Giuseppe Colangelo *

(Un)fairness, balance of interests and antitrust. Insights from the Facebook case

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1. Introduction

The advent of dominant platforms that collect and analyze personal data on a daily basis has brought the interface between antitrust law and the rules on data protection to the heart of international debate. In particular, two policy visions have been taking shape in recent years. To give individuals full control over their personal data, one of these policy approaches suggests using the provisions of competition law outside their usual purposes to remedy the shortcomings of privacy law, The other approach recommends that antitrust rules be used in a traditional way, i.e. to limit the market power that is rooted – or is said to be rooted – in big data and data accumulation. The recent *Facebook* case manifests itself as an example of the first policy trend. In reality, it achieves the goal of the second.

After a three-year investigation, on 6 February 2019 the Bundeskartellamt (GCA) found Facebook's data policy to be abusive [1]. In its assessment, the

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[1] BUNDESKARTELLAMT, Case B6-22/16, *Facebook*, Press release, *https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html;jsessionid=*

authority stated that, by making the use of its social-networking service conditional upon users granting extensive permission to collect and process their personal data, Facebook unlawfully exploited its dominant position in the German market for social networks.

Consistent with the antitrust approach, the GCA ascertained that Facebook holds a dominant position in the German market for social-networking services. In particular, it established that, due to this market position, Facebook's users cannot switch to other social networks with minimal effort or an equal level of satisfaction. Thus, the GCA held that, in regulating the operation of its business model, Facebook should comply with special obligations, one of these being that it should use adequate terms of service without exploiting its locked-in users.

In reality, according to the GCA Facebook did not do that. First, Facebook failed to make its users fully aware of the fact that it collected their personal data from sources other than the Facebook platform and, then, merged them with those gathered on its own platform, all with the ultimate aim of detailing their online profiles better than its competitors could. Second, Facebook put its users in the difficult position of either accepting the above data policy or refraining from using the social network in its entirety. In other words, in the view of the GCA, because of Facebook's dominant position, even well-informed users, aware of Facebook's data policy, would have not been able to voluntarily consent to the aforementioned data collection and combination, fearing the alternative of no longer being able to access the social network. Therefore, not only did the GCA conclude that Facebook's conduct violated the EU rules on data protection (General Data Protection Regulation – GDPR) by depriving its users of the human right to control the processing of their personal data and of the constitutional right of informational self-determination, but it also maintained that Facebook's dominant position was a key element of such a privacy violation, with the result that a link was established between the typical antitrust element of market power and the traditional privacy issues connected to information disclosure and individuals' awareness.

In more detail, the GCA relied on the general clause of Section 19(1) of the German Competition Act (GWB) to establish that the above violation of data protection rules also represented an antitrust violation. Indeed, ac-

8A581062B36687451A3D1E7A5C256390.2_cid378?nn=3600108. For a critical analysis of the preliminary assessment of the case, see G. COLANGELO, M. MAGGIOLINO, *Data Accumulation and the Privacy-Antitrust Interface: Insights from the Facebook case*, in 8 *International Data Privacy Law*, 224 (2018).

cording to that provision, competition law applies in every case where one bargaining party is so powerful that it can dictate the terms of the contract, with the end result being the abolition of the contractual autonomy of the other bargaining party [2]. In addition, the GCA maintained that, where access to the personal data of users is essential for the market position of a company, the question of how that company handles the personal data affects the way in which it competes. Therefore, if a dominant firm collects and analyzes users' data pursuant to exploitative terms and conditions – that is, terms and conditions that do not comply with EU data protection rules – it also violates antitrust law by acquiring an unfair competitive advantage over the firms that adhere to the GDPR. In the words of the GCA, therefore, by processing user data inappropriately, Facebook gained "a competitive edge over its competitors in an unlawful way and increased market entry barriers, which in turn secures Facebook's market power towards end customers" [3].

Unsurprisingly, this *Facebook* decision has sparked lively discussion since it deals with the value of data in digital markets and the possible commingling of data protection rules and antitrust provisions to properly address privacy concerns arising in the digital economy. After all, individual user data is precious in the data-driven economy since it allows multi-sided media platforms to improve their services through personalization and to place targeted advertisements. Indeed, the emergence of these platforms occurred in parallel with the success of business models that revolve around the collection and use of personal data, generating revenue from profiling and advertising based on user data. In addition, in the context of zero-price markets, it becomes particularly important to look at non-price competition. Thus, a growing number of scholars and institutions are suggesting that antitrust authorities should take into account additional dimensions of competition (including those outside the field of economics) and rely on a more synergistic approach, merging data protection law, competition law, and consumer protection law [4], as the GCA did in the *Facebook* case by applying the law on abuses of dominance.

Whereas the Court of Justice (CJEU) and the European Commission consider that privacy-related concerns as such do not fall within the scope

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[2] BUNDESKARTELLAMT, Case B6-22/16, *supra* n. 1, paras. pp. 525-534.

[3] BUNDESKARTELLAMT, *Facebook*, Case summary, 15 February 2019 *https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html?nn=3600108*, p. 11.

[4] See e.g. I. LIANOS, *Polycentric Competition Law*, in 71 *Current Legal Problems*, 161 (2018).

of competition law[5], the GCA relies on the case law of the German Federal Court of Justice, which considers business terms abusive according to civil law principles, chiefly those that aim to protect a contracting party in an imbalanced negotiation position. Following this route, the GCA applies the GDPR in its assessment of Facebook's terms and argues that the infringement of data protection rules is a manifestation of Facebook's market power[6].

This paper maintains five theses. First, the GCA has been tenacious: from the beginning of the *Facebook* case it has felt uncomfortable with the fact that Facebook's unique dataset is the result of its many data accumulation activities. At the end of a three-year investigation, the GCA has found a way – uniquely German-specific – to limit Facebook's ability to gather, combine, and analyze data. It has made the data accumulation process more expensive, with the ultimate intent of weakening Facebook's competitive advantage that – in the view of the GCA – is rooted only in the size and uniqueness of its dataset. Second, there is nothing illegitimate in the GCA's decision. The manner in which it prosecutes and condemns Facebook's conduct is fully consistent with the general clause of Section 19(1) of the GWB and its broad interpretation. What is peculiar to the *Facebook* case is that the clause in question finds no equivalent in other jurisdictions and, more importantly, is barely justified in light of the current antitrust rationale. It seems intended to punish dominant firms for behaviours which violate any piece of law, ranging from environmental law to privacy law, and not for behaviours that are either unfair or exclusionary and anticompetitive. Third, in order to make Facebook's data accumulation activities more costly, the GCA has acted as a self-appointed enforcer of data protection rules and undermined the value of privacy as a fundamental right granted on equal terms to everyone, regardless of the size of the party involved. Indeed, the GCA could have ascertained a violation of antitrust law by referencing Article 102(a) TFEU without considering the existence of an infringement of data protection rules. Instead, it wandered into the realms of privacy, with the result, ultimately, of ascertaining a violation previously undetected by any data protection authority, and placing a "special privacy responsibility" on dominant firms. Fourth, there is room to argue that the unfairness of Facebook's terms of service could have

[5] CJEU, Case C-238/05, *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL v. Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, EU:C:2006:734, para. p. 63; European Commission, Case M.8124, *Microsoft/LinkedIn*, C(2016) 8404 final, para. p. 177.

[6] BUNDESKARTELLAMT, Case B6-22/16, *supra* n. 1, para. p. 523.

been prosecuted under Article 102(a) TFEU. In this respect, the GCA should have developed a theory of harm different from the one actually used. Instead of maintaining that, under the general clause of Section 19(1) of the GWB, privacy violations are also antitrust violations, the GCA could have established that Facebook's terms and conditions were disproportionate, unilaterally imposed, and seriously opaque. Fifth, due to the hurdles that the GCA has created to make data accumulation more costly, it is arguable that Facebook will be forced to offer different versions of its social networking services, with the end result of making the platform less attractive for advertisers.

2. The Bundeskartellamt investigation

The Bundeskartellamt's investigation is premised on the idea that Facebook has a quasi-monopoly on the German market for social networks due to the massive number of users and the limited substitutability of rivals' products. Professional networks (such as LinkedIn and Xing) as well as messaging services (such as WhatsApp and Snapchat) or other social media (such as YouTube or Twitter) are not considered part of the relevant product market because, even though these services are in some respects competitive substitutes for Facebook, from the user perspective they merely serve a complementary need.

Strong direct network effects of Facebook's business model and the difficulties associated with switching to other social networks played a key role in the market dominance assessment. As a result of both the size of the social network and the ability of users to find persons they want to associate with (so-called identity-based network effects), the GCA found it difficult to "motivate" Facebook's users to switch to another service. Further, the disappearance of some competitors and the downward trend in the user-based market shares of the remaining rivals indicate a market tipping process. Therefore, according to the GCA, these direct network effects operate as significant barriers to entry and lead to a locked-in effect, so that users cannot "practically" switch to other social networks. Moreover, Facebook's dominance is enhanced by indirect network effects, which increase the barriers to market entry. Indeed, in advertising-supported platforms the advertising side profits from a large private user base and a competitor must acquire a critical mass of private users in order to enter the market successfully. With the help of the user profiles generated, Fa-

cebook is able to improve its targeted advertising activities. As a consequence, Facebook is becoming more and more indispensable for advertising customers. Finally, Facebook has superior access to competition-relevant data, in particular to the personal data of its users. As social networks are data-driven products, access to such data is an "essential factor" for competition in the market[7]. Indeed, data are relevant to both the product design and the potential for monetizing the service. Combined with the direct and indirect network effects, this access to data constitutes another barrier to market entry for a competitor's product.

Against this backdrop, the GCA investigation is rooted in the fact that Facebook makes the usage of its social network conditional on its being allowed to amass without limitation any kind of data generated when using third-party websites, and to merge it with the user's Facebook account (the so-called Facebook package). Third-party sites include services owned by Facebook (WhatsApp, Instagram, Oculus and Masquerade) as well as websites and apps of other operators with embedded Facebook application programming interfaces (APIs). Indeed, if a third-party website has embedded Facebook Business Tools such as the "Like" button, a "Facebook login" option or analytical services such as "Facebook Analytics", data will be transmitted to Facebook via APIs as soon as the user calls up that third party's website for the first time. Through APIs, data are transmitted to Facebook and collected and processed by Facebook even when a Facebook user visits other websites. In accordance with Facebook's terms and conditions these data – coming from the services owned by Facebook and the websites embedding Facebook's tools – can be combined with data from the user's Facebook account and used by Facebook, even if users have blocked web tracking in their browser or device settings.

In the authority's assessment, it is stated that these terms and conditions are neither justified under data protection principles nor appropriate under competition law standards. Namely, in light of the EU data protection rules, the practice of combining data in a Facebook user account should have been subject to users' voluntary consent, added to which, as argued by the President of the Bundeskartellamt Andreas Mundt, such a consent could not consist in a mere and simple "tick on the box". Indeed, due to "Facebook's superior market power, […] the only choice the user has is either to accept the comprehensive combination of data or to refrain from

[7] BUNDESKARTELLAMT, *Facebook*, FAQ's, 7 February 2019, *https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=6*, p. 5.

using the social network. In such a difficult situation the user's choice [to tick a box] cannot be referred to as voluntary consent" [8]. In light of the antitrust rules, then, this form of coercion to the detriment of users, together with the choice to keep users unaware of data combination, was what pushed the GCA to maintain that Facebook's conduct is exploitative within the meaning of the general clause of Section 19(1) of the GWB.

In forbidding Facebook's conduct the GCA held that Facebook-owned services can continue to collect data for their services. However, where users do not voluntarily consent to data combination, the data must remain within the respective service and cannot be processed in combination with Facebook data. And in the further case of data from third party websites, both the collection and the combination with Facebook data must require a further voluntary consent by users. In other words, without users' consent, data processing must generally take place in an internally separated process.

As a consequence, Facebook is required to adapt its terms of service and data processing accordingly. Namely, the GCA considers different criteria as feasible: it mentions restrictions on the amount of data, purpose of use, type of data processing, additional control options for users, anonymization, processing only upon instruction by third party providers, and limitations on data storage periods. Facebook is required to implement the necessary changes within a period of twelve months and to submit an implementation road map for the adjustments within four months.

In summary, to quote Mundt, "[t]he combination of data sources substantially contributed to the fact that Facebook was able to build a unique database for each individual user and thus to gain market power". Therefore, with the investigation the GCA is carrying out an "internal divestiture" of Facebook's data. In other words, since the real concern has always been the excessive amount of data accumulated by Facebook in its unique dataset, with its decision the GCA has intervened only against the activities that result in the accumulation of data. As we will better explain in the following paragraph, not only has it subjected *both* the gathering of data from sources other than Facebook's platform *and* the combination of these data to users' consent, but it has also required that the users' consent given to dominant firms be stronger than the ordinary one. Indeed, many of the criteria proposed by the GCA to improve Facebook's data policy target the uniqueness of Facebook's dataset, in terms of volume (restrictions on the amount of data and on data storage periods), variety (limitations as to pur-

[8] BUNDESKARTELLAMT, Press release, *supra* n. 1, 2.

pose of use and the type of data processing), and significance (anonymization).

3. Interpreting the GDPR through the lens of a competition authority

In order to analyze the *Facebook* decision in light of the EU rules on personal data protection, one should bear in mind a simple principle: pursuant to the GDPR, processing personal data is generally prohibited, unless either the data subject has consented to the processing (Article 6(1)(a)) or the processing is expressly allowed by law in some specific cases (Article 6(1)(b-f)). In other words, as the GDPR aims at giving individuals full control of their personal data, the GDPR also recognizes that individuals have the right to decide whether or not to have their personal data processed.

The basic requirements for the effectiveness of a valid legal consent are defined in Articles 4 and 7 and specified further in Recitals 32, 42 and 43 of the GDPR. Consent is any informed, specific, unambiguous, and freely given indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her (Article 4). In other words, with the twofold intent of making data controllers accountable for their processing activities and data subjects aware of the importance of their personal data and of any decision about its processing, the GDPR requires that data controllers perform some activities which guarantee that data subjects' consent, once granted, is well-grounded, genuine, and demonstrable.

In more detail, first, the GDPR assumes that no one can express his/her consent without being informed about what the consent is for. Thus, it asks each data controller to inform data subjects as to: its identity and the intended purposes of the processing for which the personal data are required (Recital 42); the right to withdraw their consent at any time (Article 7(3)); and the many other pieces of information mentioned in Articles 12 to 14 of the GDPR.

In addition, the GDPR does not want data subjects to grant a sort of general, implicit, and/or vague waiver to the processing of personal data, because data subjects must always be aware of the fact that they are giving their consent and of the exact extent of it (Recital 42). Therefore, consent should cover all processing activities carried out for the same purpose or purposes and, when the processing has multiple purposes, consent should

be given for all of them (Recital 32). For example, if the data subject's consent is to be given following a request by electronic means, the request must be clear, concise and not unnecessarily disruptive to the use of the service for which it is provided (Recital 32). Likewise, if the data subject's consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language (Article 7(2) and Recital 42). In addition, the way in which the consent is collected should leave no room for doubt as to the data subject's intentions in providing their agreement to their personal data being processed (Article 4).

Finally, the GDPR forbids data controllers from misleading, intimidating or forcing data subjects, with the ultimate purpose of obtaining their consent. In other words, it requires that consent be given on a voluntary basis, as a result of a genuine choice on the part of the data subjects (Recitals 32 and 42). Therefore, not only do silence, pre-ticked boxes or inactivity not constitute consent (Recital 32), but also consent is not to be regarded as freely given where: (*i*) the data subject has no genuine or free choice or is unable to refuse or withdraw consent easily and without detriment (Article 7(3) and Recital 42); (*ii*) the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract (Article 7(4)); (*iii*) there is a clear imbalance between the data subject and the controller (Recital 43); and (*iv*) the data subject is prevented from giving separate forms of consent to different data processing operations (Recital 43). In contrast, when it comes to electronic means, consent can be expressed by ticking a box when visiting an internet website, by choosing technical settings for information society services or by another statement or action which clearly indicates in this context the data subject's acceptance of the proposed processing of his or her personal data (Recital 32).

That said, in examining whether Facebook's data policy was appropriate pursuant to the GDPR, the GCA took the following steps into the realms of privacy – steps that lead one to believe that the GCA acted as if it were a data protection authority.

First, the GCA noticed that Facebook's users were not fully aware of how Facebook collected and processed their personal data and therefore could not express a genuine and well-grounded form of consent. In general, users could not have expected that the platform would analyze data emanating from other websites. In addition, when they had the opportunity to read Facebook's terms of service, users could barely understand the

reasons why Facebook was processing and, in particular, combining their data. Indeed, according to the GCA, Facebook's terms of service were very complex, replete with links to other explanations, and significantly too opaque to allow ordinary users to understand its data policy. Facebook was, in fact, therefore free to process more data than that which was necessary to offer its social networking service. Furthermore, as a matter of law, users' eventual consent to release their personal data could not be deemed either truly "informed" or "specific" within the meaning of the GDPR.

Second, the GCA further analyzed the consent of Facebook's users sufficiently to maintain that it was not "freely given". The GCA stated quite clearly that it cannot be substantiated that Facebook has to combine all the data it has gathered to fulfil its contract: "[p]rocessing data from third-party sources to the extent determined by Facebook in its terms and conditions is neither required for offering the social network as such nor for monetizing the network through personalized advertising, as a personalized network could also be based to a large extent on the user data processed in the context of operating the social network". In addition – and more interestingly – the GCA argued that even if users had consciously consented to Facebook's data policy, such consent would have not been voluntary, but instead "forced" by the interest in having access to Facebook's social networking services. In the words of the CGA, "[v]oluntary consent to [users'] information being processed cannot be assumed if their consent is a prerequisite for using the Facebook.com service in the first place". The GCA therefore maintained that Facebook's activities in collecting personal data from other websites and combining them with the data already collected on its own platform were extraneous to the offer of the social networking service.

Therefore, such an offer should have not been conditional on users consenting to Facebook's entire data policy[9]. If Facebook were free to conclude such an unbalanced deal – the GCA argued – it was because the platform holds a dominant position in the German market for social networking services. Hence, according to the GCA, when the data controller is in a dominant position, its users' consent is never enough, because such a significant market power always puts users in the position of having to "take or leave" any offers made.

Nevertheless, there is nothing in the GDPR that makes the quality of the consent dependent on the level of the data controller's market power. The GDPR does not make a distinction on the basis of firms' market power, hence it does not recognize anything resembling a "special privacy re-

[9] BUNDESKARTELLAMT, Case B6-22/16, *supra* n. 1, section B(II).

sponsibility" on the part of dominant firms. True, as Recital 43 recalls, imbalance between data controllers and data subjects may call into doubt the freely given nature of the consent. However, and once again, this is a new interpretation of the GDPR that the Bundeskartellamt took the liberty of offering in order to undermine Facebook's data accumulation strategy.

Finally, to conclude definitively that Facebook processed its users' personal data without obtaining the kind of consent that the GDPR requires, the GCA showed that Facebook did not meet any of the other conditions, listed in Article 6 of the GDPR, that legitimize data processing. In particular, in light of the case law of Article 102(a) TFEU, it is worthwhile highlighting the fact that, according to the GCA, Facebook collected and analyzed an excessive amount of data compared to that which was actually necessary for the execution of the contract for the provision of its social networking services.

4. Privacy violations dressed as antitrust

As seen above, Facebook's conduct brought about a privacy harm, because its users lost control over their personal data: they did not know what data Facebook collected, from which sources it collected them, how it combined them, and for what purposes.

However, once it reached this conclusion, the GCA had to turn the ascertained privacy harm into a cognizable antitrust injury. This was not only because the GCA is entrusted with the sole power to apply German and European competition rules, but also because the real goal of its investigation was to target (and hence limit) Facebook's data accumulation strategy.

To this end, first the GCA maintained that Facebook's conduct also violated the constitutional right to informational self-determination – the right under which data protection law provides individuals with the power to decide freely and without coercion how their personal data is processed. In doing so, the GCA stressed that the restriction of the users' right to self-determination was linked to Facebook's dominant position. Second, the GCA relied on the case law of the German Federal Court of Justice (Bundesgerichtshof), which establishes an abuse of business terms based on the general clause of Section 19(1) GWB, in particular when terms and conditions are applied as a manifestation of market power or superior bargaining power [10]. Notably, as far as the appropriateness of conditions agreed in an

[10] BUNDESKARTELLAMT, Case B6-22/16, *supra* n. 1, paras. pp. 525-534.

unbalanced negotiation is concerned, the case law of the Bundesgerichtshof applies to all other areas of the law. Thus, this also holds true for data protection law, the purpose of which is to counterbalance asymmetries of power between organizations and individuals and ensure an appropriate balancing of interests between data controllers and data subjects. Therefore, the GCA concluded that, in order to protect the constitutional right to informational self-determination, German Competition Law should prohibit those cases where one contractual party, such as Facebook, is so powerful that it is able to dictate the terms of the contract to the extent that it abolishes the contractual autonomy of the other party. After all, in undertaking this strategy, Facebook gained a competitive edge over its competitors and increased market entry barriers, which in turn has secured Facebook's market power over end users.

In summary, therefore, the Facebook decision has been taken under German Competition Law, but the GCA used the data protection principles and rules mentioned in the previous section as a benchmark for establishing the abusive nature of the terms and conditions applied by Facebook.

The implications of this approach are thorny and go well beyond the boundaries between competition and data protection enforcement. As seen above, the German stance would represent the end of privacy law as we know it. In *Facebook* the GCA has acted as a self-appointed enforcer of data protection rules (by ascertaining a privacy violation previously undetected by any data protection authority) and has interpreted data protection rules in a restrictive way that goes far beyond the limits of its legal competence. Instead, size should not matter when it comes to data protection law, since a dominant firm is just as bound by privacy rules as its small rivals are. The *Facebook* decision could be used to maintain that no dominant firm can be satisfied with users' consent, because of the power asymmetry.

Moreover, both the European institutions have explicitly stated that privacy-related concerns *as such* do not fall within the scope of competition law. Namely, in *Asnef-Equifax* the CJEU held that "any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection". In the same vein, in *Facebook/WhatsApp* the European Commission maintained that "[a]ny privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection

rules" [11]. Lastly, in *Microsoft/LinkedIn* the Commission argued that any "data combination could only be implemented by the merged entity to the extent it is allowed by applicable data protection rules", noting "that, today, Microsoft and LinkedIn are subject to relevant national data protection rules with respect to the collection, processing, storage and usage of personal data, which, subject to certain exceptions, limit their ability to process the dataset they maintain". In summary, up to now the European institutions have never used competition law to defend individuals' control over their personal data and digital identities.

However, this does not imply that privacy concerns and other non-antitrust concerns, should not be considered in antitrust investigations. Indeed, in *Facebook/WhatsApp* and *Microsoft/LinkedIn*, the Commission acknowledged the role that privacy may play as a driver of consumer choice, hence as an important parameter for competition between digital platforms. Multi-sided media platforms do not offer their services for free, but rather in exchange for attention and personal data. Thus, in big data cases non-price dimensions of competition, such as quality, may be prominent to the extent that data may lead to innovative improvements in products and services. In this regard, it is conceivable that consumers may view privacy as an important element of quality and that the misuse of consumer data may be an indicator of low quality caused by a lack of competition.

Since the quality of products and services may be assessed by taking into consideration whether they are privacy-friendly or not, the GCA could have relied on a privacy-quality theory of harm to force data protection concerns into the traditional antitrust law framework. However, the GCA made no effort to build such a quality narrative, because it would have had to explain why the users had not switched to different social networks, and hence analyze the substitutability between social networks that respect informational self-determination and those that violated this principle [12]. Indeed, from a technical standpoint, quality-driven assessments are difficult to develop. Scholars are working on new econometric tools and indexes, such as the "small but significant non-transitory decrease in quality" (SSNDQ) test, but these still seem difficult to manage [13].

The theory of harm elaborated by the GCA, which is fully consistent

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[11] EUROPEAN COMMISSION, Case COMP/M.7217, C(2014) 7239 final, para. p. 164.

[12] LIANOS, *supra* n. 6, p. 189.

[13] J. CRÉMER, Y.-A. DE MONTJOYE, H. SCHWEITZER, *Competition Policy for the digital era*, Report for the European Commission (2019), p. 45, *http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf*.

with the case law on Section 19(1) of the GWB, is based chiefly on the protection of the constitutional right to informational self-determination. As acknowledged by the same GCA, so far "only the case-law of the highest German court has been established which can take into account constitutional or other legal principles (in this case data protection) in assessing abusive practices of a dominant company" [14]. Conversely, according to the above-mentioned EU cases, while data protection principles can be relevant to the antitrust assessment of a dominant firm's conduct, a mere breach of the GDPR does not fall within the scope of competition law because it is not *as such* a harm to competition.

In this last regard, further clarification is due. Since competition law protects the well-functioning of the market, although a dominant undertaking has a special responsibility not to impair genuine and undistorted competition, its unilateral practices violate antitrust law in two main scenarios: either when they are both exclusionary and capable of reducing consumer welfare, or when they are exploitative. In the first hypothesis, the antitrust assessment of a practice is required to mirror economic analysis and economic-driven theories of harm. Indeed, as argued by the Advocate General Wahl in *Intel*, "competition law aims, in the final analysis, to enhance efficiency" [15]. Clearly enough, the GCA's approach disregarded both the exclusionary and the anticompetitive effects of Facebook's conduct. In contrast, it **is rooted in the idea that virtually every legal infringement by a dominant firm could amount to an antitrust violation** [16], although in this way competition authorities would become "economy-wide super-regulators and enforcers, policing – and *interpreting* – all manner of laws under the auspices of their competition authority." [17]. This makes the approach of the GCA quite distinctive or, at least, German-specific.

In the second hypothesis, i.e., in relation to the case of exploitative abuses, it is worth investigating whether, besides the hurdles of the mentioned privacy-quality theory of harm, the GCA could have succeed in building its investigation on the relevant norm of European competition

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[14] BUNDESKARTELLAMT, FAQ's, *supra* n. 15, p. 6.

[15] Opinion of AG Wahl in Case C-413/14 P, *Intel Corp. v. European Commission,* EU:C:2016:788, para. p. 41.

[16] D. AUER, *The FCO's Facebook Decision: Putting Privacy Before Competition*, Competition Policy International (2019).

[17] G. MANNE, *Doing double damage: The German competition authority's Facebook decision manages to undermine both antitrust and data protection law*, (2019) *https://truthonthemarket.com/2019/02/08/doing-double-damage-bundeskartellamt-facebook/*.

law. Indeed, the Bundeskartellamt stated that such a proceeding against Facebook would "generally" also be possible under Article 102 TFEU. In particular, the GCA admitted that Facebook's practice could have been prosecuted under Article 102(a) TFEU. However, it recognized that Article 102(a) TFEU is not as strict as the general clause of Section 19(1) GWB, which, according to the interpretation provided by the Bundesgerichtshof allows an antitrust authority to take into account the protection of constitutional values and interests in assessing the practices of dominant firms. Moreover, by relying on national law, the GCA does not run the risk of the case being referred to the CJEU.

4.1. Unfairness and exploitative business terms: the Facebook's conduct under Article 102(a) TFEU

Since Facebook's conduct has been assessed by the GCA as being a case of exploitative business terms, the appropriate provision would be Article 102(a) TFEU, which prohibits the dominant firm from imposing unfair trading conditions on its counterparties. From this perspective, the theory of harm would rely on the exploitative effects of third-party tracking in order to assess whether it amounts to excessive data collection [18]. Further, in "data as consideration" business models, the quantity of personal data exchanged for the platforms' services can be conceptualized as the implicit prices of those services. Since the collection of personal data takes place under the terms of an agreement reached between the users of a website and the firm managing that website, one could argue that the act of data collection amounts to an exploitative abuse where the arrangements applicable to it are unfair.

The notion of unfairness has only been analyzed by the CJEU and the European Commission in a few decisions [19]. In some old judgments and decisions, the injustice of the clauses analyzed was traced back to two facts: the circumstance that such clauses were not functional to the achievement of the

[18] See A. EZRACHI, V.H.S.E. ROBERTSON, *Competition, Market Power and Third-Party Tracking*, in 42 *World Competition*, 5, 8-9 (2019) arguing that extensive data gathering and analysis in digital markets, in particular through the amalgamation of data from multiple sources, has the capacity to support the creation of market power.

[19] K.J. CSERES, *Towards a European model of economic justice: the role of competition law*, in H.W. MICKLITZ (ed.), *The many concepts of social justice in European private law*, Edward Elgar (2011), 427. See also H. KALIMO, K. MAJCHER, *The Concept of Fairness: Linking EU Competition and Data Protection Law in the Digital Marketplace*, in 42 *European Law Review*, 210 (2017).

purpose of the agreement, and the fact that the clauses were unjustifiably restricting the freedom of the parties. In particular, in *SABAM*, the CJEU held that an exploitative abuse may occur when "the fact that an undertaking entrusted with the exploitation of copyrights and occupying a dominant position … imposes on its members obligations which are not absolutely necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright" [20].

More recently, the association between unfairness on the one hand and the absence of a functional relationship between the contractual clauses and the purpose of the contract on the other was highlighted in *Tetra Pak II* [21] and in *Duales System Deutschland (DSD)* [22]. Furthermore, in the latter case the Commission referred back to the findings of the CJEU in *United Brands* to state that "[u]nfair commercial terms exist where an undertaking in a dominant position fails to comply with the principle of proportionality" [23].

Moreover, it may be inferred from a reading of some of the Commission's other decisions that in some cases unfairness has been associated with opaque contractual conditions that have increased the weakness of the dominant firms' counterparties, who ended up being unable to understand the actual terms of the commercial offer in question. In particular, in *Michelin II* the Commission concluded that a discount program implemented by the French company was unfair because it "placed [Michelin's dealers, that is, its counterparties] in a situation of uncertainty and insecurity," because "it is difficult to see how [Michelin's dealers] would of their own accord have opted to place themselves in such an unfavourable position in business terms," and because Michelin's retailers were not put in a position to carry out "a reliable evaluation of their cost prices and therefore [could not] freely determine their commercial strategy" [24].

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[20] CJUE, Case 127/73, *Belgische Radio en Televisie e société belge des auteurs, compositeurs et éditeurs v. SV SABAM e NV Fonior*, EU:C:1974:25, para. 15. See also European Commission, Case IV/26.760, *GEMA*, (1981) OJ L94/91; Case IV/26.760 *GEMA II*, (1972) OJ L166/22; Case IV/29.971, *GEMA III*, (1982) OJ L94/12.

[21] EUROPEAN COMMISSION, Case IV/31.043, *Tetra Pak II*, paras. pp. 105-108, (1992) OJ L72/1.

[22] EUROPEAN COMMISSION, Case COMP D3/34493, *DSD*, para. 112, (2001) OJ L166/1; affirmed in GC, Case T-151/01, *Der GrünePunkt – Duales System DeutschlandGmbH v. European Commission*, EU:T:2007:154 and CJEU, Case C-385/07 P, EU:C:2009:456.

[23] CJEU, Case C-27/76, *United Brands Company and United Brands Continental BV v. Commission of the Euopean Communities*, EU:C:1978:22, para. p. 190.

[24] EUROPEAN COMMISSION, Case COMP/E-2/36.041/PO*, Michelin (Michelin II)*, paras. pp. 220-221 and pp. 223-224, (2002) OJ L143/1, where the Commission further argued that, "[the

Taken together, there is scope to argue that the notion of unfairness under Article 102(a) captures clauses which are unjustifiably unrelated to the purpose of the contract, unnecessarily limit the freedom of the parties, are disproportionate, unilaterally imposed or seriously opaque[25]. Therefore, the GCA could have succeeded in showing that Facebook's terms and conditions were unfair because they were, at least, disproportionate, unilaterally imposed or seriously opaque. Further, the Bundeskartellamt could have arrived at this conclusion without giving any consideration to EU data protection law.

This observation gives rise to two conclusions. On the one hand, though there might be cases where a privacy harm may also represent an antitrust harm within the meaning of Article 102(a), no automatism should be allowed, unless one wants to make antitrust enforcement ancillary to data protection rules. On the other hand, if one argues that any law violation affects the competitive process by giving a competitive advantage to the infringer – that is by determining a kind of harm that competition law can address – then any antitrust authority would become a Leviathan, who also intervenes when a company does not comply with any law, such as antipollution rules or tax law. It was not by chance that the GCA admitted that the general clause of Section 19(1) GWB is stricter than Article 102(a) TFEU insofar as it allows the prosecution of practices that barely violate EU competition law[26]. Indeed, the GCA recalled that, pursuant to Article 3(2) of the Modernization Regulation[27], Member States are not precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings[28].

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discount scheme] was unfair not only because the dealers were placed in a weak psychological position during negotiations, but also because, during the negotiations, they were not able to base themselves on a reliable estimate of their cost prices and thus to determine their business strategy freely".

[25] See also R. NAZZINI, *Privacy and Antitrust: Searching for the (Hopefully Not Yet Lost) Soul of Competition Law in the EU after the German Facebook Decision*, Competition Policy International (2019), arguing that the EU case law and Commission practice are capable, in theory, of supporting a finding of abuse by a dominant social network if its privacy policy is unfair under Article 102(a) because it is disproportionate or has no connection with the purpose of the contract with the end user.

[26] BUNDESKARTELLAMT, Case B6-22/16, *supra* n. 1, para. p. 914.

[27] Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, (2003) OJ L1/1.

[28] BUNDESKARTELLAMT, Case B6-22/16, *supra* n. 1, para. p. 914.

5. From privacy violations to antitrust structural remedies

So far, we have discussed how the GCA ascertained that Facebook violated data protection rules to then dress that as antitrust in maintaining that Facebook was capable of harming privacy solely on the grounds of its dominant position.

Putting aside the question of whether this nexus is well-grounded, one thing appears clear: the remedy to the privacy violation should have been a privacy remedy. Indeed, having ascertained that Facebook's users were not fully informed about the data policy of the social network, the GCA requires Facebook to ensure that its users are in a position to know about, and to consent to, each of the data processing activities that Facebook runs on the data gathered inside and outside the platform. At first glance, hence, the solution envisaged by the GCA is fairly consistent.

However, on closer analysis the approach followed by the GCA is intended to do more than increase users' awareness and put them in a position to express their informed, specific, unambiguous, and freely given consent.

Firstly, the GCA stated expressly that it would not be satisfied with users giving their consent with just a simple tick in the box. Indeed, since Facebook has a superior market power and imposes a take-it-or-leave-it offer, the tick in the box cannot be referred to as voluntary consent, even if Recital 32 of the GDPR mentions it among the possible tools available to users to express their consent. Therefore, the GCA is requiring a "strengthened" form of consent, which does not consist in a pure manifestation of awareness, but serves users as a remedy against the loss of control over their personal data by restoring their full and effective free choice.

Secondly, the fact of requesting consent to data combination – which, incidentally, leads to data accumulation – together with the fact that any users should be allowed to continue using the platform irrespective of his/her consent, obliges Facebook (and commentators) to envisage the scenario where some users will deny such consent and still have the right to enjoy Facebook's social networking services. Therefore, this means that Facebook will perhaps be forced to offer at least four different versions of its platform in order to allow users to select the one that best suits their needs/concerns. Namely: (*i*) a "basic" Facebook version resulting from data collection allowed solely on Facebook's platform without any merger with data coming from any other data source; (*ii*) a "pure" Facebook version resulting from data collection and data combination allowed on Face-

book's ecosystem (i.e. Facebook's platform and its owned services); (*iii*) a "premium" version resulting from data collection and combination allowed on Facebook's platform and third party websites; and (*iv*) a "full" Facebook version, resulting from data collection from all the available sources, i.e. the current Facebook package. It is not by chance that the GCA has expressly stated that it is carrying out an "internal divestiture" of Facebook's big data, intended to limit Facebook's competitive data advantage against its rivals.

The criteria proposed by the GCA to improve Facebook's data policy also seem to confirm this stance. Aside from the vagueness of the suggestion that control options for users be added, the other criteria could undermine the uniqueness of Facebook's dataset by affecting its volume (restrictions on the amount of data and on data storage periods), variety (limitations as to purpose of use and the type of data processing), and significance (anonymization). Hence, these remedies being suggested as feasible are intended to target at least three of the "Vs" that characterize big data, namely, volume, variety and value.

Overall, what has been crafted as a privacy remedy reveals itself as an antitrust remedy, and not even a behavioural one, but rather a structural one. This has made the data accumulation process more expensive, with the ultimate intent of making Facebook less appealing for advertisers, who can no longer take it for granted that their audience will be the "full" Facebook version nor that the profiling will be based on such a fully-fledged audience. Making Facebook less attractive for advertisers will weaken the competitive advantage rooted in the uniqueness of its dataset.

6. Concluding remarks

No one contests the commercial importance that user data holds for digital platforms and neither is it refuted that privacy constitutes an increasingly important component of non-price competition. However, the *Facebook* decision raises some urgent questions.

First, one might wonder if it will pave the way to a new wave of cases where privacy violations will be dressed as antitrust violations. As the GCA suggested, Article 102(a) could work as the legal basis for prosecuting as "unfair terms and conditions" the data policies of dominant firms' which do not comply with the GDPR. However, to pursue this goal European antitrust authorities other than the GCA would have to use a theory of harm dif-

ferent from that which underlies Article 19(1) GWB. Instead of maintaining that privacy violations are also antitrust violations as they harm constitutional rights, non-German antitrust enforcers should argue that Facebook's terms of use are disproportionate, unilaterally imposed or seriously opaque.

Second, one may question the GCA's choice to act as if it were a privacy authority entrusted with the power to apply and interpret the GDPR. In particular, one might wonder if this decision were legitimate in light of the two following considerations: (*i*) in relation to the application of the GDPR, the Irish data protection authority should have been the competent authority, rather than the GCA; (*ii*) with regards to the interpretation of the GDPR, the GCA endorsed a quite restrictive approach by opting for some solutions that privacy authorities have not supported before, such as the idea that the existence of a dominant position requires a kind of "strengthened" consent by the users with the ultimate result of placing upon dominant firms a special privacy responsibility.

Third, on closer looking, one may recognize that this privacy analysis led the GCA to target Facebook's dataset by imposing its internal divestiture. The investigation was premised on the idea that the platform's dataset was what made Facebook attack its rivals. Therefore, any unlawful way to handle that dataset – i.e. to build it up, to manage it, or to use it – was understood by the GCA as an anticompetitive way of acquiring a competitive advantage against rivals and so strengthening Facebook's dominant position. Therefore, it should come as no surprise that the criteria the GCA suggested to remedy the detected privacy violations reveal themselves as antitrust remedies which, as a matter of practice, could bring about the structural unbundling of Facebook's services.

Finally, one might wonder if such an expansive approach, which targeted data accumulation by considering privacy violations as sources of competitive harm, is good for the effectiveness of antitrust law. Indeed, one might argue that an antitrust injury happens whenever dominant firms violate any piece of law, because in such cases they acquire an advantage by saving costs or raising rivals' costs. However, this would mean that antitrust authorities would act as economy-wide super-regulators and enforcers.