴ That is, a monetary incentive that made the respondent indifferent between the ‘social network 1’ and the ‘fifth alternative’.

⁷⁵ The results of the choice modelling exercise are consistent with the findings of a consumer survey commissioned by the BKA that around three-quarters of German users of social media consider the (responsible) handling of data (i.e. appropriate data processing conditions) to be (very) important for the choice of a social network. See BKA Decision, fn 1, para. 427 Fn. 415, 883. However, due to the lack of competition and choice, they are bound to agree to whatever terms Facebook imposes.

⁷⁶ Düsseldorf Court Judgment, fn 5, p. 34

⁷⁷ Ibid. ‘The benefit of the Facebook network for its users increases with the total number of people connected to the network, because with increasing numbers of users, the communication options for each individual user increase. As a result, the market position of Facebook as a provider of a social network can only be successfully challenged if a competitor succeeds in winning a sufficient number of users in a reasonable amount of time to enhance the attractiveness of its network, which, in turn, depends on whether it can offer an attractive social network compared to Facebook.com. Therein lies the decisive hurdle to market entry.’

⁷⁸ Ibid

⁷⁹ Ibid, 34-35

⁸⁰ House of Lords, ‘Online Platforms and the Digital Single Market’ 24.

of users attract more advertisers, since they can access a larger audience to whom they can show their ads. These two effects interact with and are fuelled by data-driven externalities, thereby reinforcing the position of Facebook relative to its competitors in the two-sided market for social networks and display advertising.

In particular, larger volumes of data lead to data-driven economies of scale. Based on the data gathered from user-generated content and users' interactions with the platform, Facebook's social network algorithms can increase the relevance of social network engagement, suggested friends or suggested interests that are shown to specific users. For example, the stories shown in a user's newsfeed are determined by the user's connections and activity on Facebook. Specifically, Facebook shows more stories of interest of a specific user that are posted by friends with whom such user interacts the most.⁸¹ Similarly, Facebook shows targeted ads based on the information it holds about users, including age, gender, location, interests and any other inferred information. The more information Facebook has, the higher the precision of ad targeting is. As the Economist has reported:

'[t]he more users write comments, "like" posts and otherwise engage with Facebook, for example, the more it learns about those users and the better targeted the ads on newsfeeds become [...] Facebook gets its users to train some of its algorithms, for instance when they upload and tag pictures of friends. This explains why its computers can now recognise hundreds of millions of people with 98% accuracy.'⁸²

Furthermore, greater variety of data leads to data-driven economies of scope. Linked data is a source of 'super-additive insights' and value that are greater than the sum of its isolated parts.⁸³ As Schepp and Wambach explain: '[t]he linkage of [...] data [from different sources] can give companies more insights into user habits, enabling them to further improve their services and reinforce their market position. Generally speaking, the more data a company can combine, the better its chances to gain knowledge that can be used to strengthen its market position.'⁸⁴ The more that users rely on Facebook's services (such as its social network platform, Messenger, Instagram or WhatsApp) and the greater the variety of personal data on particular users Facebook has, the more personalised and more targeted its social network and advertising services are.

Also, the velocity of data processing leads to economies of speed, that is, 'the capacity of a company to use the velocity at which a data set grows to discern trends well before others.'⁸⁵ If users' interests suddenly change as a consequence of a recent event, Facebook needs to react rapidly and adapt to the new scenario. Given its unparalleled audience, Facebook has first access to data about recent events, which enables it to update relevant content more quickly than competing social network platforms, thereby generating more traffic, more consumer engagement

⁸¹ Facebook, 'Help Centre' <<https://www.facebook.com/help/327131014036297/>> accessed 18 November 2020.

⁸² 'Data Is Giving Rise to a New Economy' *The Economist* (6 May 2017) <<http://www.economist.com/news/briefing/21721634-how-it-shaping-up-data-giving-rise-new-economy>> accessed 18 November 2020; See also, fn 10, 292: 'Facebook [...] has access to valuable first-party data from users' interactions on its social media platform. It can infer users' likely demographic attributes, preferences and behaviours from their interactions on its leading social media platform, but also from their friends' and families' interactions as well. This enables Facebook to collect a greater quantity and variety of high-quality data that is useful for advertising to obtain insight on their audiences and to target advertising.'

⁸³ OECD, 'Data-Driven Innovation for Growth and Well-Being: Interim Synthesis Report' (2014) 29.

⁸⁴ Nils-Peter Schepp and Achim Wambach, 'On Big Data and Its Relevance for Market Power Assessment' (2015) 7 *Journal of European Competition Law & Practice* 120, 121.

⁸⁵ Daniel L Rubinfeld and Michal S Gal, 'Access Barriers to Big Data' (2017) 59 *Ariz. L. Rev.* 339, 353.

and consequently more data. For example, within the first twelve hours of news that David Bowie had died, thirty-five million people had one hundred million interactions about Bowie's passing on Facebook,⁸⁶ thereby attracting more users who were interested in this news.

Ultimately, the interaction between Facebook's 'traditional' and data-driven network effects leads to a 'virtuous cycle':⁸⁷ more users attract more users, generating more data; user data is used to train algorithms to improve users' social networking experience by making their social interactions more relevant to their interests. At the same time, user data is used to create user profiles and derive valuable insights to better target advertisements, which in turn attracts more advertisers and therefore more revenues. More revenues enable Facebook to acquire firms that hold valuable datasets or may yield some type of data advantage,⁸⁸ as a result of which Facebook can gather and process more data to improve its social networking and advertising services, thereby attracting more users and advertisers, in a positive feedback loop whereby Facebook grows bigger and bigger, and so does its market power.

Therefore, the notion that more data raises barriers to entry in the two-sided market for social networks and display advertising is actually highly comprehensible. It is clear that large volumes of data about consumers improve ad-targeting algorithms and consequently provide Facebook a competitive advantage that competitors without access to the same scale of data cannot match.⁸⁹ The role of direct network effects as a barrier to entry cannot be analysed separate from the other externalities mentioned above. Nor can the social network market be assessed in isolation, without regard to the feedbacks involving the advertising side. Doing so inevitably leads to analytical mistakes, as proved by the Düsseldorf Court's example of Google+.

The Düsseldorf Court observed that the amount of data was 'obviously' not decisive for the successful operation of a social network (and therefore could hardly amount to a barrier to entry), as allegedly confirmed by the investigation of the European Commission in *Facebook/WhatsApp*.⁹⁰ In its merger decision in that case, the Commission noted that Google had a 33% share of data collection on the Internet, whereas Facebook only had 6.39%. In spite of this, Google+ was forced to leave the social network market, a fact that would confirm the inconsequential character of data in that segment. The problem with this argument is that it rests on a flawed analysis of a two-sided market that considers only one side in isolation, which is a huge mistake.⁹¹ The social network, which is offered at a zero-price, is what attracts users and generates the raw material (that is, data) necessary to operate the revenue-making side (i.e. display advertising). Although Google+ indeed left the market largely due to its inability to overcome Facebook's strong network effects, Google

⁸⁶ Colin Stutz, 'David Bowie's Death Leads to 100 Million Facebook Interactions in First 12 Hours' (*Billboard*, 2016) <<http://www.billboard.com/articles/columns/rock/6836601/david-bowie-death-100-million-facebook-interactions-12-hours>> accessed 18 November 2020.

⁸⁷ 'And there is a virtuous cycle here: more data means better machine learning, which means better services and more users, which means more data.' Nick Srnicek, 'We Need to Nationalise Google, Facebook and Amazon. Here's Why' *The Guardian* (30 August 2017) <<https://www.theguardian.com/commentisfree/2017/aug/30/nationalise-google-facebook-amazon-data-monopoly-platform-public-interest>> accessed 18 November 2020.

⁸⁸ Such as for example the Onavo app, which enabled Facebook to determine which new apps had the potential to become a competitive threat, and attempt to acquire them to prevent the possible emergence of viable challengers. See Lovdahl Gormsen and Llanos, fn 33, 76–83.

⁸⁹ See Section V below.

⁹⁰ Düsseldorf Court Judgment, fn 5, p. 35

⁹¹ The need to consider both sides of the market when dealing with issues of market definition, market power and unilateral conduct is stressed by Evans. See David S Evans, 'The Antitrust Economics of Two-Sided Markets' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=332022> accessed 18 November 2020.

has not exited any online advertising segment, where data is indispensable for ad-targeting precision. This is unsurprising, as Google has a plethora of data sources powering its advertising business. Indeed, the fact that Google and Facebook have a duopoly in online advertising is widely acknowledged, and access to vast repositories of data is universally signalled as one of the underpinnings of such market structure.⁹² Thus, the additional data gathered by Facebook through the imposition of exploitative terms on consumers can indeed raise barriers to entry in the display advertising side of Facebook's two-sided market, irrespective of the unsuccessful attempts of another data-driven behemoth to penetrate the social network segment. The Federal Supreme Court shares the same understanding. According to this Court, '[t]he attractiveness of the Facebook service offer made available to advertising customers increases with the quality and quantity of the data provided [by users].'⁹³ The failure of the Google+ social network, on the other hand, only serves as support to the conclusion that 'good access to competition-relevant data is not sufficient to compensate for the lack of sufficient direct network effects.'⁹⁴

Lastly, in view of the dynamics of big data, a requirement to specify the 'concrete data' the processing and linking of which hinders market entry amounts to a *probatio diabolica*. The value of data derives from the insights it is possible to extract from analysing the data rather than from the data itself.⁹⁵ The analysis of big data, performed through algorithms and advanced data processing techniques (i.e. big analytics), is valuable to the extent that it allows for specific patterns to be found and new correlations to be made between several datasets from different sources, as a result of which new information can be deduced or inferred, and trends and behaviour can be accurately predicted with astonishing precision.⁹⁶ The more data is available for processing, irrespective of its apparent significance or value, the higher are the chances to obtain unexpected and potentially valuable information.⁹⁷ Accordingly, specific data leading to a particular advantage can be hardly singled out. What truly matters in the assessment of whether data raises barriers to entry is the extent to which the data in question reinforces data-driven economies of scale, scope and speed, thereby eliciting more value.⁹⁸ Given that the abusive terms gave Facebook access to very large volumes of additional data,⁹⁹ it is difficult to dispute that such terms fuelled the aforementioned data-driven externalities, thereby strengthening its market position.

V. Enveloping Part 2: Exclusionary Abuse in the Display Advertising and Related Markets

Facebook's enveloping strategy has caused foreclosure effects in the origin and enveloped markets, leading to market structures with fewer competitors. Specifically, through the privacy policy tying, Facebook ensures that users of the origin (i.e. social network) platform grant access to data generated in the target platforms, thereby allowing Facebook to combine the data generated from

⁹² See fn 106 below.

⁹³ Federal Supreme Court Judgment, fn 7, para. 43

⁹⁴ *Ibid*, para. 95

⁹⁵ Geoffrey A Manne and Ben Sperry, 'The Problems and Perils of Bootstrapping Privacy and Data into an Antitrust Framework' (2015) 2 CPI Antitrust Chronicle 9.

⁹⁶ Primavera De Filippi, 'Big Data, Big Responsibilities' (2014) 3 Internet Policy Review 2.

⁹⁷ Directorate General for Internal Policies, 'Big Data and Smart Devices and Their Impact on Privacy' (2015) 11 <[http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536455/IPOL_STU\(2015\)536455_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536455/IPOL_STU(2015)536455_EN.pdf)>.

⁹⁸ Jose Tomas Llanos, 'The Data Paradox in Competition Enforcement' (2018) TLI Think! Paper 10/2019 23–35 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3373553> accessed 18 November 2020; This is the approach followed by the Commission in *Apple/Shazam*. See Commission Decision in *Case M8788 – Apple/Shazam* (2018) 317–326.

⁹⁹ See below text accompanying footnote 112.

all the platforms without the need for additional consent.¹⁰⁰ As a result, Facebook obtains an insurmountable data advantage which competitors in the social network, display advertising and other enveloped markets cannot possibly replicate. This type of privacy policy tying is profitable because it allows Facebook to offer a better service – i.e. better matching between users and between users and advertisers – in the origin market, also shielding this market from entry.¹⁰¹ This strategy falls neatly within the definition of exclusionary abuse set out by the CJEU in *Post Danmark I*:

[exclusionary abuse is] conduct of a dominant undertaking that, through recourse to methods different from those governing normal competition on the basis of the performance of commercial operators, has the effect, to the detriment of consumers, of hindering the maintenance of the degree of competition existing in the market or the growth of that competition.¹⁰²

Firstly, accessing data and obtaining other advantages through the imposition of unfair trading terms on consumers can hardly constitute ‘normal competition’ or competition on the merits. This conclusion is reinforced by the fact that such terms violate EU data protection law,¹⁰³ a circumstance that can be taken into account as an element of context in the overall assessment of the abuse.¹⁰⁴

Secondly, the imposition of Facebook’s exploitative terms has led to three types of anti-competitive effects, one felt across the whole of the display advertising market,¹⁰⁵ one suffered by content publishers only, and one suffered by different players in adjacent data-driven markets which have become the target of Facebook’s enveloping strategy. The first one is that identified by the BKA: the additional data that Facebook was able to amass by imposing unfair terms on consumers enabled it to enrich its user profiles and thereby refine its ad-targeting algorithms, to the detriment of competing suppliers of display advertising that cannot match Facebook’s unparalleled audience and data advantage.¹⁰⁶ The additional data does not have to be unique or

¹⁰⁰ Condorelli and Padilla, fn 28, 30.

¹⁰¹ *ibid.*

¹⁰² *Case C-209/10, Post Danmark A/S v Konkurrenceradet (Post Danmark I) [2012] ECR I-0000 [22–24]*.

¹⁰³ Lovdahl Gormsen and Llanos, fn 33, 44–50; Bundeskartellamt, ‘Case Summary - Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing’, fn 12, 10–11.

¹⁰⁴ Autorité de la Concurrence and Bundeskartellamt, ‘Competition Law and Data’ (2016) 23.

¹⁰⁵ Apart from other advertising-funded social network platforms like Twitter and Snapchat, content publishers, such as the news and entertainment websites, are Facebook’s competitors in the display advertising market, as they all compete for user’s attention, data and advertising revenues.

¹⁰⁶ Access to large audiences and unparalleled volumes of data are identified as the main underlying causes of the Google/Facebook duopoly in online advertising. The Autorité de la Concurrence recently observed: ‘[the majority of publishers, advertisers and advertising service providers expressed [...] that Google and Facebook form a duopoly in the online advertising sector that captures most advertising revenue and growth in the sector. Some feel that there will be less and less competition in the sector in the future. A significant number of players underlined the competitive advantage of having large audiences from the services provided to internet users. This enables Google and Facebook to sell advertising inventories and capitalise on huge volumes of data.’ Autorité de la Concurrence, ‘Opinion No. 18-A-03 of 6 March 2018 on Data Processing in the Online Advertising Sector’ (2018) 36 <http://www.autoritedelaconcurrence.fr/doc/avis18a03_en_.pdf> accessed 18 November 2020; The Cairncross Review arrived at similar conclusions: ‘Publishers gather user data from their own sites, including login data for their subscribers, but this pales in comparison to the power of online platforms, which have a rich set of user data giving them significant advantage over others in the market.’ ‘The Cairncross Review - A Sustainable Future for Journalism’ 62; Numbers lend support to these contentions. In Q1 2016 US online ad revenues ‘hit a record-setting high at nearly \$16 Billion’. However, it was estimated that

qualify as an ‘essential facility’. As Nazzini observes, it is sufficient that ‘the “data asymmetry” that the unlawful conduct creates hinders “the maintenance of the degree of competition existing in the market or the growth of that competition”, that is, that the “data asymmetry” has a likely foreclosure effect.’¹⁰⁷

In the 2014 *Facebook/WhatsApp* merger decision, the Commission observed that the majority of Facebook’s advertising customers placed a high value on Facebook’s advertising services, not least due to its highly engaged user base and ad targeting opportunities,¹⁰⁸ which generally leads to a higher return on investment.¹⁰⁹ Given that the more data about users Facebook can access, the greater its ad targeting opportunities are,¹¹⁰ by enlarging the universe of Facebook’s data sources, the imposition of Facebook’s unfair terms on consumers dramatically hindered the maintenance of the degree of competition existing in the display advertising market. After such terms came into force, Facebook became able to follow its users across the Internet, collect data on their browsing behaviour, and accordingly derive additional inferences about their preferences, interests and even intimate details, all of which could be used for advertising purposes.¹¹¹ According to Facebook, as of April 2018, the Like button appeared on 8.4 million websites, the Share button on 931,000 websites covering 275 million webpages, and 2.2 million Facebook pixels had been installed on websites globally.¹¹² Based on those numbers, it can be safely assumed that the additional data Facebook has been able to gather and process after the imposition of its unfair terms is of an impressive magnitude, and on account of data-driven externalities and feedback effects,¹¹³ of great significance for the improvement of its ad targeting precision.

The Federal Supreme Court agreed with this view, noting that Facebook’s terms of use are ‘likely to hinder competition.’¹¹⁴ In particular, this Court held that ‘competition concerns arise from the

90% of the growth went to Google and Facebook. Jason Kint, ‘Google and Facebook Devour the Ad and Data Pie. Scraps for Everyone Else.’ (*Digital Content Next*, 16 June 2016) <<https://digitalcontentnext.org/blog/2016/06/16/google-and-facebook-devour-the-ad-and-data-pie-scraps-for-everyone-else/>> accessed 18 November 2020.

¹⁰⁷ Nazzini, fn 4, 7.

¹⁰⁸ *Case COMP/M7217, Facebook/WhatsApp (2014) 77, 177.*

¹⁰⁹ For example, it has been reported that Facebook’s hyper-targeted Custom Audiences feature enables advertisers to advertise so specifically that advertisers have seen their new customer acquisition costs decline by as much as 73%. See Ali Parmelee, ‘How Effective Is Facebook Advertising? The Truth About Facebook ROI’ (*IMPACT*, 28 February 2018) <<https://www.impactbnd.com/blog/how-effective-is-facebook-advertising-the-truth-about-facebook-roi>> accessed 18 November 2020.

¹¹⁰ ‘Facebook has much in common with traditional forms of advertising like television and print, but the difference is companies who use Facebook have a near-endless number of data points with which to target their ads, and can show them to much narrower slices of the population.’ See Louise Matsakis, ‘Facebook’s Targeted Ads Are More Complex Than It Lets On’ (*WIRED*, 25 April 2018) <<https://www.wired.com/story/facebooks-targeted-ads-are-more-complex-than-it-lets-on/>> accessed 18 November 2020.

¹¹¹ For example, a person experiencing drug abuse problems may not be inclined to post anything related to that issue on Facebook. However, if that user visits websites providing information on drug abuse and embedded with Facebook’s Plug Ins or other tracking-enabling technology, Facebook can infer that condition from the user’s browsing behaviour, and then target that user with ads on drug abuse treatments both on and off Facebook.

¹¹² Facebook, ‘Response to Questions Asked during “Facebook: Transparency and Use of Consumer Data” Hearing, House of Representatives’ (2018) 114 <<https://docs.house.gov/meetings/IF/IF00/20180411/108090/HHRG-115-IF00-Wstate-ZuckerbergM-20180411.pdf>> accessed 18 November 2020.

¹¹³ See text accompanying footnotes 81-87.

¹¹⁴ German Federal Supreme Court (Bundesgerichtshof), fn 6.

fact that imposing an undesired service [i.e. the personalised user experience] increases the consideration for the desired service (i.e. the use of the social network) in the form of provision of more personal data, *which constitutes a significant competitive advantage in the [paid] market.*¹¹⁵ The Court also observed that Facebook's market position in the market for social network can be only challenged if a competitor succeeds in gaining a sufficient number of users within a reasonable period of time to make its network attractive.¹¹⁶ However, direct network effects and associated 'lock-in effects' prevent this from happening, thus effectively raising barriers to entry. Also, since access to data is an essential parameter of competition in both the social network and advertising markets, Facebook's access to a 'considerably larger database further reinforces the already pronounced "lock-in effects"' that result from network effects.¹¹⁷ This larger database enhances the possibilities of financing the social network with the advertising proceeds, which also depend on the 'scope and quality of the available data.'¹¹⁸ The Federal Supreme Court concluded:

'The more data Facebook has at its disposal, the more accurate is the predictability of user behaviour. (...) Moreover, as each increase in the quantity and quality of the data and data analysis provided by Facebook, which is already very large in terms of the number of users, also reduces the chances of both actual and potential competitors that they can compete with this offer, there is the risk that (potential) competitors will lose the competition for advertising contracts necessary to run their network. This comes on top of the market entry barrier caused by direct network effects.'¹¹⁹ In short, 'because of the negative effects on competition for advertising contracts, the possibility of an impairment of the market for online advertising cannot be ruled out.'¹²⁰

Indeed, improved ad-targeting resulting from Facebook's exploitative conduct impairs competing display advertisers' ability and incentive to compete. The quality gap arising from Facebook's access to additional data through unlawful means entails that competitors' advertising services are inevitably less attractive to advertisers. Without access to similar data, whether by reason of their smaller scale, their more limited or lack of vertical or horizontal integration, or their adherence to competition on the merits, their ability to compete is effectively restricted.¹²¹ In turn, confronted with the realisation that they are unlikely to catch up with Facebook's scale of data collection, their incentive to compete is reduced.¹²² Ultimately, defied by virtually no effective competitive

¹¹⁵ Federal Supreme Court Judgment, fn 7, para. 59

¹¹⁶ *Ibid*, para. 93

¹¹⁷ German Federal Supreme Court (Bundesgerichtshof), fn 6.

¹¹⁸ *ibid*.

¹¹⁹ Federal Supreme Court Judgment, fn 7, para. 94. See also para. 84: 'There is no serious doubt that the terms of use complained of would lead to an anti-competitive market outcome because they could not be expected under conditions of effective competition.'

¹²⁰ *Ibid*, para 96.

¹²¹ According to the CMA, advertisers and media agencies complained to the CMA that Google's and Facebook's 'unique and vast sources of data' allows them to offer in-depth targeting options which they cannot replicate. The CMA concluded that '[t]he inability of smaller platforms and publishers to access user data creates a significant barrier to entry'. See fn 10, 15.

¹²² 'Though platforms and news publishers acquire data on their users from the personal information that users willingly provide, people tend to enter much more personal data for a Facebook account, for instance, than for an account with a news publisher. This data, along with data about a user's browsing history (contained in a "cookie" in their internet browser), can be tailored for online advertising according to demographic, location, browsing and purchasing data [...] Publishers will thus need to collect far more extensive information on their users, if they want to compete effectively for online advertising spend.' 'The Cairncross Review - A Sustainable Future for Journalism', fn 106, 45.

constraints, Facebook faces less pressure to innovate and improve its services in the interests of consumers.¹²³

Facebook's infrastructure and scale advantages further contribute to the reduction of the scope of competition on the display advertising market. As a result of its privacy policy tying, Facebook has the ability to deliver ads on its own properties (mostly Facebook and Instagram, and indirectly on messaging functionalities if ads are sent by users) and on third-party publisher websites and apps that are members of the Facebook Audience Network. The use of automatic placements on both inventories is likely to lower the overall cost of advertising campaigns,¹²⁴ for which reason advertisers are likely to be more inclined to choose Facebook's advertising services. The *Cairncross Review* concluded that the position of Facebook in online display advertising, through its integrated infrastructure and 'vast repositories of data', is of such magnitude '*that challengers are effectively unable to enter the market*', which may be indicative of '*grounds for intervention*.'¹²⁵

Based on the findings of the *Cairncross Review*, the UK Competition Markets Authority (the 'CMA') launched a market study on Online Platforms and Digital Advertising.¹²⁶ Many submissions to this study expressed the view that the display advertising market is not working,¹²⁷ largely due to the Facebook/Google duopoly and the data advantage these players have been able to consolidate, against which content publishers cannot compete.¹²⁸ This was also the CMA's conclusion in its final report published on 1 July 2020.¹²⁹

The second type of anti-competitive effects arise from the fact that Facebook's unfair terms gave Facebook the ability to track content publishers' readers and visitors, and by extension the ability to undercut their value and content publishers' pricing power over them. Consider the following example. A content publisher such as the TechCrunch attracts a well-defined audience interested in gadgets, technology and Internet trends. The TechCrunch has an interest in keeping that audience engaged with its website, so it can show them ads that are targeted to their interests and thereby make profit. However, the ability to monitor Internet users across the Web meant that Facebook could determine with precision who the members of the TechCrunch's audience are, follow them throughout the Internet and target them with ads on any website or app other than the TechCrunch, charging a significantly lower ad serving cost than that the TechCrunch would

¹²³ See fn 10, 129.

¹²⁴ See fn 106, 55.

¹²⁵ 'The Cairncross Review - A Sustainable Future for Journalism', fn 106, 63.

¹²⁶ Market study on Online Platforms and Digital Advertising Market Study <<https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study>> accessed 18 November 2020.

¹²⁷ See for example the submissions by the Competition Law Forum at BIICL, Damien Geradin, Dr Ryan and Dr Lynksey, DGM Media and European Publishers Council, available at <https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study?utm_source=671811af-849d-410f-8ab9-ecd48401a3d2&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate> accessed 18 November 2020.

¹²⁸ '[...] it will be extremely hard, if at all possible, for companies that only collect data in the context of a single activity (e.g., news publishers) to compete with multi-market online platforms. When it comes to digital advertising, no company seems close to match the data collection and processing abilities of Google and Facebook.' Damien Geradin, 'Submission to the CMA's Study on Online Platforms and Digital Advertising' (2019) 4

<https://assets.publishing.service.gov.uk/media/5d7274da40f0b6092f56c0de/Damien_Geradin_response.pdf> accessed 18 November 2020.

¹²⁹ See fn 10, 211.

charge.¹³⁰ Put in other words, Facebook contributed to the commoditisation of content publishers' most valued asset: their loyal audiences. Consequently, content publishers' ability and incentive to compete is reduced even further: lower advertising revenues make the production of quality content more difficult, and as a result their audiences are likely to lose interest in their content offering.

Facebook may argue that its data processing practices (i.e. combination of first- and third-party data) generate efficiencies vis-à-vis the advertisers, as the combined dataset allows advertisers to run more and/or higher-quality targeted ads, resulting in higher return on investment (ROI). However, there are two trends suggesting that Facebook appropriates any alleged short-term efficiencies vis-à-vis advertisers, thereby harming them in the long run. First, Facebook has become an indispensable trading partner for advertisers, which is reflected in the exponential growth of its advertising revenues in recent years.¹³¹ Facebook's annual advertising revenues went from USD 11.4 billion in 2014, the year before the implementation of its unfair terms, to USD 69 billion in 2019.¹³²

Second, and more tellingly, advertisers have very little bargaining power vis-à-vis Facebook, as shown by their inability to verify by themselves the performance of their ads on Facebook's platforms. For example, it has been observed that on some occasions the performance of Facebook's advertising services is overstated, which may be the consequence of over reporting the number of visitors to its platform.¹³³ Similarly, it is claimed that the standards Facebook has adopted may mislead advertisers into believing that the number of consumers that have viewed their ads is higher than actually is.¹³⁴ Indeed, Facebook has a rich history of miscalculating ad metrics.¹³⁵ For instance, in 2017, ad videos served on the Facebook mobile app continued to play after they were scrolled out of view, and Facebook charged advertisers for the background views.¹³⁶ Also, in 2016 Facebook admitted that it had been overstating the 'average duration of [the] video viewed' metric.¹³⁷ Facebook reportedly told some advertisers that it had been 'probably' overstating the average time spent watching video ads by 60 per cent to 80 percent; however, a group of small advertisers claimed in a lawsuit that Facebook had instead inflated the average ad-

¹³⁰ As Srinivasan explains, 'if Facebook could compile a list of people that read the *Journal*, even those who did not use Facebook, it could simply sell the ability to retarget "*Journal* readers" with ads across the internet for a fraction of the cost that the *Journal* charged.' Dina Srinivasan, 'The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy' (2019) 16 *Berkeley Business Law Journal* 64.

¹³¹ Bundeskartellamt, 'Background Information on the Facebook Proceeding' (2017) 4 <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2017/Hintergrundpapier_Facebook.html> accessed 18 November 2020.

¹³² See Forms 10-K "Annual Report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934" for the fiscal years ending on 31 December 2014 to 31 December 2019, filed by Facebook with the U.S. Securities and Exchange Commission, <<https://www.sec.gov/cgi-bin/browse-edgar?company=facebook&owner=exclude&action=getcompany>> accessed 18 November 2020.

¹³³ Australian Competition & Consumer Commission, 'Digital Platforms Inquiry' Preliminary Report (2018) 77.

¹³⁴ *ibid.*

¹³⁵ For a list of measurement errors see Tim Peterson, 'FAQ: Everything Facebook Has Admitted about Its Measurement Errors' (*Marketing Land*, 17 May 2017) <<https://marketingland.com/heres-itemized-list-facebooks-measurement-errors-date-200663>>.

¹³⁶ *ibid.*

¹³⁷ Greg Finn, 'Facebook Acknowledges Discrepancy That Had Overstated a Video View Metric' (*Marketing Land*, 23 September 2016) <<https://marketingland.com/facebook-acknowledges-discrepancy-overstated-video-view-metric-192828>> accessed 18 November 2020.

watching time by 150 per cent to 900 per cent.¹³⁸ Importantly, complaints have been made that Facebook is measuring the performance of its own advertising services whilst restricting the ability of advertisers to resort to independent third parties to this end.¹³⁹ According to the *Australian Competition & Consumer Commission*:

‘the inability for advertisers to verify the delivery and performance of their ads on [...] Facebook has the potential to lessen competition in the supply of advertising services. This is because it has the potential to mislead advertisers into thinking their ads perform better than they actually do. This impedes the transmission of price and quality signals in the market and encourages some advertisers to advertise on [Facebook] rather than with competing suppliers of advertising services.’¹⁴⁰

The more market power Facebook has in digital advertising, the higher it is its ability to exploit advertisers through high prices and increasing the overall cost of advertising in its platforms, thereby causing negative spill-overs that are ultimately borne by consumers. As the CMA observes, ‘if the costs of digital advertising are higher than they would be in a more competitive market, we would expect this to be felt in the prices that consumers pay for hotels, flights, consumer electronics, insurance and many other products that make heavy use of digital advertising’.¹⁴¹

The third type of anti-competitive effects result from the leveraging of market power onto related data-driven markets. Take the example of Marketplace, a platform where buyers and sellers meet to buy and sell multiple types of items such as electronics, clothes or household appliances. There are no listing or selling fees in Marketplace, as Facebook monetises Marketplace through advertising. In particular, Facebook allows advertisers to extend their Facebook ads from News Feed to Marketplace, ‘where people actively shop’.¹⁴² Users see those ads alongside other relevant products in Marketplace, and if they click on the ad, they are directed to the advertiser’s website or app for more information.

As part of the process to show ads on Marketplace, advertisers must ‘[i]mplement the Facebook pixel and/or SDK’ on their websites or apps to measure the actions users take on them.¹⁴³ The implementation of Facebook technology enables the transmission of users’ browsing data from Marketplace advertisers’ websites and apps to Facebook, and based on such data, Facebook can enhance the targeting precision of Marketplace ads. Also, Facebook can use such browsing data to enrich its user profiles to show targeted ads across Facebook, Instagram, Messenger and the Audience Network.¹⁴⁴ This is a direct consequence of Facebook’s privacy policy tying, which allows Facebook to track user behaviour on any website or app embedded with Facebook’s tracking technologies and social plugins. As a result, Facebook has successfully enveloped the market for classified ads, availing itself of ‘reverse economies of scope’: the data acquired in the

¹³⁸ Ethan Baron, ‘Facebook Lured Advertisers by Inflating Ad-Watch Times up to 900 Percent: Lawsuit’ (*The Mercury News*, 16 October 2018) <<https://www.mercurynews.com/2018/10/16/facebook-lured-advertisers-by-inflating-ad-watch-times-up-to-900-percent-lawsuit/>> accessed 18 November 2020.

¹³⁹ Australian Competition & Consumer Commission, fn 133, 77.

¹⁴⁰ *Ibid* 79.

¹⁴¹ CMA, fn 10, 70.

¹⁴² Facebook, ‘Ads in Marketplace’ (*Facebook Business*) <<https://en-gb.facebook.com/business/m/one-sheeters/ads-in-marketplace>> accessed 18 November 2020.

¹⁴³ *ibid*.

¹⁴⁴ *Ibid*. ‘Facebook itself uses the possibility of advertising ‘across the entire Facebook family of apps and services’ as a selling point of Marketplace ads, noting that in a study they ‘found that audiences who saw impressions across Facebook, Instagram and Audience Network had conversion rates of 8x higher than audiences only exposed to a single placement on Facebook.’

enveloped market allows Facebook to improve its user matching and advertising targeting in the origin market, extracting additional surplus. In turn, by leveraging the monopoly power Facebook has on consumer attention, Facebook is able to protect its dominant position in the origin market and reinforce its position in display advertising, thereby reducing the degree of competition that already exists in these segments. As Condorelli and Padilla observe, '[f]ighting the enveloper in the target market may be very difficult, if not impossible, for firms which operate only in that market, even when they are as efficient or even more efficient than the enveloper.'¹⁴⁵

The universe of markets Facebook is enveloping is quickly expanding. In addition to display advertising in third-party properties and classified ads, Facebook has entered retail banking (Facebook Pay), online gaming (Facebook Gaming) and online dating (Facebook Dating). Facebook has the ability and incentive to engage in exclusionary conduct in these related segments. For instance, the Danish dating site Dating.dk has claimed that it had used Facebook's advertising services for a long time; however, shortly after Facebook announced the launch of its own dating service in 2018, its ad requests were turned down.¹⁴⁶ As the CMA observes, if Facebook engages in practices of this type, 'existing services may be forced to exit as their businesses cease to be financially viable, reducing both consumer choice and innovation in the sector.'¹⁴⁷

VI. Facebook's Overall Strategy: Immediate, Substantial and Foreseeable Effects in the EU and Single and Continuous Infringement

Facebook's enveloping by privacy policy tying does not exist in a vacuum. Rather, it forms part of an overall strategy composed of different sets of abusive conduct pursuing the same aim: to protect and strengthen Facebook's dominant position in social networking services and by extension its revenues derived from display and social advertising. In particular, since the acquisition of Instagram in 2012 Facebook has implemented a 'Snap up or Squash' strategy designed to maintain its dominant position by building an unassailable 'moat' that competitors cannot cross. In this way, Facebook secured access to valuable data to improve its social network and advertising offering, preventing any nascent threats from becoming an actual challenger at the same time (1).

Some practices comprising Facebook's Snap up or Squash strategy were implemented outside the EU. However, as they form part of overall strategy pursuing the same aim, they are liable to have immediate, substantial and foreseeable effects in the internal market. Accordingly, the Commission can readily assert jurisdiction over said practices, assessing them in conjunction with the enveloping by privacy policy tying as a whole. In addition, as Facebook's array of anti-competitive actions pursue an identical objective which distorts competition within the internal market, the Commission is able to have recourse to the single and continuous infringement concept to ensure effective enforcement and assess a fine consistent with the duration and gravity of Facebook's overall plan (2).

VI.1 Snap up or Squash

When Facebook perceives the presence of a viable competitive threat, it either buys them out or block them from access to essential data they need to compete, thereby preventing them from gaining scale. This pattern of conduct is complemented by acquisitions and practices that have

¹⁴⁵ Condorelli and Padilla, fn 28, 35.

¹⁴⁶ 'Dating.Dk i Åbent Brev Til Margrethe Vestager: Stop Facebooks Misbrug Af Dominerende Stilling' (*Avisen.dk*, 14 June 2019) <https://www.avisen.dk/datingdk-i-aabent-brev-til-margrethe-vestager-stop_555500.aspx> accessed 18 November 2020.

¹⁴⁷ See fn 10, 144.

improved Facebook’s ability to detect potential future challengers and act upon them. This Snap up or Squash strategy and the enveloping by privacy policy tying share the same objective and outcome, as they comprise an overall plan: they seek to impede entry into the worldwide market for social networks, causing market foreclosure and anti-competitive harm in the form of quality degradation and reduced choice for consumers and advertisers alike.

a. Acquisitions (Snapping up)

Instagram

When Facebook announced the acquisition of Instagram for around USD 1 billion in 2012, analysts readily identified the move as both offensive and defensive¹⁴⁸, as it allowed Facebook to access a new large audience – and therefore more data - and prevented the emergence of a successful challenger, either on its own or merged with an actual or potential competitor.

In a recent US House of Representatives antitrust subcommittee’s hearing on antitrust issues in tech, Facebook showed a number of emails and documents from 2012 that inadvertently revealed its anti-competitive motivations behind the Instagram acquisition. The emails show that Facebook sought to acquire smaller competitors, including Instagram, Foursquare and Path, to take advantage of network effects, ‘neutralise’ competitors, and ‘buy time’ – i.e. preventing these competitors and any other newcomers from ‘getting closer to their scale’.¹⁴⁹

Quickly after the acquisition, in November 2012 Facebook amended its privacy policy to gain the ability to share user information with its ‘affiliates’ (that is, companies owned by Facebook, such as Instagram).¹⁵⁰ In this way, Facebook degraded Instagram users’ privacy and choice by integrating Facebook and Instagram functionalities and data to show targeted ads on either of these outlets. Accordingly, the acquisition of Instagram was instrumental to the deployment of Facebook’s enveloping by privacy policy tying.

Onavo

In 2013 Facebook acquired the mobile-analytics company Onavo,¹⁵¹ creator of the Onavo Protect app, which offered a number of security features including security alerts and access to a virtual private network (VPN) service. VPNs create a virtual encrypted tunnel between users and a remote server operated by a VPN service.

¹⁴⁸ Somini Sengupta and Nick Bilton, ‘Facebook Plays Offense and Defense in a Single Deal’ *The New York Times* (11 April 2012) <<https://www.nytimes.com/2012/04/11/technology/facebook-plays-offense-and-defense-by-buying-instagram.html>>.

¹⁴⁹ Casey Newton, ‘“Instagram Can Hurt Us”: Mark Zuckerberg Emails Outline Plan to Neutralize Competitors’ (*The Verge*, 29 July 2020) <<https://www.theverge.com/2020/7/29/21345723/facebook-instagram-documents-emails-mark-zuckerberg-kevin-systrom-hearing>>.

¹⁵⁰ Kashmir Hill, ‘What You Actually Need To Know About The Changes Facebook Is Making To Its Privacy Policy’ (*Forbes*, 2012) <<https://www.forbes.com/sites/kashmirhill/2012/11/26/what-you-actually-need-to-know-about-the-changes-facebook-is-making-to-its-privacy-policy/#6be19f6a148d>>; Mathew Ingram, ‘Facebook Makes It Official — an External Advertising Network Is Coming Soon’ (23 November 2012) <<https://gigaom.com/2012/11/23/facebook-makes-it-official-an-external-advertising-network-is-coming-soon/>>.

¹⁵¹ Reed Albergotti, ‘Facebook Acquires Onavo, Gaining Office in Israel’ (*WSJ*, 14 October 2013) <<https://blogs.wsj.com/digits/2013/10/14/facebook-deal-gives-it-office-in-israel/>> accessed 15 March 2019.

Facebook portrayed Onavo as a means for users to block malicious websites, keep their traffic safe and protect their data privacy, whilst Facebook itself was accessing and analysing that traffic. The insights Facebook derived from analysing mobile traffic enabled it to identify new trends in the mobile ecosystem. For example, Facebook would get an early heads up about apps that were becoming breakout hits; it could also tell which apps were seeing slowing user growth; and it could see which apps' new features were becoming popular.¹⁵² Knowledge of these trends, in turn, was the driver of some important strategic decisions and acquisitions by Facebook.

For example, Onavo helped shape Facebook's live-video strategy. Facebook's employees could see usage patterns for live-video apps like Meerkat and Twitter's Periscope. Based on this knowledge, Facebook made the decision to add a live-video feature to the Facebook app in 2016.¹⁵³ Similarly, Houseparty, an app that let groups of people hang out over video on smartphones, was quickly gaining popularity in 2016. Soon thereafter, Facebook executives approached Houseparty for meetings, to explore an acquisition. Then, two months after Houseparty advertised itself as 'the Internet's living room', Facebook's Messenger informed that it would become a 'virtual living room.'¹⁵⁴ Based on Onavo data, Facebook had spotted Houseparty's explosive growth.¹⁵⁵ After Facebook executives informed Houseparty that the conversations had not progressed, Facebook introduced a feature to the Messenger app which allowed users to see up to six people in a conversation, as compared to the eight-person rooms supported by Houseparty.¹⁵⁶ Ultimately, Facebook ended up launching its own live group-chat app, Bonfire, a clone of Houseparty.¹⁵⁷

In a similar vein, internal presentations based on Onavo data depicted Snapchat as a potential threat as of April 2013.¹⁵⁸ Whilst Facebook and Instagram led in US mobile apps for iPhone, Snapchat was nevertheless growing fast, reaching a 13.2 per cent market share and ranking 16. Conversely, Facebook's Messenger had a 13.7 per cent market share, and ranked 15. Onavo data reportedly revealed to Facebook how many Snaps were sent every day on Snapchat.¹⁵⁹ That year Facebook attempted to acquire Snapchat for USD 3 billion, but Snapchat's CEO rejected the offer.¹⁶⁰ After the failed acquisition attempt, Facebook decided to devote its efforts to copy the features that led to Snapchat's initial success, including Stories (i.e. a public feed of photos and

¹⁵² Sarah Perez, 'Facebook Is Pushing Its Data-Tracking Onavo VPN within Its Main Mobile App' (*TechCrunch*, March 2018) <<http://social.techcrunch.com/2018/02/12/facebook-starts-pushing-its-data-tracking-onavo-vpn-within-its-main-mobile-app/>>.

¹⁵³ Deepa Seetharaman and Betsy Morris, 'Facebook's Onavo Gives Social-Media Firm Inside Peek at Rivals' Users' *Wall Street Journal* (13 August 2017) <<https://www.wsj.com/articles/facebooks-onavo-gives-social-media-firm-inside-peek-at-rivals-users-1502622003>>.

¹⁵⁴ Betsy Morris and Deepa Seetharaman, 'The New Copycats: How Facebook Squashes Competition From Startups' *Wall Street Journal* (9 August 2017) <<https://www.wsj.com/articles/the-new-copycats-how-facebook-squashes-competition-from-startups-1502293444>> accessed 30 April 2019.

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*

¹⁵⁷ Aatif Sulleyman, 'Facebook's New App Wants to Change How You Chat to Friends Online' (*The Independent*, 14 September 2017) <<http://www.independent.co.uk/life-style/gadgets-and-tech/news/facebook-bonfire-video-chat-app-friends-develop-feature-social-media-network-a7946261.html>>.

¹⁵⁸ Damian Collins, 'Note by Chair and Selected Documents Ordered From Six4Three' (November 2018) 12 <<https://www.documentcloud.org/documents/5433555-Note-by-Chair-and-Selected-Documents-Ordered.html>>.

¹⁵⁹ Seetharaman and Morris (n 153).

¹⁶⁰ Scott Thurm, 'Snapchat Spurned \$3 Billion Acquisition Offer from Facebook' (*WSJ*, 13 November 2013) <<https://blogs.wsj.com/digits/2013/11/13/snapchat-spurned-3-billion-acquisition-offer-from-facebook/>>.

videos that disappear after 24 hours) and augmented reality features.¹⁶¹ Facebook initially introduced its own version of Stories on Instagram, thereby leveraging its then-user base comprised of 500 million users. Stories on Instagram elicited more traffic and user engagement, and at the same time removed the motivation for Instagram's users to give a try to Snapchat.¹⁶² Instagram's Stories quickly surpassed Snapchat's¹⁶³ and directly kneecapped Snapchat, the growth of which was slowed by 82 per cent at the end of 2016.¹⁶⁴

WhatsApp

Facebook's CEO was reportedly highly concerned in 2013 about the prospect of a messaging app becoming a broader social network.¹⁶⁵ Thus, it resorted to Onavo to track and detect potential threats, thereby realising about WhatsApp's impressive growth and usage trends.

Onavo data showed that WhatsApp was progressively gaining market reach, surpassing apps such as Tumblr, Foursquare, Vine and Google+.¹⁶⁶ Similarly, Onavo data from April 2013 showed that WhatsApp was sending 8.2 billion messages per day, largely surpassing Facebook Messenger's 3.5 billion.¹⁶⁷ Onavo data also showed that WhatsApp was outpacing Facebook Messenger in engagement time. A few months after Facebook's acquisition of Onavo, Facebook acquired WhatsApp for around USD 19 billion.

Both the US Federal Trade Commission (FTC) and the Commission approved the acquisition. They generally saw WhatsApp as an unprofitable start-up with a large user base in a fragmented market, which would have otherwise gone under its radar had it not been for Facebook's proposed acquisition. However, Facebook had the tools and information to determine that WhatsApp was a potential future 'Facebook killer'.

Just as in the case of Instagram, the WhatsApp acquisition resulted in less competition, quality and choice. WhatsApp was a privacy-driven messaging service with a simple business model: the provision of free service for a year and charging an annual 1-dollar subscription fee thereafter. Facebook claimed in the merger review proceedings before the FTC and the Commission that it would not change WhatsApp's data handling practices and would not combine WhatsApp data with Facebook data. Quickly after the acquisition, however, Facebook amended WhatsApp's

¹⁶¹ Karissa Bell, 'While You Weren't Looking, Facebook Hit Snap Where It Hurts Most' (*Mashable*, 3 May 2018) <<https://mashable.com/2018/05/02/facebook-stories-crushing-snapchat/>>.

¹⁶² Ben Thompson, 'The Audacity of Copying Well' (*Stratechery by Ben Thompson*, 3 August 2016) <<https://stratechery.com/2016/the-audacity-of-copying-well/>>.

¹⁶³ Cara McGoogan, 'Instagram Stories Overtakes Snapchat with 200m Daily Users' *The Telegraph* (13 April 2017) <<https://www.telegraph.co.uk/technology/2017/04/13/instagram-stories-overtakes-snapchat-200m-daily-users/>>.

¹⁶⁴ Josh Constine, 'Snapchat Growth Slowed 82% after Instagram Stories Launched' (*TechCrunch*, 2016) <<http://social.techcrunch.com/2017/02/02/slowchat/>>.

¹⁶⁵ Zuckerberg told the Board that 'the biggest competitive vector for [Facebook] is for some company to build out a messaging app for communicating with small groups of people, and then transforming that into a broader social network'. This scenario was 'a big risk' for Facebook. Bill Goodwin, 'Calls for Facebook Break up as US Issues Lawsuits for Anti-Competitive Behaviour' (*ComputerWeekly.com*, 10 December 2020) <<https://www.computerweekly.com/news/252493441/Calls-for-Facebook-break-up-as-US-issues-lawsuits-for-anti-competitive-behaviour>>.

¹⁶⁶ Collins (n 158) 12.

¹⁶⁷ *ibid* 14.

privacy policy to allow data to be shared with Facebook,¹⁶⁸ thereby effectively limiting the options of those consumers who prefer higher levels of data protection. WhatsApp users' phone numbers began to be shared with Facebook, which enabled the latter to run analytics on user activity and make friends suggestions based on people with whom users talk on WhatsApp,¹⁶⁹ thereby enriching its social graph. Thus, the WhatsApp acquisition eliminated a viable competitive threat and enabled Facebook to implement its privacy policy tying to protect and improve its position in the social networking market and thereby secure its advertising revenues.

b. Foreclosure of input data (Squashing)

Facebook's social graph, that is, 'the information about one's relationships on [Facebook] that the user makes available to the system',¹⁷⁰ is one of Facebook's most valuable assets. To encourage app developers to write apps for Facebook, for years Facebook gave them access to its users' social graph through the Find Friends API, an IP-protected interface which effectively allows users to connect with their Facebook friends on other apps. This interoperability permission was essential to the viability and success of social apps. This is because social apps, just like Facebook, depend on connections between people, and only Facebook knows who people's real connections are.

However, after Facebook had gained unparalleled scale and attained a dominant position in the social network market, to protect that position, it began to deny apps it perceived as a competitive threat access to the Find Friends API, thereby impairing their growth potential.

For example, Voxer was a walkie-talkie mobile app that allowed users to talk to friends across iPhones and Android devices. In 2012 the app started to become viral, ranking in top places in the app stores. It availed itself of the Find Friends API to propel adoption and growth. Based on its growth potential it raised over USD 30 million in that year.¹⁷¹ However, in 2013 Facebook copied Voxer by adding voice messaging to its Messenger app,¹⁷² and two weeks later Facebook cut off Voxer's access to the Find Friends API.¹⁷³ Soon thereafter Facebook applied the same measure to Wonder,¹⁷⁴ a then-new social search app developed by the Russian search engine Yandex which combined its own proprietary search algorithms with social network data from Facebook, Twitter,

¹⁶⁸ Tas Bindi, 'WhatsApp, Facebook to Face EU Data Protection Taskforce' (*ZDNet*, 27 October 2017) <<https://www.zdnet.com/article/whatsapp-facebook-to-face-eu-data-protection-taskforce/>>.

¹⁶⁹ Michael Duran, 'How to Stop WhatsApp From Giving Facebook Your Phone Number' [2016] *Wired* <<https://www.wired.com/2016/08/how-to-stop-whatsapp-from-sharing-your-phone-number-with-facebook/>>.

¹⁷⁰ Arnold Roosendaal, 'Facebook Tracks and Traces Everyone: Like This!' (Social Science Research Network 2010) SSRN Scholarly Paper ID 1717563 4 <<https://papers.ssrn.com/abstract=1717563>>.

¹⁷¹ Eric Eldon, 'Walkie Talkie App Voxer Goes Big, IVP And Intel Lead \$30 Million Round' (*TechCrunch*, 2012) <<http://social.techcrunch.com/2012/04/11/walkie-talkie-app-voxer-goes-big-ivp-and-intel-lead-30-million-round/>>.

¹⁷² Josh Costine, 'Facebook Adds Voice Messaging To Messenger For IOS and Android, Tests Open Source VoIP In Canada' (*TechCrunch*, 2013) <<http://social.techcrunch.com/2013/01/03/facebook-voice-messaging/>>.

¹⁷³ Josh Costine, 'Facebook Is Cutting Off Find Friends Data To "Competing" Apps That Don't Share Much Back, Starting With Voxer' (*TechCrunch*, 2013) <<http://social.techcrunch.com/2013/01/18/facebook-data-voxer/>>.

¹⁷⁴ Josh Costine, 'Facebook Blocks Yandex's New Social Search App From Accessing Its Data Just Three Hours After Launch' (*TechCrunch*, 2013) <<http://social.techcrunch.com/2013/01/24/facebook-blocks-yandex-wonder/>>.

Instagram and Foursquare, supporting searches on places, music and news.¹⁷⁵ The same happened with Twitter's video app Vine,¹⁷⁶ Path,¹⁷⁷ and Circle.¹⁷⁸

Facebook justified these decisions on the basis of a prohibition in its Platform policy, which forbade the replication of a core Facebook functionality without permission,¹⁷⁹ without explaining what its core functionality was, and what would happen when Facebook expanded that functionality into a new segment. Unsurprisingly, this prohibition was used for anti-competitive purposes. For example, the app Phhphoto, which allowed users to shoot animated GIFs, was cut off from Instagram's social graph soon after reaching 1 million users, and six months later Instagram launched Boomerang, a blatant copy of Phhphoto.¹⁸⁰

Facebook's pattern of conduct disincentivised newcomers from developing new features that Facebook could construe as overlapping with its offering. Facebook could readily find some social features added to an app as in competition with Facebook, whereupon Facebook could swiftly cut access to its APIs. The outcome of this, again, is less innovation, competition and choice.

VI.2 Jurisdiction and Single and Continuous Infringement

The Commission's jurisdiction to apply EU competition law has been traditionally asserted on the basis of the implementation test developed in *Woodpulp*, a case on concerted practices of wood pulp producers established outside the EU whereby they fixed their export prices into the EU. Noting that undertakings could easily escape the prohibition of Article 101 TFEU if its applicability depended on the place where the agreement, decision or concerted practice was formed, the CJEU concluded that the place where the agreement, decision or concerted practice is implemented is the decisive factor to establish the Commission's jurisdiction¹⁸¹. However, the implementation test, conceived at a time at which countries' economies were brick-and-mortar-based, has become excessively narrow and consequently outdated. As AG Wahl noted in his Opinion on *Intel*, in the absence of other tests, 'various types of conduct that may well have the object or effect of preventing, restricting or distorting competition within the internal market would fall beyond the reach of those rules'¹⁸².

¹⁷⁵ Ingrid Lunden, 'Yandex Confirms Wonder, A Voice-Powered Social Search App, As A U.S. "Experiment," Gets Legal Advice On Why It Shouldn't Irk Facebook' (*TechCrunch*, 2013)

<<http://social.techcrunch.com/2013/01/24/yandex-launches-social-search-app-wonder-as-a-u-s-experiment-gets-legal-advice-on-why-it-shouldnt-bother-facebook/>>.

¹⁷⁶ Jeff Blagdon, 'Facebook Has Apparently Blocked Vine's Friend-Finding Feature' (*The Verge*, 24 January 2013) <<https://www.theverge.com/2013/1/24/3913082/facebook-has-apparently-blocked-vines-friend-finding-feature>>.

¹⁷⁷ Josh Constine and Mike Butcher, 'Facebook Blocks Path's "Find Friends" Access Following Spam Controversy' (*TechCrunch*, 4 May 2013) <<https://social.techcrunch.com/2013/05/04/path-blocked/>>.

¹⁷⁸ Chris O'Brien, 'Facebook's Alleged Use of APIs to Crush Competition Is a Warning to Other Data Companies' (*VentureBeat*, 11 December 2020) <<https://venturebeat.com/2020/12/11/facebooks-alleged-use-of-apis-to-crush-competition-is-a-warning-to-other-data-companies/>>.

¹⁷⁹ Constine, 'Facebook Clarifies Ban On Apps That Use Its Data To Replicate Its Features Or Don't Share Back' (*TechCrunch*, 2013) <<http://social.techcrunch.com/2013/01/25/facebook-bans-replicating-its-functionality/>> accessed 20 April 2019.

¹⁸⁰ Josh Constine, 'Facebook Shouldn't Block You from Finding Friends on Competitors' (*TechCrunch*, 2018) <<http://social.techcrunch.com/2018/04/13/free-the-social-graph/>>.

¹⁸¹ *Case 89/85 Ahlström Osakeyhtiö and others v Commission* [1994] ECLI:EU:C:1994:12 (*Wood Pulp*) [16].

¹⁸² *Case C-413/14 P Intel/Commission* [2017] ECLI:EU:C:2017:632 *Opinion of AG Wahl* ECLI:EU:C:2016:788 (*Opinion of AG Wahl*) [294].

An effects-based approach to jurisdiction is undoubtedly better-suited to the reality of global digital markets, where the effects of conduct implemented outside the EU can be readily felt within it. In *Intel*, the CJEU upheld this view. Noting that both a ‘qualified effects’ test and the implementation test aim at ‘preventing conduct which, while not adopted within the EU, has anticompetitive effects liable to have an impact on the EU market’¹⁸³, the CJEU acknowledged them as standalone and alternative routes to assert the Commission’s jurisdiction¹⁸⁴.

Some practices comprising the Snap up or Squash strategy – specially the monitoring of competitive threats and denial of access to the Find Friends API – were arguably implemented outside the EU. However, after *Intel*, there is no doubt that Commission can assess and punish these practices insofar as they are bound to have immediate, substantial and foreseeable effects in the EU¹⁸⁵.

Importantly, when assessing whether the Commission has jurisdiction to apply EU competition law, ‘it is necessary to *examine the conduct* of the undertaking or undertakings in question *as a whole*’¹⁸⁶ (emphasis added). It follows that in order to assess the nature of the effects of Facebook’s practices on the EU market, especially the degree to which they are substantial,¹⁸⁷ it is appropriate to take into consideration both the Snap up or Squash and the enveloping by privacy policy tying strategies. Doing otherwise would cause an artificial fragmentation of an overall anti-competitive strategy capable of distorting competition within the EU into an array of separate forms of conduct which may escape the EU’s jurisdiction¹⁸⁸.

Indeed, as seen in Figure 3 below, Facebook’s Snap up or Squash strategy has been a prerequisite for the implementation of the enveloping by privacy policy tying, and both components are essential complements of its anti-competitive aim. Facebook has monitored usage trends to detect potential threats, and as soon as it has identified one, Facebook has given them a binary choice: either be acquired or be squashed. After a successful acquisition, Facebook amends its services’ privacy policies to be able to combine the newly acquired firm’s data with that hoovered from its current offering, thereby degrading the privacy and choice of the acquired firm’s users. If an entrant is brave enough to resist an acquisition offer and chooses instead to compete with Facebook, Facebook either blocks access to essential inputs to compete or steals the entrant’s innovation, leveraging its user base and making even more profit than the entrant would have otherwise made.¹⁸⁹ The prospect of becoming a target is bound to chill start-ups’ incentives to compete and innovate in segments and ways that may potentially threaten Facebook’s market power.¹⁹⁰ As a consequence, competition and innovation levels are lowered in the areas where Facebook has presence, and Facebook’s products and services, even if inconsistent with the preferences of some consumers, become the only available options.

Figure 3. Interplay between the Snap up or Squash and Privacy Policy Tying strategies

¹⁸³ *Case C-413/14 P Intel/Commission [2017] ECLI:EU:C:2017:632 [45]*.

¹⁸⁴ *ibid* paras. 46-47.

¹⁸⁵ *ibid* 49.

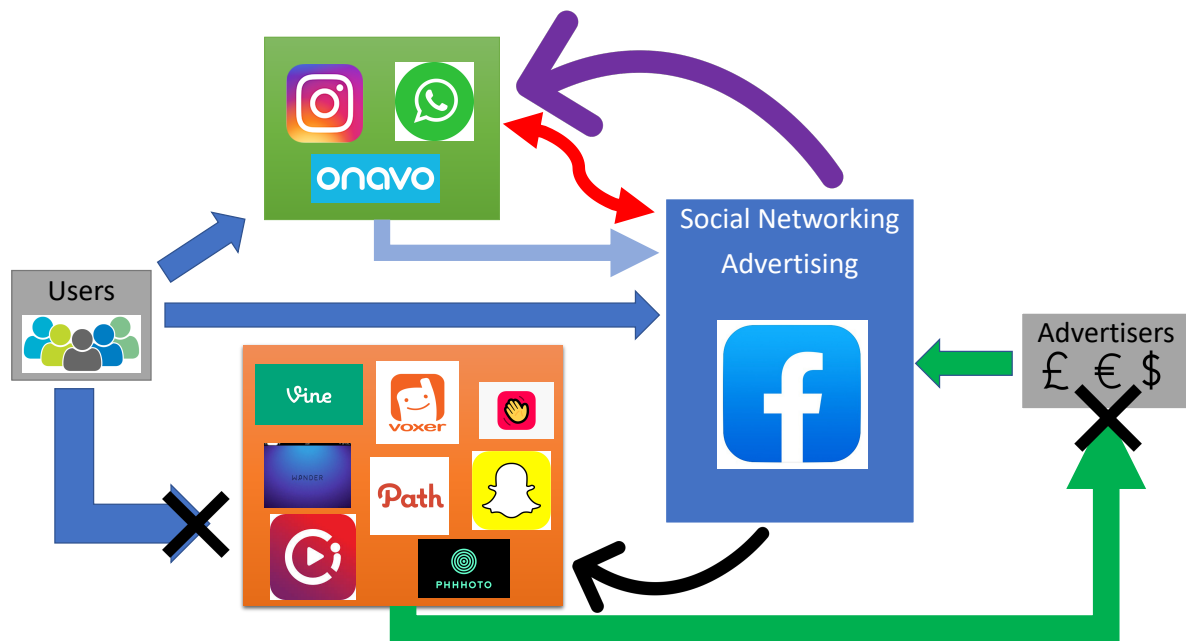
¹⁸⁶ *ibid* 50.

¹⁸⁷ See *ibid* 56.

¹⁸⁸ See *ibid* 57.

¹⁸⁹ See text accompanying footnotes 161-164

¹⁹⁰ Maurice E Stucke, ‘Should We Be Concerned About Data-Opolies?’ (2018) 2 *Georgetown Law Technology Review* 275, 307.



Legend

- Data and attention
- Data
- Blocked access to data and attention
- Advertising revenues
- Blocked access to advertisers
- Snap up
- Squash
- Privacy policy tying

The effects of Facebook’s practices implemented outside the EU undoubtedly meet the qualified effects test’s foreseeable, immediate and substantial criteria. Firstly, it is sufficiently probable¹⁹¹ that Facebook’s snap up or squash strategy would either force potential entrants in the EU to sell or lower competition and innovation levels after such newcomers suffered Facebook’s active steps to copy their functionalities or prevent them from gaining scale. Secondly, since Facebook’s Snap up or Squash strategy was designed to send a clear message to the world, including the EU internal market, that anyone getting close to competing with Facebook had to either sell their business or face devastating consequences, the effects of Facebook’s conduct in the EU are both intended and immediate. And thirdly, given that to assess the substantial nature of the effects in the EU of Facebook’s practices implemented outside the EU - which form part of a successful overall strategy aimed at preserving its worldwide monopoly over the social network market and thereby protect its advertising revenues – it is appropriate to take into consideration Facebook’s conduct ‘viewed as a whole’¹⁹², the substantial character of said effects is hard to dispute. Therefore, the Commission can readily apply Article 102 TFEU to every component of Facebook’s Snap up or Squash strategy in conjunction with the enveloping by privacy policy tying.

¹⁹¹ See *Case C-413/14 P Intel/Commission [2017] ECLI:EU:C:2017:632* (n 183) para 51.

¹⁹² See *ibid* 56.

Although some disagree with the CJEU's approach in *Intel* to establish EU jurisdiction over foreign conduct forming part of an overall plan to restrict competition,¹⁹³ it is submitted that this approach actually provides a coherent standard for the determination of Article 102 TFEU's jurisdictional limits.

Article 102 TFEU applies when unilateral conduct may affect trade between Member States - otherwise, national law applies. In essence, the 'effect on trade' criterion establishes 'the boundary between the areas respectively covered by [EU competition] law and the [competition] law[s] of the Member States.'¹⁹⁴ When assessing whether an abuse has an effect on inter-state trade, the abuse's elements need not be appraised in isolation; rather, conduct forming part of an 'overall strategy' must be assessed in terms of its 'overall impact'¹⁹⁵. Specifically,

[w]here a dominant undertaking adopts various practices in pursuit of the same aim, for instance practices that aim at eliminating or foreclosing competitors, in order for Article [102] to be applicable to all the practices forming part of this overall strategy, it is sufficient that at least one of these practices is capable of affecting trade between Member States.¹⁹⁶

If viewing and assessing conduct composed of various practices as a whole, on account of their common anticompetitive aim, is a longstanding established practice in EU competition law for the purpose of the effect on trade jurisdictional test, it makes no sense to follow a different approach in the context of the qualified effects test, another jurisdictional test designed to set the limits between EU competition law and the competition laws of non-EU jurisdictions.

Ultimately, the CJEU's approach in *Intel* should be praised on two grounds. First, it brings about much-needed clarity with respect to the acceptability of the qualified effects test to ascertain the Commission's jurisdiction. Second, and perhaps more importantly, it ensures consistency in the way to assess a dominant undertaking's conduct composed of various practices forming part of the same overall strategy when determining whether EU competition law or the competition laws of EU member states and non-EU states apply. The Commission should avail itself of this clarity and coherence to investigate and punish Facebook's overall anti-competitive strategy as a whole.

Moreover, given the degree to which the different forms of conduct by Facebook, as depicted in Figure 3 above, complement each other to achieve the identical objective, the Commission is able to have recourse to the single and continuous infringement concept and avail itself of its procedural advantages to facilitate the repression of Facebook's overall anti-competitive strategy.

The concept of single and continuous infringement has been mostly employed in the context of Article 101 TFEU to ensure that infringements which consist of an array of anti-competitive practices forming part of an overall plan to restrict competition be investigated and dealt with as a whole, instead of separately. In the context of Article 102 TFEU, it serves to identify a single infringement which is essentially an exclusionary strategy based on different components. Being essentially a procedural rule, the concept facilitates enforcement and deterrence. In particular, it allows the Commission to punish conduct that extends over time. Since the end of the continuous

¹⁹³ See *Case C-413/14 P Intel/Commission* [2017] ECLI:EU:C:2017:632 *Opinion of AG Wahl* ECLI:EU:C:2016:788 (*Opinion of AG Wahl*) (n 182) para paras. 321 et seq.

¹⁹⁴ *Case 22/78 Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission* [1979] ECLI:EU:C:1979:138 para 17.

¹⁹⁵ European Commission, 'Commission Notice, Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty (2004/C101/07)' para 17.

¹⁹⁶ *ibid* 17.

infringement determines the date on which the limitation period begins to run,¹⁹⁷ the Commission can address conduct that would be time-barred if considered in isolation. In turn, the ‘continuous’ nature of the infringement has an impact on its duration, which plays a decisive role in the calculation of the amount of the fine.¹⁹⁸

In order to characterise various forms of conduct as a single and continuous infringement, it is necessary to establish their complementarity in the attainment of the overall plan, taking into account any circumstance capable of establishing or casting doubt on that complementary link, including the period of application, the content and methods used, and the objective of the various actions in question.¹⁹⁹

Table 3. Facebook’s single and continuous infringement

Content and methods	Period of application	Objective of the action	Outcome
Snap up – strategic acquisitions of Instagram and WhatsApp	9 April 2012 (date of the Instagram acquisition) – to date ²⁰⁰	<ul style="list-style-type: none"> - Removal of competitive threats - Access to large audiences and more data - Gaining benefits from stronger (traditional and data-driven) network effects 	Protection and reinforcement of dominant position in the social network market
Snap up – strategic acquisition of Onavo	13 October 2013 (date of the Onavo acquisition) – to date ²⁰¹	<ul style="list-style-type: none"> - Gaining the ability to monitor competitors, detect threats and act upon them by either attempting to buy them or squashing them (i.e. replication of innovations and blocking access to essential inputs) 	Protection of dominant position in the social network market
Squash – replication of entrants’ innovations	At least 2 August 2016 (date on which Instagram implemented Stories) – to date	<ul style="list-style-type: none"> - Leveraging of Facebook products’ large user bases to ensure competitors’ innovations do not gain traction - Gaining benefits from stronger (traditional and data-driven) network effects 	Protection and reinforcement of dominant position in the social network market
Squash – denial of access to essential APIs	At least January 2013 (month in which Facebook denied Vine and other apps access to its APIs) – to date	<ul style="list-style-type: none"> - Removal of competitive threats - Sending the message that the market for social networks is ‘off limits’ 	Protection of dominant position in the social network market

¹⁹⁷ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, Article 25(2)

¹⁹⁸ *ibid*, Article 23(3)

¹⁹⁹ Case T-321/05 *AstraZeneca v Commission*, EU:T:2010:266, paragraph 892, referring to Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission*, EU:C:2004:6, para. 258; Joined Cases T-101/05 and T-111/05 *BASF and UCB v Commission* EU:T:2007:380, paras. 179 and 181

²⁰⁰ Whilst the application of Article 102 TFEU as a means to control mergers is rare, there is an important precedent that allows to do so. In *Continental Can*, using a teleological interpretation of the competition rules, the CJEU held that the strengthening of the position of an undertaking as a result of a merger may be an abuse and prohibited under Article 102 TFEU if it has the effects of substantially fettering competition. *Case 6-72, Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities [1973] ECR 215* (n 31) para paras. 26-27 Since this abuse takes the form of consummation of mergers which remain implemented, this abuse is ongoing. .

²⁰¹ Same considerations of the preceding footnote apply.

Squash – prohibition to copy ‘core functionalities’	At least 25 January 2013 (data on which Facebook ‘clarified’ its Platform policy) ²⁰² – to date	<ul style="list-style-type: none"> - Sending the message that the market for social networks is ‘off limits’ - Gaining the ability to expand onto adjacent segments and squash 	Protection and reinforcement of dominant position in the social network market
Privacy Policy Tying	November 2012 (month in which Facebook amended its privacy policy to share user data across Facebook, Instagram and other properties ²⁰³) – to date	<ul style="list-style-type: none"> - Ensuring access to more data - Ensuring benefits from stronger (traditional and data-driven) network effects - Removal of privacy-driven options for consumers - Commodification of (publisher) competitors’ loyal audiences - Reinforcing the ability to expand onto adjacent markets (such as classified ads, online dating and gaming) 	Protection and reinforcement of dominant position in the social network market

As can be seen in Table 3 above, the complementary link amongst Facebook’s various forms of conduct is apparent: each practice is carefully implemented to both secure exclusive access to valuable data and ensure that no potential competitor may grow to become a viable alternative social network and thereby threaten Facebook’s advertising revenues. In particular, Snap up or Squash practices seek to deter entry and deny competitors access to valuable traffic and data, whilst the privacy policy tying secures Facebook’s data advantage which competitors cannot match. As a result, competition in the social network market is eliminated, consumers have no privacy-focused alternatives, and Facebook can continue enriching its ‘super-profiles’ of Internet users to drive revenues up, improve its services and collect more data. In turn, this dynamic enables Facebook to avoid strong competition in the supply of advertising services, thereby harming advertisers²⁰⁴.

By characterising Facebook’s conduct as a single and continuous infringement, the Commission can benefit from a reduction of its burden of proof and therefore face less hurdles to enforce Article 102 TFEU effectively. In particular, the Commission can assume that the infringement has not been interrupted, even if it does not have evidence of the infringement in respect of certain specific periods, provided that the different practices which form part of the infringement pursue a single aim and fall ‘within the framework of a single and continuous infringement’²⁰⁵ – criteria which Facebook’s conduct largely meets. Moreover, the Commission can capture forms of conduct (such as the Snap up practices) which could be time-barred if dealt with separately and impose a fine in respect of the whole of the period of infringement (i.e. 9 April 2012 to date) – a steep, dissuasive fine on account of the duration and gravity of the infringement.

VII. Conclusions

The BKA’s theory of harm might have been contentious, but the fact remains that the underpinning of the BKA Facebook case was grounded in reality. The Federal Supreme Court shared this appreciation, noting that ‘[t]here are neither serious doubts about Facebook’s dominant

²⁰² Justin Osofsky, ‘Clarifying Our Platform Policies’ (*Facebook for Developers*, 25 January 2013) <<https://developers.facebook.com/blog/post/2013/01/25/clarifying-our-platform-policies/>>.

²⁰³ Hill (n 150).

²⁰⁴ See text accompanying footnotes 131-140.

²⁰⁵ Joined Cases T-147/09 and T-148/09 *Trelleborg Industrie SAS and Trelleborg AB v European Commission* ECLI:EU:T:2013:259 para. 61

position in the German social networking market nor that Facebook is abusing this dominant position with the terms of service prohibited by the *Bundeskartellamt*.²⁰⁶ By quashing the Düsseldorf Court's decision, the Federal Supreme Court reset the German Facebook case in the right direction, at the same time lending support to the view that Facebook's conduct provides a solid basis for intervention under EU competition law.

Indeed, a potential Article 102 TFEU case against Facebook is very much required to restore competition in the two-sided market for social networks and display advertising, and more generally, to curb the unfair methods through which advertising-funded platforms distort competition, to the detriment of consumers. Facebook has imposed on consumers terms of service that are significantly and persistently more onerous than those prevailing under competitive conditions. Mandatory online tracking of users, a practice highly resisted by consumers over the years, could only be imposed when Facebook's dominance was cemented. Currently, Facebook unilaterally decides the scope of its online surveillance under its terms of service. As a result, consumer choice is impaired, as consumers cannot choose the extent to which they want their data disclosed and mined in order to have a personalised social network experience. In addition, imposed surveillance amounts to a reduction of quality of the Facebook social network for privacy-sensitive users, whose number is substantial, as proved by the results of the choice modelling exercise presented above. Inequality of bargaining power and the ability of Facebook to impose 'give or take' terms and conditions, so users have no choice but to accept them without any say as to what happens to their data, is an example of exploitation. If consumers reigned supreme in the social network market, they would have the choice to either give away their data without restrictions, provide data in exchange for a more restricted service, or pay to use Facebook – as opposed to being left with no choice or forced to give away their data to use a service without viable competing alternatives. Ultimately, practices by dominant undertakings whereby users are deprived of choice, Facebook is imposing unreasonable terms, which are exploitative under Article 102(a) TFEU. Traditionally, enforcement actions under Article 102(a) TFEU have been about excessive pricing, which is an excessively narrow interpretation of this provision. It is time to enforce this provision to its fullest extent, with a view to restore consumer choice in a market where the absence of a monetary price has shielded Facebook from antitrust intervention.

Importantly, the exploitation of users is directly correlated with foreclosure effects. Facebook's abusive terms give Facebook access to additional data troves with which it fuels data-driven externalities and thereby strengthens its position in the social network/display advertising two-sided market and leverages its position onto related markets, effectively reducing the degree of competition existing therein. This conduct, which is the antithesis of competition on the merits and causes anti-competitive effects, fits smoothly into the concept of exclusionary abuse established by the EU Courts, thus also providing solid grounds for intervention under Article 102(b) TFEU. Moreover, the Commission can take advantage of the clarity and coherence brought about by *Intel* to assert jurisdiction over Facebook's practices implemented outside the EU which in conjunction with the enveloping by privacy policy tying form part of an overall strategy to protect its dominant position in the market for social networks, and prosecute Facebook's anti-competitive scheme as a single and continuous infringement. The comprehensiveness and procedural advantages of this approach carry the potential of restoring competition in markets which have no prospect of becoming contestable in the absence of effective competition enforcement.

²⁰⁶ German Federal Supreme Court (Bundesgerichtshof), fn 6.