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Abbreviations

Treaty on the Functioning of the European Union – TFEU

European Union – EU

United States - US

European Court of Justice – ECJ

Court of Justice of the European Union – CJEU

European Data Protection Supervisor – EDPS

Organization of Economic Cooperation and Development – OECD

United Brands Company – UBC

Federal Trade Commission – FTC

Bundesverfassungsgerichtshof – BverfG (German Federal Constitutional Court)

General Data Protection Regulation – GDPR

United States of America - USA

Federal Cartel Office – FCO

Gesetz gegen Wettbewerbsbeschränkter - GWB

Introduction

Dominance is a very strong position in competitive markets, contrary to the known, gaining this position is not a restrictive activity, rather it is one of those remarkable qualities that shows well-founded ambition of the undertaking in question. Dominance as a desirable achievement can be reached either competition friendly or unlawful conducts. Competition law as a main regulatory figure to supervise the markets prohibits the unlawful conducts – misconducts of the market players who have or are assumed to have any kind of intention which might harm the idea of perfect competition in the market. In this meaning, misconducts of the dominant firms are being considered abuses of that position, because dominance is that key element from which the eligibility of the company in question to commit those misconducts generates.

Under the primary source of EU law – Article 102 TFEU a conduct is to be considered as an abuse, when it starts to affect the trade between Member States in a negative way. The ECJ defined the notion of dominance in its case law at the last century that it relates to a position of economic strength, enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by affording it the power to behave to an appreciable extend independently of its competitors, customers and consumers[1]. As is seen from the definition of the Court the understanding of dominance is being related to the strength of the market power which is enough to promote the company higher level of independence to act freely in the market.

In the competition law part of the thesis types of abuses of dominant position, how a conduct of the dominant market player falls under the notion of abuse, in what way should dominant companies in this position act in order to protect effectiveness of competition in the market is going to be discussed. However, the main discussion point in terms of abuses in this thesis is exploitative type of abuses, which are intended to harm final consumers. This EU specific type of abuses will also be reviewed in data economy.

[1] Case C- 27/76 United Brands Company and United Brands Continental v Commission [1978], ECLI:EU:C:1978:22, para. 65; Case C-85/76 Hoffmann-La Roche & Co. v Commission [1979], ECLI:EU:C:1979:36, para. 38

The first chapter will also explain special responsibilities of dominant firms under the notion of competitively efficient market. As the dominant companies possess larger market share in competition and the efficiency of competitiveness depends on the conducts of market players and each player in this sense contributes to the market in due with its market share, then dominant firms are obliged to pay more attention on their conducts which might affect competition in due manner. In this regard, the competences of competition authorities increase in amount in order to detect market failures not only committed within the competition law boundaries, but also to detect the misconducts of dominant firms who abuses their market power by violating other branches of law. Therefore, the chapter will also tend to address this problem.

The second chapter has been dedicated to data protection law part of the thesis. Data takes one of the leading roles in the information century. It is being used massively by the data owners for participating at social online activities, enjoying social media services, in some cases taking discounts in online sale. On the other hand, in order to take pleasure of this activities data has to be subject to processing. As social media platforms grow with network effects, this creates a non-substitutable condition for behavioral advertising. Business model of the mentioned online activity services facilitates market players of the data economy to gain dominance in the market and this "rewarded" dominance gives access to huge amount of data to the possessors. In this regard, the second chapter is going to reveal the placement of data in competition markets.

From the data protection law perspective, the chapter will shortly explain data privacy policy and the legality of processing in the EU by referring to the case law of the Union. These sections are based completely on privacy law. The other parts of the second chapter will be presented in unity with competition law. In this sense, the constitutional right of informational self-determination will play the role of combination.

The third chapter is dedicated to case analysis. The case is Facebook decision of the Bundeskartellamt which has been made in February 2019 as a result of inquiries launched by the FCA in March 2016. The main problematic area stands in the center of the discussions is Facebook's processing and sharing users' personal and device-related data from outside of the company's social network media – from third party platforms. From the first side it might be seen that the problem is data protection violation, because lack of consent directly refers to one of the fundamental rights of individuals, but as far as the key element that caused to the performed violation came from the dominant position of Facebook competition law intervention is necessary. By considering all these, the chapter will present facts of the case in very detailed version in terms of problematic areas and tend to analyze the areas in point-by-point basis.

1. Competition law

1.1. Scope of application and goals of competition law

Competition law has its own goal within its scope of application. This goal is achieving highly competitive performance in every single market by protecting and improving consumer welfare. Although from this sentence it can be understood that consumer welfare seems like to be a tool for the purpose, but in fact it is the supreme target that not only competition law, but also every single company that operates in a competitive market should aim to preserve it.

There is a substantial argumentation about the duties of the competition law. Most of the arguers say that competition law deals with the misconducts of the undertakings which bring violates the rights of consumers in the final step. In contrast to this view there are two other approaches to the functioning aims of the competition law. The first one argues that competition law pursues economic goals which is protecting consumer welfare and providing efficiency on the performing of the competition. The second contradictory view, however, argues that this law sphere attends to stimulate national industry, to foster employment in an economic sense and to preserve environment in non-economic one.[2]

Competition law also deals with balancing competing interests, meaning that the interests of the market players meet purposefully in terms of competitiveness and these competing interests can incentivize the market players to indirectly harm their competitors while trying to build better and larger market

[2] Chalmers D., Davies G., Monti G., European Union law, 3rd ed., chap. 21, "*EU Competition law: Function and Enforcement*", Cambridge University press [2014], p. 944

position for itself. This intention can refer either to improve and invest the existing business in competitively-friendly way, or to harm directly its competitors in the same market or indirectly of final consumers. With assessing this, it should not be underqualified that not only one firm in the market has this intention, but every market player in this regard attends to improve its profit. From this point of view competition law pursues role of providing a perfect balance between these interests. Balance on its own refers to the meaning of equitable competition.

As consumer welfare is being shown off as one of the two main goals of competition law while formulating market structure, in order to understand the scope of this law sphere in a broad sense, we need to look at the scope from the perspective of protection of consumers. Only by this way we will be able to get the entire idea of protecting consumer welfare under competition law.

Consumer welfare is the goal of almost every branch of business law, a basic element differentiates these goals is every branch tries to protect or improve it within its own objective. The objective that makes competition law distinctive from others is competition law preserves consumer welfare under the aim of guaranteeing competitively effective market structure.

More accurate clarifications about the scope of competition law will be explained more detailed in the next divisions of this thesis.

1.2. Abuse of dominant position in the relevant market

Dominance has been defined by Community law for the first time in 1976 as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extend independently of its competitors, customers and ultimately of its consumers.[3] The idea of dominance in this text refers to the strength of power which is sufficient enough to give independency to the dominant undertaking by making it eligible for distorting competition in the relevant market.

The concept of independence in this regard relates to the degree of competitive restraints put forth in the market by the undertaking in question. It

[3] *Supra* note 1, UBC & Commission [1976].

allows us to come to the result that hardness of restraints for competitors or barriers for entry characterizes the independency level of the dominant firm. A dominant position in the relevant market is absolutely normal level that every successful company in competition can achieve. Achievement of dominance can be received with competition-friendly conducts, unless after reaching dominance this kind of conducts will not distort competition in the market, because after distortion that conduct is not competitively-friendly any more, it will be considered as an abuse. So, the abuse is a normal commercial practice that is being carried out by a dominant undertaking in order to harm competition in the market.

Nevertheless, dominance as a notion has some elements, which are formulating this position when they come together on a company. These elements are economic strength, eligibility to behave on the relevant market independently and enough power to prevent effective competition. But it does not mean that the company which already owned this position always acts in a way to abuse it, not every conduct of the dominant undertaking is an abuse unless it does not distort competition in the market.

Experiences in competition law field show that there is also a reasonable concern about dominant digital firms which says that they have strong incentives to engage in anti-competitive behavior.[4] Even if the intention of the dominant undertaking is not distorting competition, as long as it creates market failures or as a result of the conduct by the undertaking in question will negatively affect some weak members of the same relevant market then the conduct is reasonable enough to be considered as an abuse. In this regard, competition law pursues the goal to make the market function in a perfectly competitive way, but this goal should not interfere in and harm the incentives of the dominant companies, discounting of the dominance as a main element, to have strong interests in improving their business, investing or particularly their attempts of benefitting from the growing economy. As is briefly noted in the final report of the European Union, irrespective of dominance, competition law must not kill economic actors' incentives to invest and innovate.[5]

[4] Final report by Crémer J., Montjoye Y.A., Schweitzer H., Competition Policy for the digital era, Publications office of the European Union, [2019], p. 3, available at: http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf
[5] *Ibid*, p. 105.

In comparison with the US antitrust law, it does not prevent monopolies from charging monopoly prices, whereas the US antitrust law believes that restricting such kind of conducts could result in hampering the stimulation of the dominant firms to improve their business. In EU competition law, by contrast, firms in a dominant position must not directly or indirectly impose unfair purchase or selling prices or other unfair trading conditions.[6] Because EU law with requesting dominant firms to have competitors in the market, also requires them to protect consumer welfare as such, it requires market players to act in the most competitively effective way to attract more customers with improving and investing to its business. In other words, EU competition law requires companies to gain customers by their own satisfaction, not by kicking competitors out of market.

While noting competition law responsibilities the authors of the final report also emphasize the responsibilities of dominant firms to have incentives to protect competition in the market,[7] which means that if competition law should protect the interests of the dominant firms to improve their business, dominant firms in their own way should have the responsibility of protecting competition in the market. Although this statements in the final report have been provided for explaining the role of essential facility doctrine in the EU Competition Law, which is acting as a part of exclusionary type of abuses, but as long as the main of the statement is reasonable and equitable enough to be applied to the exploitative abuses as well, it can be generalized under the entire idea of abuse of dominance. Types of abuses with details will be presented in the subchapter.

1.3. Special responsibilities of dominant firms

The very basic idea stands in the origin of competition law is competition law starts working in the market where we have market failures. In order to avoid these market failures every market player should conduct in a highly competitive way and should skip every single behavior that might disturb its competitor. Each market player in this sense should act in due with its market share. As dominant

[6] Gebicka, A. & Heinemann, A. '*Social Media & Competition Law*'. World Competition 37, no. 2 [2014], p.162
[7] *Supra* note 4, Crémer J., Montjoye Y.A., Schweitzer H., [2019], p.105 .

firms have larger shares in the market, they need to pay more attention on their conducts than their weaker competitors in order to preserve highly competitive image of the market.

In EU competition law only dominant firms have special responsibilities which come out of their strong position in the market. Other market actors which do not possess dominant share do not have such obligations required by the law.[8]

A clarification from Franz Böhm can be a good idea for emphasizing the functioning of dominant firms: "the one who has power has no right to be free and the one who wants to be free should have no power".[9]

Under which circumstances a conduct of abuse of dominance faces with sanctioning operation differs from jurisdictions and scopes of applications of various law fields. Under the EU Competition law Article 102 TFEU sanctions abuses only if it affects trade between member states, meaning that EU competition law sanctions abuses by the dominant companies within the borders of internal market if it has negative impact on trade between member states. As one of the main goals of EU internal market is achieving perfectly flawless trade between member states, competition law in this context pursues very important role of performing supervision on functioning of effective competition.

On the other hand, the CJEU has several times noted in its case law that dominant firms carry responsibility of protecting competition in the market and respectively not damaging it. The Court held that a finding that an undertaking has a dominant position is not in itself a recrimination but simply means, that undertaking has a special responsibility, irrespective of the reasons for which it has such a dominant position, not to allow its conduct to impair genuine undistorted competition on the common market.[10]

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[8] The only special obligation of non-dominant firms exists in case of merger control. The EU competition law in this regard assesses the merger cases if they create dominant position under the terminology of "attempt to monopolization". See, Vatiero M. "*Power in the market: on the dominant position",* [2005], *4th page, available at:* http://ec.europa.eu/competition/antitrust/art82/005.pdf

[9] From *supra* note 2, Chalmers & others, [2014], p. 951

[10] Case C-322/81 Michelin v. Commission [1983], ECLI:EU:T:2003:250, para. 57; Case T-228/97 Irish Sugar v. Commission [1999], ECLI:EU:T:1999:246, para. 112

1.4. Types of abuses in terms of dominance

There are two kinds of abuses that have been sanctioned under Article 102 TFEU: these abuses are exclusionary and exploitative types of abuses. Exclusionary abuses are conducts of the dominant firms that have been intended to harm competition in the market by excluding or weakening competitors or can directly refer to the certain competitors.

Unlike exclusionary ones, exploitative abuses are not directed to the competitors in order to eliminate or exclude them, rather they are conducted to harm final costumers and consumers. In this thesis exploitative type of abuses are going to be clarified, which are carried out by dominant firms in the digital world against their consumers, specifically against their users. Nevertheless, for a long period of time the EU Commission has primarily sanctioned exclusionary, rather than exploitative abuses.[11] Because it is mostly very hard for the competition authorities, even for the EU Commission to detect exploitative abuses in order to deter dominant firms from avoiding these conducts. This is the reason why the Community Court has very limited practice on issuing this type of abuses.

Exploitative abuses are kind of unique for European Union. In comparison with the EU Competition law, the US Antitrust law does not sanction exploitative abuses, it only pays attention to the exclusionary conducts.[12] Pinar Akman has added to this concern that the initial intention of the EU founding fathers was to sanction via Art. 102 TFEU primarily exploitative conducts, rather than exclusionary practices.[13] Whereas the time played its role, exclusionary abuses are much detectable in terms of dominance than exploitative abuses.

Under the EU law exploitative and exclusionary conducts of the dominant companies meet where the exploitative conditions prevent customers from choosing competing products.[14] Acquiring this feature in the market relates straightly to super eligibility of the undertaking in question to control the market

[11] Botta M. & Wiedemann K. [2018], 'EU Competition Law Enforcement vis-à-vis Exploitative Conducts in the Data Economy Exploring the Terra Incognita.' Max Planck Institute for Innovation and Competition Research Paper No. 18-08, p.9
[12] *Ib*, p.5
[13] Akman P. [2009], "Searching for the Long-Lost Soul of Article 82 EC" 29(2) Oxford Journal of Legal Studies, cited in: *Supra* note 11, Botta & Wiedemann [2018] p. 6.
[14] *Supra* note 6, Gebicka & Heinemann [2014], p. 163

structure. This is one of those dangerous situations that customers cannot either switch to another competitor or simply locked-in to one market player.

While coming to the exploitative abuses, under Article 102 the Community law sanctions 3 types of: 1) unfair trading conditions; 2) unfair purchase or selling prices; 3) discriminatory prices.

Unfair trading conditions. Article 102 (d) TFEU estimates this clause as making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. This kind of abuses can be assessed from the point that they can harm direct customers or final consumers. Although the ECJ has never discussed the overlap between competition and consumer protection law in cases in which they sanctioned unfair trading conditions[15] and some authors have argued that EU competition law should leave the task of sanctioning unfair contractual clauses in the context of the data economy to data protection and consumer law,[16] it does not mean that this clause should be taken out from the frame of competition law. As this paper is going to clarify exploitative abuses in data economy and dominant firms in online platforms are working vis-a-vis their users, the assessment point of unfair trading conditions against final consumers will be explained in a very broad sense in this thesis.

As each area of law shares different perspectives on protecting consumer welfare by sanctioning unfair contractual clauses, we are obliged to determine the most applicable sphere which matches perfectly to the situation in question. In this sense, the scope of data protection law is providing wider privacy protection for individuals, that of consumer law however is safeguarding the final consumer's informed choice by sanctioning misleading and aggressive commercial practices.[17] Unlike these areas of law, competition law pursues the role of sanctioning anti-competitive conducts that indirectly negatively affects consumer welfare.

Unfair purchase or selling prices. This clause is normally understood as excessive pricing, the idea of the term unfair refers to charging the purchasers or customers in an excessive amount. Although the usual understanding of the term

[15] *Supra* note 11, Botta & Wiedemann [2018] p. 18
[16] *Ibid.* p.20
[17] Botta M. & Wiedemann K. [2019], "*The Interaction of EU Competition, Consumer and Data Protection Law in the Digital Economy. The Regulatory Dilemma in the Facebook Odyssey"* Antitrust Bulletin. p.1, available at: https://journals.sagepub.com/toc/abx/0/0

"excessiveness" is applicable, what amount is being considered excessive, what is the starting point for this concept still remains undetermined. In *Latvian Copyright Society*, the ECJ additionally confirmed that "there is no minimum threshold" in order to decide that if the price is excessive or not. According to the Court, a price is unfair if it is "appreciably higher" than it would be under normal market conditions.[18] This statement connects the notion of excessiveness with the price being reasonably higher in amount than the real market value of the product in question.

Discriminatory prices. A dominant firm breaches Article 102 TFEU when it applies "...dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage."[19] Discriminatory prices under Article 102 of TFEU is included to dissimilar conditions. The Court has clarified this rule in its decision that the policy of differing prices enabling the dominant firm to apply dissimilar conditions to equivalent transactions with other trading parties was an abuse of a dominant position.[20] Depending on the intention of the applying dominant firm, this conduct can either be counted as exploitative or exclusionary. If the strategy was intended to form for instance, a margin squeeze, then it should be considered as exclusionary abuse, because the intention itself was directed to weaken or to exclude competitors. But if it comes to price discrimination which generates from the conduct that the dominant firm sets different prices between same levelled retailers, thereby placing them at a competitive disadvantage, then it should be considered as exploitative ones.

Here there is a tricky point that should be taken into account while assessing the notion of competitive disadvantage on Article 102 (c) TFEU. On one of its recent cases the ECJ said that not every price discrimination condition that the weaker undertaking has been put under, means that the undertaking is in a competitive disadvantage. The Court ruled out that the dominant undertaking who is applying differing prices should have a relevant interest on excluding one of its partners on a downstream market,[21] if there is no interest on excluding the

[18] Case C-177/16, Autortiesību un komunicēšanās konsultāciju aģentūra v. Latvijas Autoru apvienība v Konkurences padome [2017] ECLI:EU:C:2017:689, para 55.
[19] *Supra* note 11, Botta & Wiedemann [2018] p.12
[20] *Supra* note 1, UBC & Commission [1976] para. 234
[21] Case C-525/16, MEO — Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência [2018], ECLI:EU:C:2018:270, para 37

downstream partner form the market, then this situation cannot be considered as competitive disadvantage.

Gebicka and Heinemann came to the conclusion on their explanation that the deeper reason for the prohibition of exploitative abuses in European competition law is the wish to correct market results in the absence of effective competition, on the other hand, they noted in contrast that in well-functioning markets, firms are controlled by their competitors.[22] While connecting these two statements, it would be clearer to sum up that prohibition of exploitative abuses related directly to the protection of final consumers and in this sense, if the authorities will only look for the violations on final customers, as it is now, detection of the abusive conducts by competition authorities will be very hard. But while assessing the point from competitors' aspect, as long as the misconducts of the dominant firms negatively affect the business of their competitors, the divulgence of the abusive intention will reveal itself very easily. In another words, if an undertaking starts to behave independently in the market and this independency has negative influence in the effective functioning of the competition, then that undertaking in the end will face with switching of its customers to other competitors. In this context independency might mean any kind of anti-competitive conduct against consumers, e.g. excessive pricing, making more profit by decreasing the quality of the product, so on. The notion of independency in this regard might refer to the confidence or surety of the dominant undertaking that as a result of its any conduct the customers will not switch to other competitors. From this point it is very agreeable to confirm the aim of the prohibition of the exploitative abuses is protecting the other market side as well.

1.4.1. Exploitative abuses in data economy

Data economy is the most rapidly growing economy in today's world. At the center of this grow stands personal data, which as a key element consists of choices and preferences of individuals. As this content helps the data collectors to benefit from the economy and each new joiner brings more interest to these

[22] *Supra* 5, note 6, Gebicka &Heinemann, [2014], p. 162

collectors, this position of the data grow increases attention of the competition law analysts on this factor.

While drawing a roadmap for this analysis, first need is to look at the nature of the data and how this new element built an economy over itself. The key elements of personal data have been revealed as individually specific personal data, preferences and choices of those individuals in terms of users.

As has already been mentioned in the previous subchapter there are three types of exploitative abuses under article 102 (c) TFEU. These conducts are emerging in data economy as follows: 1) excessive pricing as excessive processing of personal data; 2) discriminatory pricing as different offers for the online service users by dominant undertakings; 3) unfair trading conditions as enjoying better online services in reward to less privacy-friendly conditions.

How the 'personal data value chain' becomes usable for digital market chains has been clarified in the OECD Digital Economy Paper in following four stages: (1) collection and access, (2) storage and aggregation, (3) analysis and distribution and (4) usage of personal data.[23]

Personal data as a payment method for online services has been valued in total at over EUR 300 billion and have been forecast to treble by 2020.[24]

Excessive pricing clause of exploitative abuses was also defined by the Court in its case of *United Brands* that because there was not reasonable relation to the economic value of the product, the price under the issue should be counted as excessive in value[25]. While applying this ruling to the data economy it is needed to compare the expected value of the data with the processed amount of personal data. Here the easiest way is equalizing excessive pricing to excessive processing. Since the value of the personal data depends on the borders of disclosure of such data, profit of the data collecting dominant company will definitely rise in due with the disclosed amount data.

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[23] OECD, '*Exploring the Economics of Personal Data'*, [2013], p. 10, available at: https://www.oecd-ilibrary.org/docserver/5k486qtxldmq-en.pdf?expires=1563789431&id=id&accname=guest&checksum=EEE342FAFDDF8F71C62E9A8678BBF6CB

[24] Preliminary Opinion of the EDPS, "*Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy*" [2014], p. 8. Available at: https://edps.europa.eu/sites/edp/files/publication/14-03-26_competitition_law_big_data_en.pdf

[25] *Supra* note 1, Case UBC & Commission, [1978], para 250.

It cannot be denied that data processing is beneficial also for the data subjects. In this sense benefits of the data disclosure for the processors stand in the first row. Because, from the economic point of view processors are the most profit gaining party in this relationship. In order to explain this statement a little more detailed, we need to take a wider look to the processing system of personal data.

The companies independent of their positions in the digital market are processing data massively and gaining profit from this mass accordingly. Although as a result of this collection the companies offer each data owner that data specified services, in this meaning they process that huge amount of data for providing these services in better and more enjoyable way for their users, but, on the other hand, they enjoy themselves by giving access to other marker side as such. Here emerges third party partnership of digital markets. In other words, in order to serve better facilities to users and to profit therefrom, digital platforms collect data also from other platforms by matching personal data with others. The massiveness of the processing sleeps under this third-party platform 'partnership'.

The main issue stands in the center of our discussions is "network effects". Digital platforms gain their profit from the network effects, meaning that the more user in amount joins to the platform, the bigger in network size it makes the company and this network size relates directly to market share of that company. A very basic understanding stands in the origin of market size of the network effects is, new joiners prefer the network in which they have all, in many cases, most of their friends, colleagues, i.e. all their acquaintances, rather than the new network platforms in order to incentivize them to improve. Therefore, improvement of online platforms in network effects within the digital market tend to bring them up to the dominancy, here occurs competitive distinction between market types. Unlike to other types of markets, here users in face of customers use the service of the platform in which they already have most of their friends and competitors in this type of market try to attract more customers from the very beginning, consequently the winner of this competition, by owning the strongest network effect, not only leads to the market but also in most cases either takes super dominance in the market or even achieves to monopoly. The source of this idea comes from OECD Hearings: dominance - or even monopoly - can be the virtually inevitable outcome of success,[26] where the competition in digital markets characterized as owning tendency of "winner takes all", which comes beyond that of fast-paced innovation and high rates of investment.

There is another reasonable question might be very concerning about the relation of these two spheres of law that whether privacy would be better protected under monopoly than under competition, and whether privacy problems tend to arise from too much competition rather than too little.[27] As we already mentioned in the previous chapter, in the digital market firms are competing to receive wider network size that their competitors. In order to possess the widest network size, in some cases even to be able to compete in the relevant market, they need to improve their business in the manner that their intended number of users will consider the alteration in the services distinctively reasonable enough to switch from other market player to the new one. After reaching this purpose the company will be more likely to increase the privacy unfriendly conditions than the previous market dominant company in order to gain more profit. At the end of the day the companies will be competing with the terms which provide less protection on personal data. Even though the extend that digital companies process personal data is completely lawful under data protection law, by using the wider scope of application of competition law, we can achieve to effective functioning market in a more privacy friendly environment, meaning that by applying consumer welfare goal of competition law, we can force digital companies to compete in a way that not to harm final consumers. Exploitative type of abuses of dominant position on protecting economic well-being of the final consumers appears in this context as well.

In its decision on "Microsoft – Yahoo Search Business" merger decision the EU Commission noted that Microsoft and Yahoo on the market of business search are not competing separately with the strong market player Google in an efficient way. However, the Commission agreed with the statement of majority of

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[26] OECD Hearings on "The Digital Economy, 2012", p. 5, DAF/COMP[2012]22, 2013. Available at: http://www.oecd.org/daf/competition/The-Digital-Economy-2012.pdf

[27] Allen P. Grunes, "*Another look at Privacy*" George Mason Law Review, Vol. 20:4, [2013] p. 1112

respondents to the market investigation that with their merge these two companies will be able to compete with Google more effectively.[28]

Origin of two-sidedness of digital platforms, in itself, comes from connecting two different levelled customers. The "customary" purpose of the processing is serving better facilities to the users, the monetary one however comes from two-sided connection, means while serving user-specific services, platforms get access to their interest points and profit from sharing the access to individuals' data with advertisers. So, digital undertakings are connecting their users with advertisers and in reward although the services are free in nature they earn the attention of the users which is much higher in commercial value.

1.5. Competences of competition authorities on penalizing abuse of dominance in different law spheres

As has been mentioned above, one of the main goals that competition law tends to persist is the protection of consumer welfare. In this sense competition authorities should also pay attention to the conducts of the dominant firms while violating other spheres of law which has negative impact on consumer welfare. As is already written in the subchapter 2.3., a conduct which is completely lawful under other spheres of law, can be subject to breach of rules under competition law. In this regard, competition law attends stricter goals than other law fields while protecting consumer welfare. The rule has been set by the ECJ in order to mention the priority of scope of application of competition law on other spheres of law. The Court found out that in most of the cases conducts about abuses of dominant positions had been completely lawful under other branches of law.[29]

On the other hand, the ECJ also ruled out 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

[28] Decision of EU Commission on Case No COMP/M.5727 – Microsoft/ Yahoo! Search Business, [2010], para 253, 254, 256, available at: http://ec.europa.eu/competition/mergers/cases/decisions/M5727_20100218_20310_261202_EN.pdf

[29] Case C-457/10 P, *AstraZeneca AB & AstraZeneca plc*, v. European Commission, [2012], ECLI:EU:C:2012:770, para. 132.

protection.[30] Most of the authors argue that this statement by the Court should be understood as there is no correlation between these two spheres of Law and because of the lack this direct connection, data protection violations cannot be fall under the scope of competition law. However, in order to determine the scopes of different law areas more precisely, we need to understand this description as follows: recognition that competition, data protection and consumer law are separate policy areas that pursue different objectives.[31] In addition to this content, it is also appreciated to note that as data protection and competition law are two members of EU law family, regardless of their different material scope and normative objectives, these two law spheres share significant family ties.[32]

While comparing with US practice in evaluating whether a trade practice is unfair, it is quite common to see that the FTC focuses considerably on substantial injury to consumers,[33] rather than seeking for market failures.

Some authors argue that in data protection and competition law relationship the Commission should not detect abusive conduct by simply referring to privacy law. Their approach is rather basing on disproportionality, but on the other hand they evaluate a violation of data protection law as an additional weight to the abuse theory.[34]

The Court stated in its case law that even if a price for a product has been determined by the national regulatory authority, it does not mean that that conduct might not be an object to abuse of dominance.[35] Here the ECJ confirms much stricter role of competition law than other branches of law in the national level. Considering that competition law aims for perfectly functioning, failure-free markets, regardless of which lawful conducts do the dominant firms pursue in the market, as long as these activities of the firms in question harms either competition or final customers, they will be considered misconducts under the terms of

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[30] Case C - 238/05 Asnef-Equifax & Administración del Estado, [2006], ECLI:EU:C:2006:734, para. 63

[31] *Supra* note 17, Botta & Wiedemann [2019] p. 12

[32] Costa-Cabral, F. & Lynskey, O. "*Family ties: the intersection between data protection and competition in EU Law.",* [2017], 54 Common Market Law Review 11, p. 14.

[33] Solove D. J. & Hartzog W., "*The FTC and the New Common Law of Privacy*", 114 Columbian Law Rev. 583, [2014] p. 639

[34] Volmar, M.N. & Helmdach K.O. "*Protecting consumers and their data through competition law? Rethinking abuse of dominance in light of the Federal Cartel Office's Facebook investigation*". European Competition Journal, [2018], Vol. 14, p. 203

[35] Case C-280/08 P, *Deutsche Telekom AG v. European Commission*, ECLI:EU:C:2010:603, [2010] para. 80-83

competition law. That is to say, in conclusion with its this decision the Court affirmed priority of competition law on other branches of law.

2. Data protection law

2.1. Data privacy policy and right to privacy of individuals in the EU

The origin of protection of personal data in the Europe comes from Article 8 of the European Convention on Human Rights and Fundamental Freedoms.

In the Article 8 paragraph 2 of the Convention it has been explicitly notified that *there shall not be any interference by a public authority with the exercise of right to respect for private and family right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, ... or for the protection of the rights and freedoms of others.* This rule has been confirmed by Directive 95/46/EC adding that each of the Member States of the Union should formulate their national laws in the way that to take the protecting fundamental rights as an object to processing of personal data and it should not lessen the protectivity level of the Convention, rather should provide more security in terms of privacy of the individuals.[36]

One of the remarkable histories in the chronological order of data protection should be noted is Convention 108 of Council of Europe which should be mentioned with its being the first internationally legally binding instrument dealing explicitly with data protection.[37]

Other vital element which has already been mentioned but in due course becomes next is the Directive 95/46/EC, which is the very first legal document that regulated data protection in the EU law.[38]

[36] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995], recital (10)
[37] Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data [1981].
[38] European Union Agency for Fundamental Rights & Council of Europe, [2014], *"Handbook on European Data Protection law", p. 14*

Charter of Fundamental Rights comes up next on the historical chronology on the regulation of personal data. In Article 8 of the Charter two basic rights of the individuals have been enshrined: first, protection of personal data of the citizens of EU and second, access to their own collected data and right to have it rectified.

Other than the Article 8 of the Chapter, there is another EU wide legally binding treaty that regulates data protection law, which is TFEU with Article 16 providing a broad data protection ruling on the processing of personal data for the legal persons in the EU.

The next and most notifiable document in the data protection history is the GDPR, which replaced the Directive 95/46/EC with providing more specific and more precise regulation in terms of protection of personal data.

2.1.1. Privacy preferences of individuals: right to informational self-determination

The term right to self-determination was firstly used by the German Constitutional Court (*Bundesverfassungsgerichtshof*) on 15th of December 1983.

More subtle instances would be, for example, instances where employees would know they are being monitored by their employer and their productivity evaluated in real time. Although they do not have *expectations* of privacy in that case, they still have lost something that very much resembles 'their privacy'.[39]

The Federal Court states in the abstract of the case that the limitations of the "right to informational self-determination" are only permissible if there is an overriding public interest.[40] The Court as a continuity of this statement further clarifies the conditions of this limitation under which the right cannot be fulfilled. These conditions are requirement of statutory basis, specification of the conditions and scope of limitations which should have been made clear and understandable to the data subjects under the principle of legal clarity that has been originated from the rule of law and furthermore, during this process is being done, the legislator on

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[39] Rouvroy A. & Poullet Y. [2009], Chapter 2: "The Right to Informational Self-Determination and the Value of Self- Development: Reassessing the Importance of Privacy for Democracy." From Serge Gutwirth, Yves Poullet, Paul De Hert, Cécile de Terwangne, Sjaak Nouwt, *Reinventing Data Protection?* p. 48

[40] BVerfG, Judgment of the First Senate of 15 December 1983 - 1 BvR 209/83, para. 2 ECLI:DE:BVerfG:1983:rs19831215.1bvr020983, Available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1983/12/rs19831215_1bvr020983en.html

the other hand should examine that the principle of proportionality is not being violated simultaneously.[41]

There are two elements that can characterize right to informational self-determination: the first element is the free and informed consent of the individuals, which gives an important ground to legitimize data processing, and, second one is individuals' various rights to exercise control over their data, such as rights to correction or erasure.[42]

The Bundesverfassungsgerichtshof by 'discovering' this fundamental right referred to the major data protection principles that *directly* derive from two basic Constitutional provisions[43] that consecrate the value of autonomy (self-determination) and the incommensurability (dignity) of each person in the society.[44] In the view of the Court the understanding of informational self-determination contains independence of individuals to decide the 'fate' of their data and different preferences of those individuals in respect of their social status in their mind. Here the cognitive social status refers to the impression of the natural persons on themselves. The value of the autonomy hides in these impressions, meaning that more limited, stricter or lighter privacy preferences of the natural persons is directly related to difference of the choices in individuals' mind.

The other main issue that stands in the center of our discussion is the notion of consent. Under the light of informational self-determination consent plays a main role in two-party relationship under the knowledge of "freedom of contract" and in this meaning, it empowers the data subject to determine the extent of the disclosure of his or her own personal data. But what makes consent an issue in terms of data processing is its being inadequate from users' side.

Most of the data protection authors approach to the consent under the notion of right to informational self-determination as a myth of theory. In their view, the notion of consent for the processing of personal data is the main legal

[41] *Ib.,* para. 3-5

[42] B.-J. Koops, "*Trouble with European data protection law*", International Data Privacy Law, [2014], Vol. 4, No. 4, p. 251

[43] The written two provisions come from Article 1: '*The dignity of man shall be inviolable. To respect and protect it shall be the duty of all states and authorities'* and Article 2 of the Grundgesetz [1949]: '*Everybody shall have the right to the free development of his personality insofar he does not violate the rights of others or offend against the constitutional order or the moral order.'* Cited in *supra* note 39, Rouvroy & Poullet**,** [2009], see p. 53-54.

[44] *Supra* note 39, Rouvroy & Poullet**,** [2009], p. 54

ground, but when it comes to exercise, the understanding of consent does not leave the theoretical framework, that is to say it does not have practical meaning.[45] While going a bit further in their explanations, some of the authors argue the idea of so called "transparency paradox"[46], meaning that simplicity and clarity unavoidably results in losses of fidelity.[47] Lack of transparency in terms of nowadays' data processing is being assessed from the point that natural persons do not have any idea, neither before giving their willful consent, nor after it that in which way their data is going to be used, to which extend it is going to be shared with third parties, in which degree their data is going to be disclosed and conclusively, what will be the result of the processing. If we argue the simplicity of data payment method, for instance there will not be any kind of fraud issues, on the other hand we should be ready for the complicated consequences of the activity of processing.

It is unilaterally known that most or at least more than half of the internet-based service users do not read the privacy terms and conditions, they just click to the agree button in order to go through the system. From this point of view, they argue that consent is simply not a suitable approach to legitimate data processing in online contexts.[48]

In order to compare the similarities in view of lack of adequate consent we can analyze the situation from the employees' perspective. Many data protection authorities also rightly see employment relationships as being inherently dependent, meaning that employees cannot meaningfully consent to data processing.[49] In this context it should be noted that every consent giver agrees on the privacy terms in due with their will. But what we need to discuss is, how free are they at the time of agreement, in other words, their weaker position than policy makers. The main comparison should be done here is, regardless of the willingness

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[45] *Ibid.*
[46] Nissenbaum H., "A Contextual Approach to Privacy Online", Dædalus, the Journal of the American Academy of Arts & Sciences 140 (4), [2011], p. 36. Available at: http://www.cs.cornell.edu/~shmat/courses/cs5436/contextualapproach.pdf
[47] Barocas S. & Nissenbaum H., Chap. 2: "*Big Data's End Run around Anonymity and Consent*", from Privacy, Big Data, and the Public Good - Frameworks for Engagement, Cambridge University Press [2014], p. 58, available at: https://nissenbaum.tech.cornell.edu/papers/BigDatasEndRun.pdf
[48] *Supra* note 42, Koops, [2014], p. 251.
[49] Purtova N., "*Default entitlements in personal data in the proposed Regulation: Informational self-determination off the table ... and back on again?*", [2014], Computer Law & Security Review, Volume 30, Issue 1, p.11, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2323643

of the given consent, the situation in which the consent giver was coerced to do so. As the employees are powerless to not to agree with their data to be processed, they are supposed to assent with the terms of processing of their data. Looking at the problem from employees' perspective would serve us the entire scene. The result indicates, overall, that as the notion of consent here comes from the desire of the employee to keep his or her current job, the same applies to the users in digital platforms. Users in the digital platforms are powerless in the same manner.

In this standpoint we can also refer to the decision of Supreme Court of France in which the Court did not allow the reading of an employee's email messages, even with the employee's consent.[50] Here by protecting privacy of the employees the Court confirmed their weaker position and tried to equalize the mutual interests of parties under the supremacy of its decision.

As long as the preferences of the individuals for data privacy will differentiate from one to other, generalization about beneficial aspects of data processing will remain impossible.

2.2. Data on digital markets

Personal data is being defined one of most valuable factors of the business relations in digital world as a result of technological improvements. Although there are too many diverse thoughts about data as an object to competition investigations, but it is an undeniable fact that data is the main element that triggers incentives of the competing firms to gain the market power in digital economy. The authors of this idea often argue that the scopes of data protection and competition law are very diverse in nature. However, even though data protection and competition laws serve different goals, privacy issues cannot be excluded from consideration under competition law simply by virtue of their nature, that is to say, as long dominant undertaking serve data as a main input of their products or services, data as a main

[50]See *Nikon France v. Onof*, Cour de Cassation (Supreme Court of France), soc., 2 Oct. 2001, No. 4164w, [2001], cited in: *supra* note 49, Purtova N., [2014], citing no 70: cited in Christopher Kuner, European Data Protection Law: Corporate Compliance and Regulation, (2nd edition, Oxford University Press, [2007], p.212.

source of their income can no longer be excluded from the scope of competition law.[51]

The GDPR defines personal data as any kind of information that is related to an identified or identifiable natural person. Natural person in this sense is considered the one who can be identified, directly or indirectly, an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the certain characteristics of that natural person.[52]

This precise definition of personal data shows off very careful attention of the EU competent authorities on this object. The explanation draws every single detail that a natural person can possess in terms of data specification.

There are sorts of restricting measures that have been set by the application of GDPR. For instance, with the implementation of the GDPR, it has become evident that certain dominant platforms have started using the Regulation to justify measures that allow them to leverage their market power to the extend into new markets by restricting the access of news media companies to data.[53]

However, the main restrictive framework for the personal data to be processed is consent. Under the EU data protection law consent as a decisive indication of the data subject's agreement to the processing of personal data relating to him or her should be freely given, specific, informed and unambiguous.

In order for processing to be lawful, personal data should be processed on the basis of the consent of the data subject concerned or some other legitimate basis, laid down by law.[54] The legal text explicitly includes the necessity for the performance of a contract to which the data subject is party as one of those legitimate basis.

On the other hand, personal data as an object of identification became a main tool for gaining market power by the online activity serving firms in the

[51] Autorite de la Concurrence & Bundeskartellamt, joint report: "*Competition law and Data*" [2016], p.23, available at: http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf

[52] Regulation, (EU) 2016/679, 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 (GDPR) [2016], OJ L 119/1, Article 4(1)

[53] News Media Europe (NME) submission to the European Commission (EC): "*Shaping competition policy in the era of digitization"* [2018], p.3. From the debate between NME and EC, available at: http://ec.europa.eu/competition/information/digitisation_2018/contributions/news_media_europe.pdf

[54]*Supra* note 52, GDPR, [2016], recital 40.

digital markets. Since, the data is being used as a "payment method" by the individuals, we need to look at the financial nature of the personal data.

As this paper is going to look at the data protection issues from the economic perspective, it would be appreciated to check the economic value of personal data from the data protection law objective. Unfortunately, this being said that the question has not yet been resolved as to what extend current data protection law provides legal protection of data as property.[55] We can justify the lack of the answer to this question in a way that as data protection law mostly reveals data protection as a fundamental right of individuals, it is being approached as the obligations of the States towards its citizens.

First of all, the question as to what level of data protection is optimal in terms of economic theory cannot be answered in any way in general terms. In particular, economic findings in this regard can only be applied in individual cases.[56]

Although the German Monopolies Commission approached to this context as no generalization in terms of economic value of the data possible, there are a few noticeable ideas in the literature on the issue of using data as a payment method.

In order to emphasize the value of it, data has been referred as "new oil" or as a "new currency" for several times.[57] The reason for considering data as a new oil is the purpose of its being used as a payment method in substitution with monetary payment.[58] In the EU one of the legal basis to use data as a way of payment is the proposal for the Digital Content Directive.[59]

It is very well conceivable that consumers should pay for the services they want to benefit from. There is nothing different in the online services, so, in order to use social network media services a price is to be paid or the consumer actively

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[55] German Monopolies Commission, [2015], "*Competition policy: The challenge of digital markets*",(special report No68), para. 88, *available at:* www.monopolkommission.de/images/PDF/SG/s68_fulltext_eng.pdf.
[56] *Ibid*, para. 87
[57] Speech of former consumer commissioner Kuneva at the Roundtable on "Online Data Collection, Targeting and Profiling": '*Personal data is the new oil of the internet and the new currency of the digital world*', 31 March 2009, SPEECH/09/156, available at: http://europa.eu/rapid/press- release_SPEECH-09-156_en.htm
[58] Graef I., "*EU Competition Law, Data Protection and Online Platforms. Data as Essential Facility*", [2016] Kluwer Law International, p. 129-130.
[59] *Ibid.* p.130

provides counter-performance other than money in the form of personal data or any other data.[60]

In the literature there is a strong debate about data being financially underestimated, meaning that, some authors argue that data does not act in the digital markets to replace monetary value. There have been explored three main grounds in order to show that data collection does not seeks to pursue any kind of payment method. The reasons are revealed below.

First, the author of this idea writes that the online market is complicated by the ubiquity of business models bundling advertising with products and services offered to consumers at zero monetary price. In this sense, she indicates advertisers as these businesses' customers, but not the users.[61] In her opinion, data is a tool for business partners to gain profit from, for one side, the services they offer to the significant public, for the other – advertisers' side, demonstrating their products.

Second, internet users do not know the "prices" they are paying for products and services supported by behavioral advertising because they cannot reasonably estimate the marginal disutility that particular instances of data collection impose on them.[62] As long as the individuals do not even know how their data is going to be used, to which third parties it is going to be shared, to what extend their data is going to be disclosed, there always be strong impossibility about the precise estimation of the price of personal data.

And finally, the third main reason for assessing data as a tool for digital market players in order to benefit from their business is that the online data collection and aggregation associated with the behavioral advertising business model create collective action problems for consumers, impeding them from expressing their preferences about data collection in individual transactions.[63] The collective action problem in this text stemming from the network effects of the digital market. All in all, as a result of exploration the estimated conclusion is the

[60] Article 3(1) of the proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content (proposal for a Digital Content Directive), 9 December 2015, COM(2015) 634 final, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015PC0634&from=EN, cited in: *supra* note 58, Graef I, [2016].

[61] Strandburg K.J., [2013], Free Fall: "*The Online Market's Consumer Preference Disconnect*", University of Chicago Legal Forum: Vol. 2013, p. 96

[62] *Ibid.*

[63] *Ibid.*

digital markets are not working in accordance with the preferences of data owners, in due with that of advertisers.[64]

While it may seem that individuals freely choose to pay the "informational" price, the price of not engaging socially, commercially, and financially may in fact be exacting enough to call into question how freely these choices are made.[65]

2.2.1 Legality of processing within the EU

Harmonization on the processing of personal data has first been legalized and ruled by the Directive 95/46/EC of the European Parliament and of the Council in 1995. The Directive seeks to protect the fundamental rights and freedoms of the natural persons within the borders of the EU in respect to processing activities and in this regard to guarantee the free flow of the personal data between EU Member States. Directive also sets rule that national legislation cannot lessen the protection level of data privacy issues of natural persons, but more protective regulation in national level is allowed.[66]

The case law of the ECJ on Facebook case about the protection of individuals with regard to processing of personal data and free movement of this data[67] can be a very matching example on explaining the role of the Directive in this field.

However, after the GDPR came into force, the Directive has been substituted and thereby national laws of the Member States on the data protection has been brought to the larger extend. Under the GDPR the processing of personal data is permittable within the EU, as long as such a process takes compliance with Articles 6, 9 and 10 of the Regulation, meaning that if the activity of the personal data collecting company do not take accordance with the legal provisions of these three articles, the activity in question is prohibited under EU law.

Along with this legal basis the activity of data processing should comply with the principles of data protection which are related to such activity. These

64 *Ibid,* p. 97
65 *Supra* note 46, Nissenbaum H., [2011], p.35
66 *Supra* note 36, Directive 95/46/EC, recital 10, cited in note 72, C-131/12, "*Google Spain"*
67 Case C- 210/16, Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein v. Wirtschaftsakademie Schleswig-Holstein GmbH, [2018], ECLI:EU:C:2018:388,

principles are explicitly noted in Article 5 paragraph 1 and 2 of the Regulation. The Article firstly provides that personal data should be processed in a lawful, transparent and fair manner. This provision includes three different and basic principles of processing: lawfulness, transparency and fairness.[68] If lawfulness is required while processing the personal data, there should be a legal basis for the proposed action. Secondly, the data processing should be carried out in a transparent manner, which means that the activity should be pursued transparently in relation to data subject. Thirdly, the principle of fairness means that regardless of the purpose for the processing, the service or remuneration that the data subject will receive should be fair or proportionate to the amount of processed data. Article 5(1) of the Regulation also contains six more principles to ascertain the boundaries of legal processing for the data collectors and to assure data subjects with more protective provisions in terms of privacy. These principles are purpose limitation, data minimization, accuracy, storage limitation, integrity and finally, accountability. Among these principles principle of purpose limitation should be highlighted.[69] The principle contains two elements: first element is about the purpose of the processing should be either explicit or legitimate (principle of purpose specification), second element was about excessive processing of personal data, which is relating to the restriction of further processing of personal data under the consent of the data subject after the collection of it.[70] The importance of this principle has been defined in a more simple way by Costa-Cabral & Lynskey that personal data should be 'adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed'.[71]

2.2.2. Case law of the EU assessing violation on data processing under GDPR

In its Google-Spain case the Court sensitively touched to the applicability of EU data protection law to the activity of the companies those in fact are dealing with personal data of individuals within the EU but are established outside of it. The judgement of the Court belongs to 2012 and since at that time the GDPR was

[68] *Supra* note 52, GDPR, [2016], Article 5(1)(a)
[69] *Supra* note 32, Costa-Cabral & Lynskey, [2017], p.5
[70] Feiler L., Forgo N., Weigl M., The EU General Data Protection Regulation (GDPR): A Commentary, Global law and Business Ltd, [2018], p. 18
[71] *Supra* note 32, Costa-Cabral & Lynskey, [2017], p.5

not in force, the Court by reassessing Article 4(1)(a) of the Directive 95/46/EC ruled out that, because Google as a personal data collecting company orientates its activity towards the citizens of the EU Member States and although it is a third State established company, as long as it has a branch or subsidiary in Spain, the Directive applies.[72]

In its recent judgement on the processing of personal data the ECJ held that the consumer protection association are not precluded from bringing an action to the Court against a person who is allegedly responsible for data protection infringement. The Court expressed that the Directive 95/46/EC did not preclude the consumer protection associations from this right, rather the GDPR provides this possibility precisely.[73]

This press release can also be applied to the competition authorities as well. Because, as the ruling is on consumer protection associations, as one of the main goals of competition authorities is to protect consumer welfare, this finding from the consumer protection point of view is applicable to the competition authorities in the same way.

In Microsoft and LinkedIn case by citing to the Article 7 of the Directive 95/46/EC the Commission noted that 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.[74]

2.3. How can a data policy violation be subject to abuse of dominant position?

In this subchapter the scope of application of EU competition law in the field of protection of personal data will be discussed. The section will clarify that how can the violations of privacy law fall under the scope of competition law.

[72] Case C-131/12, Google Spain SL, Google Inc.v Agencia Española de Protección de Datos (AEPD), Mario Costeja González, [2014], ECLI:EU:C:2014:317, para 55-60

[73] The CJEU, Press release 99/19 on its judgement C-40/17, "Fashion ID GmbH & Co. KG v Verbraucherzentrale NRW eV", [2019], ECLI:EU:C:2019:629, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-07/cp190099en.pdf

[74] Case Microsoft/LinkedIn (C(2016) 8404 final) Commission Decision [2017], para. 177, cited in: Colangelo G. & Maggiolino M., "*Data Protection in Attention Markets: Protecting Privacy through Competition?*", Journal of European Competition Law & Practice, [2017], Vol. 8, No. 6, p. 365.

Competition law pursues different goals from data protection law, therefore their different objectives can result with confusion, but it does not mean that their scope of application cannot meet each other in one point.

European Court of Justice has underlined the autonomy of competition law from other branches of law for several times. It is very well conceivable that a behavior which is perfectly legal under data protection law violates competition law.[75] In its case law of *AstraZeneca,* the Court mentioned that in most of the cases the conducts are being considered as the object to competition law are completely lawful under other fields of law. On the other hand, it has also been mentioned in the literature by citing to the case law of the Court with *Deutsche Telekom* that even if tariffs have been authorized by the competent regulator, there may be still an abuse of a dominant position.[76]

While coming to the value of privacy of natural persons' from an economic perspective, there can be realized two methods of evaluating the value of data in the theory, which is either deriving from their preferences for privacy (privacy as final good) or from other advantages of keeping information private (privacy as an intermediate good), e.g. for not getting harmed or discriminated.[77]

We should make an assessment on one aspect: the assessment should be the price comparison for the services that the online platform charges its users for their usage at the beginning of the term in which the undertaking in question entering to the market and the price which that online platform charges its users after possessing strong market power and being dominant. But as long as we do not have chance to give data economic value[78], we cannot make this assessment from monetary aspect. However, as the data gains value with the privacy preferences of processors, we can make this assessment in favor of privacy friendly terms and conditions.

We should assess the free nature of the services as to the extent that the personal data is collected and being commercially used by the dominant firm from the point of the application of competition law to the conduct of data collection. It

[75] *Supra* note 6, Gebicka & Heinemann [2014], p. 165.
[76] *Ibid.*
[77] Wolfgang Kerber "Digital Markets, Data, and Privacy: Competition Law, Consumer Law, and Data Protection" [2016], p. 4, available at: https://www.uni-marburg.de/fb02/makro/forschung/magkspapers/paper_2016/14-2016_kerber.pdf
[78] It is assumed that the value of personal data will treble until 2020 which has been estimated in 2014 in EUR 300 billion. See: *supra* note 24, EPDS, [2014], p. 8

means that although in fact the provided service by the online platforms are free in nature but as long as they are being used in commercial manner through advertising, the collection of this data should be assessed under competition law as long as this conduct is being carried out by dominant firm and the amount of collection is related to the position of the undertaking in the competition market.

The main idea stands behind this issue is that creating a highly competitive market in which the firms are competing with services they provide to their users under offering more privacy friendly conditions. This allows us to say that exactly in this point competition law meets with privacy law, where firms are competing in a digital area for attracting more customers with the services they provide for the users. But this situation becomes to be tricky when the provided services are brought to the customers by violating their right to privacy. The violation of the fundamental right occurs when collection of data by the competing firms fulfilled excessively for commercial usage. The problem starts to appear in this point: excessive collection of the personal data becomes an asset for the digital market players to compete with each other and this excessiveness creates an imbalance between market sides. In the next paragraphs three solutions for this problem will be clarified.

The first way that can be suggested to solve weak competition between firms and incentivize them to be more interested in offering privacy friendly conditions. However, this is the harsh reality that business model of the digital platforms' triggers competing firms to violate privacy conditions. That is to say, the network effects and the other structural features characterizing digital markets strengthen the market power of digital platforms and, thus, decrease their incentives to compete to offer high levels of privacy or privacy friendly products, services and technologies.[79]

In this context the second solution is the granting of right to decide the fate of the processed data by the online platforms to the users in order to preserve and protect their own rights in regard to services they are using. If this solution will be settled out then the competing firms will be more incentivized to conduct in a privacy-oriented manner in front of their users. So, with this way the platforms will

[79] Harbour P. J. & Koslov T. I., "Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets", [2010], Antitrust Law Journal, Vol. 76, pp. 769-797. Cited in Colangelo G. & Maggiolino M., [2017].

compete for attracting more users in favor of offering more privacy friendly conditions. Main problematic area that can be faced with during implementing this solution is that not each of the users are capable of understanding their privacy in the equal manner. In other words, privacy preferences are personal and diverse by nature.[80] This seems a bit absurd but in order to give this choice to users, each of whom are not entitled to understand their privacy in the same manner, online service providers should be sure that the users are eligible enough to understand the extend of the usage of collected data. The most advantageous way to have this purpose realized is rewriting the privacy terms and conditions in more simple and unambiguous form. But the problem does not only stand in the ambiguous wording of the terms and conditions, but also, it is in the interests of the dominant firms on abusing their access to the personal data by underestimating the value of the it.

As it has been stated in the subchapter 2.1.1. the German Constitutional Court in 1983 approached to this incommensurability as free determination of one's personal information, from this point the High Court clarified the notion as different self-evaluation of privacy of each member of a society.

Third solution gives the view that under Article 102 TFEU excessive collection of personal data will lead to exploitative price abuse. As the users are not paying for the services that are being offered in fact free in nature, but as long as the data holders are using collected data in commercially beneficial manner and the proportion of collection and the profit thereof is being increased accordingly, then it is fair to come to the conclusion that the provided services are being paid with personal data. Here the solution is not equalizing the proportion of data collection and the profits of the companies from this activity, rather the solution is giving competition authorities the competence of checking that if the value of the services that are being offered to the data owners are proportionate to the profit of the data holders.[81] If the services are lower in value than processing and disclosing

[80] Farrell J. "*Can privacy be just another good?*", J. ON TELECOMM. & HIGHTECH. L , Vol. 10. [2012], p. 251-252.
[81] The question might occur that this competence can also be given to the data protection authorities, but as long as data protection law keeps its silence on evaluating economic value of the personal data, by considering the consumer protection aim of the competition law, it is appropriate to grant this competence to competition authorities.

of personal data and the users don't have any other firm in the market with the same facilities to switch to, then it is clear that the dominant firms are already eligible enough to regulate the market and set desired prices. This situation allows us to say that disproportionality in terms of privacy should be assessed as an unfair condition and because, it is being pursued by the undertaking which is dominant in the market and is eligible enough to lock the users in one digital platform, this case should be solved under the scope of unfair trading conditions clause of exploitative abuses.

The most specific point should be taken into account is if the provided services are valuable enough for disclosed data. While going through details, it means that whether the enjoyable part of the services is worth for personal data owners in return to the sharing of their data by controller to third parties. The unfairness of trading conditions exactly comes from the proposed disproportionality that leads dominant market player to use personal data of the individuals without even taking their consent. An unreasonable expansion of the data use policy and, all the more, violations of data protection rules, may therefore constitute an abuse of a dominant position.[82]

Conducts depriving some competitors from access to data could also weaken competition and even lead to exclusion of competitors in different situations.[83]

In one of its cases the Court by citing to its case law emphasized that Article 82 EC (now Article 102 TFEU) covers not only those practices that directly cause harm to consumers but also practices that cause consumers harm through their impact on competition.[84]

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[82] *Supra* note 6, Gebicka & Heinemann [2014], p. 165
[83] *Supra* Autorite de la Concurrence & Bundeskartellamt, [2016], p.17.
[84] Case C-52/09, *TeliaSonera Sverige* [2011] ECR I-527, para. 24; Case C-209/10, Post Danmark A/S v. Konkurrencerådet, [2012], ECLI:EU:C:2012:172, para. 20.

3. Analysis of Facebook case

Facts of the case

In February 2019 after its long-lasting investigation the German Federal Cartel Office published its decision on abuse of dominant position in German social media market by USA based company Facebook. The investigations were started by the FCO in 2016.

The three years investigations aimed at sources from which user and device related data being collected. The FCO accused Facebook of collecting the users' data also outside of the Facebook.com services without explicit consent of the data owners. It also took into account of the productivity and efficacy of the business model of the social media dealing with behavioral advertising, but still did not justified the conduct of the Facebook about processing both types of data from third party platforms.[85] As a result of its inquiries the FCO came to conclusion that Facebook abused its dominance in the market by massively violating data protection boundaries.

While determining market share of Facebook.com the FCO assessed all the social network media by their services and preferences of the users on choosing them, in other words it defined key criteria for defining the market as *the high degree of product differentiation of social media* and *the various overlaps of their functionalities*.[86] While coming to the product differentiation the FCO excluded LinkedIn and Xing because of their professional nature, YouTube because of its being video-sharing platform, not a social network, Snapchat, Twitter, Pinterest and Instagram because of their simply not being significantly comparable to Facebook in the same product market. After the final assessment of switching difficulties of users the Bundeskartellamt came to the conclusion of Facebook's being super dominant in the German social network media market. Another

[85] Bundeskartellamt v Facebook, case summary of decision of 6 February 2019, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing, B6-22/16, p. 1, available in English at: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.html?nn=3600108

[86] *Ibid.*

remarkable finding is Facebook's setting high entry barriers to its proposed competitors in order to enter advertising-financed platform market.

The FCO also analyzed Facebook's abusive data policy and related the abusiveness on the ground of its having explicitly excessive access to personal and device-based data and in order to use this amount of data in business purposes there is no adequate consent in accordance with Article 6(1)(a) of the GDPR which requires for this kind of activities affected user's explicit consent. In regard with this disproportionality the FCO noted Facebook's strong bargaining power over its users and in this manner, it related the lack of voluntary consent with the weaker position of users. Another issue related to the market position of Facebook was its restricting right to informational self-determination of individuals by abusing its dominance.

With assessing all the above-mentioned factors, the Bundeskartellamt concluded that, all the violations in both spheres of law is directly related to Facebook's market position and ordered the dominant firm to stop pursuing these conducts and to present a road map on alterations to data use policy within four months after the decision.

Case analysis

The main purpose of the investigations was addressed to the amount of data processed by Facebook and its having access to this amount of data generates from its dominant position in the German social network media market. The FCO considered Facebook dominant undertaking in the market, because of its access to excessive amount of data under Section 18(3a) of the German Competition Act.[87] Additionally, the Bundeskartellamt has accepted the requisite of the business model of the advertisement financed services about collecting massive amount data, but noted very carefully that the interest of the dominant firm which comes out of requisite of the business of online platform cannot overcome expectations of users. In this sense, the FCO emphasized users' insufficient control over their own personal data and at the end of the day, the access to massive amount of data

[87] The 4th paragraph of the provision specifically mentioned that: in the case of multi-sided markets and networks, in assessing the market position of an undertaking account shall also be taken of the undertaking's access to data relevant for competition; GWB, [2017], 18 (3a) para 4, English version available at: http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0024

enables Facebook to collect its users' data without their knowledge and even against their explicit will.[88]

The key is to develop a dynamic understanding of competition law, considering the impact of competition law enforcement on the incentives to innovate, not only of the dominant firm but also of all other market actors.[89]

This is closely linked with the notion of "informational self-determination" developed by the German Federal Constitutional Court.[90] The Bundeskartellamt, noted in its decision that in order to protect the fundamental right, data protection law provides the individuals with the right to decide freely and without coercion on the processing of his or her personal data.[91]

The German NCA approached to consent as a main prerequisite for using the Facebook.com services in the first place,[92] and lack of the explicit consent lead this problem to occur. In the literature the massive amount of data processing is being assessed as is in insufficient level. So that, authors argue that some of the crucial privacy issues are generating from lack of or inadequate consent from Facebook users for the procedure of obtaining and sharing their personal data and the access and control that has been given to them over their personal data by the data collectors is in the insufficient level. [93]

The FCA in its decision came to the conclusion that Facebook's comprehensive processing of personal data from other corporate services and Facebook Business Tools, violates European data protection requirements pursuant to the GDPR and is subject to the affected users' explicit consent pursuant to data protection requirements.[94]

The German Federal Court of Justice has stated in its VBL-Gegenwert decision and the Bundeskartellamt cited to this case in its Facebook case analysis that contract terms which do not take compliance with the laws regulating general conditions and terms of trade might be subject to an abuse of a dominant position

[88] *Supra* note 34, Volmar Helmdach, [2018], p. 200
[89] *Ibid*, p. 172
[90] *Supra* note 77*,* Kerber [2016], p. 3-4
[91] *Supra* note 85, Bundeskartellamt v Facebook, [2019], p. 8
[92] *Ibid*, p. 1
[93] Esteve A., *"The business of personal data: Google, Facebook, and privacy issues in the EU and the USA."* International Data Privacy Law, [2017], Vol. 7, No. 1, p. 40.
[94] *Supra* note 85, Bundeskartellamt v Facebook, [2019], p. 10

if the use of such terms is based in the market dominance of the undertaking in question.[95]

The main issue sleeps in the origin of this problem is users' not being aware of collection of their data in the excessive manner. If the customers are not aware that the firms use the buying history ("naive" customers) and the firms have a monopoly, then this information increases profits by appropriating more (and theoretically all) consumer rents.[96] If they were aware the processing and there would have been willful consent of the users for this activity of processing this issue would not be raised.

It has been noted in the legal text that where processing is based on the data subject's consent, the controller should be able to demonstrate that the data subject has given consent to the processing operation.[97] In order to fulfill this obligation the data collector should clarify that to what extend the data is going to be disclosed or shared and for this to be pursued the collector also should make sure that the terms and conditions have been written in a very obvious, clear and unambiguous manner supposing that any consent giver will be able to understand it, not in the manner that abusing its strength over the users while being an only eligible party who writes the condition without interference of other party. Although this eligibility comes from the very nature of contractual terms, that it is no way reasonable to negotiate the terms and conditions with each user separately, but the data collectors should not benefit from this "inequality" in an abusive manner.

One of the main points which should be marked in this context is that the FCO approached to one's opening account, by accepting terms and conditions which was specified in data and cookie policies, as concluding contract with Facebook company. Pursuant to these policies, Facebook also collects data on users and their devices outside of Facebook-related activities via Facebook Business Tools integrated by advertisers, app developers and publishers.[98]

Consumer law also safeguards final consumer's informed choice,[99] which is also under violation in this case.

[95] German Federal Court of Justice, VBL-Gegenwert, KZR 58/11, [2013], para. 68, available at: http://ec.europa.eu/competition/national_courts/cases/139343/139343_2_3.pdf
[96] *Supra* note 77, Kerber, [2016], p. 5
[97] *Supra* note 52, GDPR, [2016], Article 7(1).
[98] *Supra* note 85, Bundeskartellamt v Facebook, [2019], p. 3
[99] *Supra* note 17, Botta & Wiedemann, [2019], p. 1

Although in the press release the FCO confirms the services of Facebook company to be free in nature but there is a need to look at data's theoretically free but in fact much profitable than monetary value nature. The idea that the remuneration for social media services paid by the user is not monetary by its very nature, but instead considering the attention of each individual on the advertisement demonstrated in the platforms and as long as these ads are being served to users in due with their specific preferences which is being recorded as a result of their online visits or any kind of other recordable activities, such as like or share features in our current case, in the end of all of these processes the profit of the social network media server raises adequately with the amount of data processed, it is very conceivable that with these qualities data is substituting monetary value.

The FCO confirms in some points that there may be no financial harm caused to the users because Facebook is a free service. However, it is the infringement of fundamental rights and the loss of control over their data that represents the harm to consumers.[100] Here the FCO connected the harm caused to users with the violation of their fundamental rights. As each user should have given their voluntary consent before their data going to be processed and there is huge lack about fulfilling consent, taking into account the contractual view of the FCO, lack of consent is kind of buying the product without acceptance.

The policy considerations of the FCO somehow reminds standard form contracts in contracts law. While trying to protect the reasonable expectations of users and assessing their weaker position in front of Facebook's strong market and bargaining power, the policy concentrations can be equalized to adhesion contracts. However, the main difference that separates this issue from the standard form contracts perspective is, even in their case the consent of the contracting party is necessarily required. But here although the Bundeskartellamt looks at the opening of an account from the objective of concluding contract, if the policy itself is being pursued without taking consent of the so-called contracting parties – users, either there is a huge difference between these two contracts, or there is bigger problem with consent. If we assess the free nature of the services and try to justify that because the served features are very not paid in fact and without even paying users are enjoying the provided facilities and one of the purposes of excessive amount of

[100] *Supra* note 34, Volmar Helmdach, [2018], p. 200

data processing is achieving higher satisfaction level of the consumers it can be seen as a reasonable practice from the dominant company's perspective. Although until this point everything might seem to be in order (without assessing consent part), but while coming to the point that the undertaking in question profits accordingly with the amount of processing, then we cannot conclude that the services are unpaid.

The online services are paid, not with monetary method, not with economic value of the data, but the intense value of personal data. We cannot compare monetary value with the value of personal data. Because, if we try to compare the endings of both payment methods, we will find out that, while paying with money we lose our entire connection with the paid amount, instead we take the product or enjoy a service, but while paying with our personal data we not only have our connection with our data till the end of our lives, but also, we do not have any choice to decide to which extend we want our data to be processed. From the connective point of view, as we have completely different results with either payment method, monetary and informational payment cannot be compared. But while coming to the amount section, we can compare them to reveal the violation area.

Placing data to economic framework should be considered tricky, because from the point that if data is an object to any kind of violation, the data owner will not face with monetary harm, but on the other hand although data is being used as informational method of payment, it is turning to the main element which allows the processor gain more profit as the network over it becomes larger, so, the more data has been processed, the higher the profit increases in amount and this creates proportionally related effect.

Another available option to address this problem is looking at the nature of the consumer contracts from their very beginning. As we know from the history of contracts' law the dual-party contracts were first interchange contracts, meaning that in order to get one good people were simply changing their items with others, but these items were economically equal. If we apply the same practice to our case, it will be clear that the designs look alike. In the current case users are allowing the online platform to get access to their data and in return they use the services of that platform. But, again, there is a contrast in this similarity as well. Here the users do not have any information that to what extend their data is going to be

The other issue has been offered in the literature is that the average user's not having a legally signed commercial contract with Facebook that guarantees what their profile is going to look like or what kind of features will be offered. Users do not have anything to base a claim on and have to accept that Facebook has exclusive jurisdiction regarding their profile, at least when it comes to the external appearance.[101]

Bundeskartellamt also mentioned the objectives of both data protection law and competition law from the aspect of the unbalanced negotiation position, a weighing up of interests under competition law which could be required in addition to the examination under data protection law.[102] With this consideration the FCO also confirmed that even though both of the law spheres pursue different goals to protect the individuals, their objectives can meet each other while managing unbalanced negotiation position. In this context the competition law addresses the imbalance between users and Facebook to its very strong negotiation power originating from the dominant position in the market, data protection on the other hand addresses this imbalance as the violation of right to adequate data processing of individuals.

One of the main final questions is that if penalizing the dominant company for the massive collection of personal data and sharing it with third party platforms would undermine and harm the incentives of that firm which was trying to improve its service in order to reach the higher satisfaction of its users. First and foremost, in order to reach the higher satisfaction of consumers with violating their fundamental rights cannot be allowed. Second, if the company gains the power to process data massively which is being allowed by its market position and this position allows it to build higher entries to the new market comers it is clear to realize that the proposed higher satisfaction might be replaced by the incentives to gain more profit under the excuse of investment. Thirdly, if we are talking about the situation in the EU, we should keep in our mind that in EU competition law firms should have strong attention to not to harm competition in the market, rather should always try to compete under more effective conditions. In this meaning they are sometimes pushed by the Commission to have competitors in the market, i.e.

[101] *Supra* note 6, Gebicka & Heinemann [2014], p. 163
[102] *Supra* note 85, Bundeskartellamt v Facebook, [2019], p. 11

essential facility doctrine. Moreover, the main goal of EU competition law is incentivizing the market players to compete effectively, which brings the concept of competing to gain more consumer with their satisfaction. The purpose of competing to attract more customers already in itself derives very keen interest of market players to achieve higher number of consumers by satisfying them in the highest manner. And this goal of higher satisfaction will lead them to improve their incentives to invest and innovate.

Conclusion on the case

Although most of the authors still argues that this case is none of competition law dealings, rather it should be the subject to data protection law. However, violating data protection law by massive amount of processing does not take the main role, the main issue is being capable of violating data protection law and this capability originates from the dominant position.

As is in the Facebook case with Bundeskartellamt the dominant company's market power enables it to have access to excessive data processing. For this reason, the company uses its dominance to process data from the platforms which are outside of its service area. The FCO understands the business model of the company that incentivizes it to process the huge amount of data, but does not accept the personal data of the natural persons' being processed without their explicit consent.

The conclusion has been made at the end of this research is finding the solution to this complex issue by right to informational self – determination of individuals, which will take us to the situation of everyone's being very unique in their privacy preferences. So, in this manner, averaging the level of privacy is not possible. As the Article 8 of the ECHR clarifies the highest level of protection for everyone and in the secondary source of Union law it has been noted that no lessening in terms of privacy standard is possible, only the highest for every single member of the Union can be a solution and processing individuals' personal data without their explicit consent should be considered in this sense as violation against each of them. In this way the excessive processing should be understood as abusing dominant position by setting unfair privacy conditions, because the violation is being carried out against every user individually and the power to violate their fundamental right comes from dominant position of Facebook in German social media market. So, as the dominance is the key element that gives rise to this problem, abusing it by violating another branch of law – privacy preferences of individuals and in case the highest institutional legislators in the EU adopted that no lessened protection other than provided in the ECHR can be possible, only the higher protection is allowed to national legislators, and additionally in case the strong market position of the undertaking in question serves as a main element in violation, and more specifically even with violating data protection law the undertaking in question violates individuals rights with serving them unfair trading conditions and these conditions indirectly distort competition in the market, then it is fair to come to the conclusion that the decision by the German NCA against Facebook is justifiable and the misconducts of the Facebook as a dominant company in German social media market falls under Article 19(1) of the GWB[103].

[103] The abuse of a dominant position by one or several undertakings is prohibited, GWB, [2017], see *supra* note 87.

Conclusion

Data has been turned to the most valuable asset of the digital markets. Dominant undertakings are striving for attracting more users to process more personal or device-related data in order to gain larger network size. As the nature of the digital markets requires digital companies to work with huge amount of data which comes out of the network effects. As a result of gaining strong network effects companies possess access to excessive amount of data which is the source of their business profit. The business model in this sense combines advertisers with digital market players. The company which owns access to more amount of data becomes a dominant in the market and accordingly gains the profit from sharing the processed data with advertisers. Therefore, data as a main element of gaining profit for the digital companies plays the role of key factor for reaching dominance.

As the working method of the digital markets themselves require this process to be performed, gaining dominance with this activity is not unlawful, unless the data as a key factor has been processed within a lawful context. Here we define the consent as a decisive factor for placing the issue to the lawful framework. But consent in this context should be freely given, specific, informed and unambiguous indication of agreement of data subject to the processing of his or her own personal data. On the other hand, natural persons should have the eligibility to withdraw their consent as easy as the agreeing was.[104]

Another remarkable notion should be mentioned is right to informational self-determination of individuals in regard with their data to be processed. In the basis of the right uniqueness of the individuals derived, in this sense the discoverer (Bundesverfassungsgerichtshof) of the right mentioned protection of the individual against unlimited collection, storage, use and sharing of personal data.

Another comparable discussion made in the thesis was economic value of data. Data as a virtual good does not in itself contain a monetary value. In the thesis we came to the conclusion that online service enjoyers are not paying for the services that are being offered in fact free in its economic value, but as long as the data holders are benefiting from that amount of data in financial manner and the amount of data collection and the profit of the company thereof is growing

[104] *Supra* note 52, GDPR, [2016], Article 7(3)

accordingly, then it is clear to conclude that the provided services are being paid with personal data. So, we conclude that data as a virtual good does not have economic value but as a virtual good it is being used as a payment method.

Also, in the thesis we discussed the Facebook case of German FCO. We came to the conclusion that the terms and conditions of Facebook company on the processing of personal data violation of data protection law and as long as Facebook imposes these conditions under the influence of its strong market position – dominance, this case should be solved with competition law intervention. As is mentioned in the thesis the ECJ mentioned priority of scope of competition law on other branches of law (*Deutsche Telekom, AstraZeneca*). As we revised while assessing case law, consumer rights are to wider extend protected under the scope of competition law. Therefore, competition law intervention on this case is necessarily affordable.

And lastly, we touched several problematic areas in this case and tried to assess these areas in the direction of giving our view. We concluded that the misconducts of the Facebook violated data protection law and this violation affected every single user individually negatively, because the company violated their right to informational self-determination, which in context of consent takes a unity with it. Facebook took that extensive permission to process personal data without their consent because of its dominant position in the market and enjoying its dominance by violating data protection law against each user should be considered as exploitative business terms from inadequacy point of view.

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Abstract

Digital companies are being characterized in the competition market by offering online services which are free in nature. As this kind of companies are working with one of the most profitable business models, they are in the center of market analysts. What is the most profit bringing element in this model is personal data. Since the business model of these companies forces them to process huge amount of data and the income of the data collectors increases in due with this amount, this process originates a strong debate about the economic value of personal data.

Regardless of having economic or moral value, data is the main element for the digital companies to gain strong market power in online social media market. As social media service providing companies are competing for larger user network and as long as these markets will be characterizing with network effects, this working method will lead one successful company in the market to gain dominant position, and this position allows it to have access to excessive amount of personal data. Although the working mechanism of the markets leads social media providers to gain this access, they should use and share it in accordance with legal principles of data protection law. The main issue in this sense is the usage of the data which should be pursued with the consent of the data owners, however in most of the cases lack of adequate consent is the main issue gives rise to the main problem in this area. Notwithstanding with the fact that lack of the consent should be solved as a main problem under the scope of privacy law, but as long as the essential factor that facilitates the companies to have access to the personal data is their strong position in the market which is dominant position, excessive usage of data should, in this sense, be considered as abuse of the position that gave this chance to the undertaking in question.

On the other hand, the excessive usage of the data should not be assessed as excessive pricing, but it should be approached as unfair condition from the users' side. As long as the consent is taken for processing data from certain sources, but after gaining the access it is also being carried out from unmentioned sources and with this process the company also abuses its stronger position than data owner, it should be considered as enforcing unfair conditions against each user separately, which falls under the exploitative type of abuse of dominance.

Abstract

Digitalunternehmen zeichnen sich im Wettbewerbsmarkt durch kostenlose Online-Dienste aus. Als diese Art von den Unternehmen mit einem der gewinnbringenden Geschäftsmodelle arbeiten, stehen sie im Zentrum der Argumente der Marktanalytiker. Das lukrativste Element in diesem Model ist personenbezogene Daten. Weil das Geschäftsmodell dieser Unternehmen sie um die großen Datenmengen zu versammeln zwingt und das Einkommen der Datensammler mit dieser Menge steigt, steht es zu einer heftigen Debatte über den ökonomischen Wert der personenbezogenen Daten.

Unabhängig davon, ob es sich um einen wirtschaftlichen oder moralischen Wert handelt, sind die persönliche Daten für die Digitalunternehmen das wichtigste Element, um im Online-Markt für soziale Medien eine starke Marktmacht zu erreichen. Unternehmen, die Sozial-Media-Dienste anbieten, konkurrieren um ein größeres Nutzernetzwerk, und das Netzwerkeffekt-Funktionsmodell dieser Märkte führt dazu, dass ein erfolgreiches Unternehmen auf dem Markt eine marktbeherrschende Stellung einnimmt. Diese Position ermöglicht es ihm, auf übermäßig viele personenbezogene Daten zuzugreifen. Obwohl der Arbeitsmechanismus der Märkte die Anbieter sozialer Medien dazu ermöglicht, sich diesen Zugang zu verschaffen, sollten sie es in Übereinstimmung mit den gesetzlichen Grundsätzen des Datenschutzrechts verwenden und weitergeben. Das Hauptproblem in diesem Sinne ist die Verwendung der Daten, die mit Zustimmung der Dateneigentümer weiterverfolgt werden sollte, aber in den meisten Fällen führt jedoch das Fehlen einer angemessenen Zustimmung zu dem Hauptproblem in diesem Bereich. Das Fehlen der Einwilligung sollte als Hauptproblem im Rahmen des Datenschutzrechts gelöst werden. Das Schlüsselelement in diesem Problem ist die marktbeherrschende Stellung des Unternehmens, die es ihnen ermöglicht, auf riesige Datenmengen zuzugreifen. Deshalb sollte dieses Problem im Rahmen des Wettbewerbsrechts gelöst werden.

Andererseits sollte die übermäßige Nutzung der Daten von Seiten der Nutzer als unfaire Handelsbedingungen angesehen werden. Solange die Einwilligung zur Verarbeitung von Daten aus bestimmten Quellen, aber tatsächlich auch aus anderen, eingeholt wird, das heißt, dass das Unternehmen auch seine stärkere Position als Betroffene missbraucht. Es sollte so gesehen werden, dass die

unfaire Bedingungen für jeden Benutzer separat durchgesetzt werden, was unter den Art des ausbeuterischen Missbrauchs der Marktbeherrschung fällt.