

MAYBE EXCESSIVE, DEFINITELY EXCLUSIONARY:
A DIFFERENT APPROACH TO THE
ANTICOMPETTIVE COLLECTION AND
PROCESSING OF DATA

Andres Calderon†
Piero Malcatt‡

ABSTRACT

This paper presents an alternative perspective of analysis to the conduct consisting of the excessive collection, combination, and processing of data, using the example of the German Antitrust case against Meta. The authors make the theoretical argument that this type of conduct can be analyzed as an exclusionary practice, overcoming thereby the difficulties of the exploitative theory of harm. The authors describe a hypothetical exclusionary practice consisting of a concealed collection and combination of data, that results in a competitive advantage for a dominant firm and creates a locked-in effect for consumers.

† Professor of the Academic Department of Law of Pontificia Universidad Catolica del Peru. Associate researcher at the Universidad de Palermo Center for Studies on Freedom of Expression and Access to Information (Argentina). Co-chair of the ASCOLA Latin America chapter (without Brazil). Master of Laws (LL.M.) from Yale University (United States). LL.B. from Pontificia Universidad Catolica del Peru. ORCID: 0000-0001-9922-6517, andres.calderon@pucp.edu.pe.

‡ Bachelor of Laws (LL.B.) from Pontificia Universidad Catolica del Peru Law School and Junior Research Assistant at the Pontificia Universidad Catolica de Chile Antitrust Program. ORCID: 0009-0006-5967-5725, a20151428@pucp.edu.pe.

I. INTRODUCTION	2
II. THE GERMAN FACEBOOK CASE.....	6
A. Exploitative abuse: Harmful to consumers, but according to whom..	10
1. <i>Data Protection law does not necessarily reflect consumer welfare</i>	10
2. <i>“Consumer choice” may not coincide with consumer welfare</i>	12
B. Can the collection of data be exclusionary?	13
1. Access to data as a key factor to competition law analysis	13
a. Merger control cases involving data accumulation.....	14
b. Data access and processing as anticompetitive behavior.....	18
(a) <i>Refusals to deal</i>	19
(b) <i>Other cases related to data accumulation</i>	19
2. <i>Collection and combination of data: the bricks of the wall</i>	20
3. <i>A concealed practice, subject to balancing</i>	24
III. CONCLUSION.....	27

I. INTRODUCTION

One of the cases that has gained more attention in the Competition Law ecosystem in recent years is the case initiated by the German Competition Authority against Meta Platforms, Inc. (formerly known Facebook, Inc., and/or TheFacebook, Inc.). The Bundeskartellamt, Germany’s anticompetition regulatory agency, considered that Meta abused its dominant position through the excessive collection of its users’ data via Facebook, and through the combination of that data with extra information collected from other sources (including services from the same economic group, such as WhatsApp or Instagram, and third party websites).

Since 2016, when the Bundeskartellamt started the proceedings, up to the present day, when the European Union Court of Justice has a pending request to render a preliminary interpretation from the Higher Regional Court of Düsseldorf, many scholars have analyzed different aspects of the case. On one hand, many questions have arisen regarding how the decision could influence the business models of Meta and other big tech. On the other hand, there is concern about the next steps of antitrust enforcement in digital markets around the globe, concerning the collection of data.

Renowned literature on the field has focused on analyzing the strength of the decisions issued by the different German instances involved, like the article written by Anne Witt¹ or the essays from Fountoukakos et al.,² Becher,³ Höpner,⁴ Höfling,⁵ Kerber and Zolna,⁶ and Blume.⁷

Other scholars have criticized the exploitative theory of harm developed by the Bundeskartellamt. Weber & Van den Bergh⁸ argue that competition law is being used to correct an information asymmetry problem, instead of market power. From a different approach, authors like Orla Lynskey⁹ have analyzed the interplay between competition law and data protection law, while Botta & Windemann¹⁰ have reflected on the dilemma posed by the alternatives of parallel application or joint application of competition law and other regulations, such as the data protection law and consumer law.

In this article, we seek to complement the existing literature, proposing a different perspective. We analyze whether, in a hypothetical scenario, an anticompetitive conduct such as the one advanced against

¹ Anne C. Witt, *Excessive Data Collection as a Form of Anticompetitive Conduct: The German Facebook Case*, 66 ANTITRUST BULL. 276 (2021).

² Kyriakos Fountoukakos Marcel Nuys, Juliana Penz & Peter Rowland, *The German FCO's Decision Against Facebook: A First Step Towards The Creation Of Digital House Rules?*, 18 COMPETITION L.J. 55 (2019).

³ Christoph Becher, *A Closer Look at the FCO's Facebook Decision*, 3 EUR. COMPETITION & REGUL. L. REV. 116 (2019).

⁴ Thomas Höpner, *Data Exploiting as an Abuse of Dominance: The German Facebook Decision*, 1 HAUSELD COMPETITION BULL. 1 (2019).

⁵ Stefan Höfling, *The German Facebook Case – Alternative Membership Models as an Approach?* (LL.M. dissertation, Brussels School of Competition 2021–09), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3964558.

⁶ Wolfgang Kerber & Karsten K. Zolna, *The German Facebook Case: The Law and Economics of the Relationship between Competition and Data Protection Law*, 54 EUR. J.L. & ECON. 217 (2022).

⁷ Anna Blume, *How Many “Likes” For The German Facebook Antitrust Probe?*, COMPETITION POL'Y INT'L (Aug. 2016), <https://www.competitionpolicyinternational.com/wpcontent/uploads/2016/08/Huttenlauch.pdf>.

⁸ Roger Van den Bergh & Franziska Weber, *The German Facebook Saga: Abuse of Dominance or Abuse of Competition Law?*, 44 WORLD COMPETITION 29 (2021).

⁹ Orla Lynskey, *At the Crossroads of Data Protection and Competition Law: Time to Take Stock*, 8 INT'L DATA PRIV. L. 179 (2018).

¹⁰ Marco Botta & Klaus Wiedemann, *The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey*, 64 ANTITRUST BULL. 428, 434–37 (2019).

Meta might be considered an exclusionary practice by itself. Thus, based on long-cemented case law regarding the accumulation of information as an anticompetitive exclusionary practice, we propose an exclusionary theory of harm. This theory acquires strength with some features of the practice attributed to Meta: the accumulation of a valuable asset from social media users, in a concealed manner, without making those users aware of the competitive advantage this collection of data presents to the dominant platform and of the locked-in effect it may have in the long term.

This argument represents one step forward in the direction of authors like Geradin, Karanikioti & Katsifis, who have argued that cross-usage of data by a dominant platform would empower it to “envelope” new markets, encompassing, therefore, anticompetitive conduct.¹¹ In a different, yet compatible approach, Colangelo and Maggiolino argue that a possible theory of harm could be construed if the reduction in privacy leads to a reduction in quality, which in turn entails a reduction in consumer welfare.¹²

Our proposition might find the light in the near future, as competition agencies start to question whether the accumulation and or combination of data, by itself, produces exclusionary effects in some (digital) markets.

The European Commission initiated formal proceedings against Meta for the alleged use of data obtained in the context of advertising sales via Facebook for the benefit of other Meta products, such as Facebook Marketplace.¹³ Most recently, the European competition authority has issued its Statement of Objections.¹⁴ The Commission claims that Meta has abused its dominant positions in two ways: by tying

¹¹ Damien Geradin, Theano Karanikioti & Dimitrios Katsifis, *GDPR Myopia: How a Well-intended Regulation Ended up Favouring Large Online Platforms - The Case of Ad Tech*, 17 EUR. COMPETITION J. 47, 77 (2020).

¹² Giuseppe Colangelo & Mariateresa Maggiolino, *Data Accumulation and the Privacy-Antitrust Interface: Insights from the Facebook Case for the EU and the U.S.* 3 (Stanford Law School and the University of Vienna School of Law TITLF Working Paper No. 31, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3125490.

¹³ European Commission Press Release IP/21/2848, Commission Opens Investigation into Possible Anticompetitive Conduct of Facebook (Jun. 4, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2848.

¹⁴ European Commission Press Release IP/22/7728, Commission Sends Statement of Objections to Meta over Abusive Practices benefiting Facebook Marketplace (Dec. 19, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7728.

its online classified ads service, Facebook Marketplace, to its personal social network, Facebook, and by imposing unfair trading conditions on competitors of Facebook Marketplace. Both practices would distort competition in the markets for online classified ads.

While this latter case puts forward matters concerning self-preferencing and tying that significantly differ from the conduct sanctioned by the Bundeskartellamt, it is telling of the growing concern regarding the potential exclusionary outcome arising from the collection (and certain uses) of data.

The cases recently brought against Meta by the competition authorities of Argentina and Turkey reflect a growing concern in different parts of the globe.

In May 2021, the National Commission for the Defense of Competition of Argentina (hereinafter, CNDC), started a probe against WhatsApp Inc, and its controlling firms (part of the Meta group), for alleged abuse of its dominant position. According to the *Resolution No. 492/2021*,¹⁵ the authority accuses Meta of abusing the processing, cross-referencing and consolidation of information obtained from users of all its platforms,¹⁶ a practice that would give the Meta group an advantage difficult to replicate by its competitors in the online advertising market. This could lead to exploitative and exclusionary effects. The main concern of the Argentine authority is that the combination of data from the different platforms creates a database that cannot be replicated, which generates exploitative effects and market foreclosure of competitors.

In October 2022, the Rekabet Kurumu (hereinafter, RK), the Turkish competition authority, found Meta guilty of infringing Article 6 of the Turkish Competition Act. According to its press release, Meta, by combining the data collected from Facebook, Instagram and WhatsApp

¹⁵ The CNDC imposed an interim measure against Meta. It should be noted that the decision was appealed by Meta before the Judiciary. A judge confirmed the injunction imposed by the CNDC. See *The Resolución 492/2021*, BOLETÍN OFICIAL DE LA REPÚBLICA ARGENTINA (May 14, 2021), <https://www.boletinoficial.gob.ar/detalleAviso/primera/244442/20210517>. To view the Judiciary decisions, see Web Consultation System Judicial Branch of the Nation, <http://scw.pjn.gov.ar/scw/viewer.seam?id=qC9n%2F4TP6PD6SSv8YkceNl6mhp0MzwBNTqkDIJ3akPo%3D&tipoDoc=sentencia&cid=157320>.

¹⁶ The main element motivating the investigation is the 2021 WhatsApp privacy policy change. The new modifications would allow Meta to share the personal data of WhatsApp users with other companies within the Meta economic group.

services, distorted the competition in the markets of online display advertising and personal networking services, and created entry barriers to those markets.¹⁷ The RK decision was appealed and is pending before the Ankara Administrative Courts.

Another case related to the collection and use of data is the one initiated by the European Commission against Amazon. In December 2022, the European authority published its settlement with Amazon referring to the Cases COMP/AT.40462 and COMP/AT.40703.¹⁸ In the former, the commitments accepted by Amazon were aimed at preventing the company from using non-publicly available data generated or provided by third-party sellers, in the context of their use of Amazon's marketplace services.

The recent trend of cases shows a growing interest in the exclusionary effects arising from the collection, processing and combination by big digital players, all of which underscore the relevance of the study of the possible theories of harm.

In the first chapter of this Article we introduce the German case against Meta, highlighting the main arguments put forward by the Bundeskartellamt and the judicial courts that reviewed the interim measures adopted. In the second chapter, we address the shortcomings of the standards invoked by the German authorities to support an exploitative harm to consumers, or a restraint on consumers' choice. The third chapter presents an alternative theory of harm focused on the exclusionary effects of massive data accumulation, processing and combination within Meta's ecosystem. For this purpose, we summarize analogous European case law, and we articulate the foundations of our hypothesis of competitive harm as well as a standard of analysis applicable to this type of case.

¹⁷ Press Release, Rekabet Kurumu, Meta Platforms, Inc. (Eski unvanı Facebook Inc.), Meta Ireland Limited (Eski unvanı Facebook Ireland Limited), WhatsApp LLC ile Madoka Turkey Bilişim Hizmetleri Ltd. Şti. hakkında yürütülen soruşturma sonuçlandı [Meta Platforms, Inc. (Formerly Facebook Inc.), Meta Ireland Limited (Formerly Facebook Ireland Limited), WhatsApp LLC and Madoka Turkey Bilişim Hizmetleri Ltd. Şti. The investigation was concluded.], (Oct. 26, 2022), <https://www.rekabet.gov.tr/tr/Guncel/meta-platforms-inc-eski-unvani-facebook--c3135926fa54ed11a22e00505685ee05>.

¹⁸ 2022 O.J. (C 87) 7.

II. THE GERMAN FACEBOOK CASE

In March 2016,¹⁹ the Bundeskartellamt (hereinafter, FCO or Bundeskartellamt), the German competition agency, initiated a proceeding against Meta for alleged abuse of its dominant position in the social media market related to the collection of personal data of its users in violation of data protection rules.

In February 2019, the Bundeskartellamt rendered its decision,²⁰ stating that Meta had infringed the Act against Restraints of Competition (hereinafter, German Competition Law),²¹ by imposing unfair terms to its users, conditions that were not permitted by the General Data Protection Regulation (hereinafter, GDPR).²²

After affirming that Meta was a dominant undertaking in the social media market, the Bundeskartellamt analyzed this case as an exploitative abuse against consumers. According to section 19(1) of the German Competition Law, other legal provisions could be referred as a standard to assess unfair contractual terms.²³

According to the Bundeskartellamt, the contractual terms between Meta and Facebook users pertaining to the collection and use of their personal data did not meet the ‘appropriateness’ principle, under which one party shall not lose its constitutionally protected right to self-determination by the imposition of unilateral business terms by the other party.^{24 25}

¹⁹ Press Release, Bundeskartellamt, Bundeskartellamt Initiates Proceeding against Facebook on Suspicion of Having Abused its Market Power by Infringing Data Protection Rules (Mar. 2, 2016), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html;jsessionid=3249A6E0B9D32CC0F0ED795044CA4128.1_cid387?nn=3591568.

²⁰ Press Release, Bundeskartellamt, Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources (Feb. 7, 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.

²¹ GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN [GWB] [German Act against Restraints of Competition], 2013.

²² Witt, *supra* note 1, at 281.

²³ Bundeskartellamt [BKT] [Federal Cartel Office] Feb. 6, 2019, B6-22/16, ¶¶ 524–34 (Ger.).

²⁴ *Id.* at ¶ 155.

²⁵ Witt, *supra* note 1, at 286–87.

More specifically, the German watchdog questioned Meta's data and cookies policies that had allowed it to collect, combine, and utilize users' data and device-related data, even data collected via third-party websites using different APIs²⁶ as part of Facebook Business Tools. By analyzing and measuring the data collected, through Facebook Analytics, the company improved its knowledge about users' online behavior. Hence, Meta's activities involved the processing of special data categories and the profiling of its users.²⁷ According to the Bundeskartellamt, the data processing conducted by Meta was unnecessary for the performance of the contract²⁸ and the users did not provide effective consent for that type of data processing within the scope of GDPR.²⁹

"Effective consent" is a concept regulated by the GDPR [Articles 6(1a) and 9(2a)].³⁰ According to the competition authority, users were forced to consent to the Terms of Service, among other reasons, given Meta's dominance and direct network effects that prevented them from switching to other social networks. Moreover, GDPR, Article 9(1a), states that explicit consent should be given when there are special data categories involved,³¹ which are absent in the case of Meta. Finally, the German authority noted that the limited options available in Facebook's ad setting and blocking cookies from mobile phones, did not represent a voluntary consent.³²

Although the German authority stated that this was an exploitative abuse of dominance, it also emphasized that Meta's inappropriate data collection increased entry barriers into the market of social networks ("detailed knowledge about users enables them to target the kind of advertising Facebook wants to offer").³³

Finally, the competition authority concluded that there was no need to balance interests in this case that would give Meta the opportunity to provide justifications for its abuse of dominance, inasmuch as "legislation on general terms and conditions had been breached."³⁴ In other words, a law violation could not be balanced nor justified.

²⁶ Application Programming Interface.

²⁷ B6-22/16 BKT ¶ 573 (Ger.).

²⁸ *Id.* at ¶ 667.

²⁹ *Id.* at ¶ 639.

³⁰ *Id.* at ¶¶ 640–50.

³¹ *Id.* at ¶ 647.

³² *Id.* at ¶ 651.

³³ *Id.* at ¶ 888.

³⁴ *Id.* at 890.

Meta filed an appeal and asked for interim relief from the execution of the decision. In August 2019, the Higher Regional Court of Düsseldorf granted Meta's request and suspended the imposed restrictions.

According to the Regional Court, there was no evidence that Meta's data processing caused exploitative abuse to the detriment of consumers nor an exclusionary abuse that would harm an actual or potential competitor. The Court held that the competition authority had not proved that there was a connection between the alleged violation of data protection regulations and Meta's dominant position, that is, that Meta's conduct had not been possible under competitive circumstances.³⁵ On the other hand, the Court also declared that there was no substantiation of a restraint to the prejudice of Meta's competitors.³⁶

After the Bundeskartellamt appealed, in June 2020, the Federal Court of Justice confirmed the competition agency's decision and revoked the lower instance judgment.

However, the Federal Court of Justice took a different line of argument to that of the Bundeskartellamt. The Court stated that the key aspect of Meta's abusive practice relied on consumer choice restriction. According to the judges, Meta prevented its users from deciding whether they wanted a more personalized experience that depended on the amount of data that needed to be gathered by Meta, or they preferred to limit the sharing of their data in a more private setting.³⁷ Accordingly, Meta's terms of service were unlawful since they restricted consumers' choices.

Currently, the case is pending before the Higher Regional Court of Düsseldorf. The Court has requested a preliminary ruling concerning the GDPR to the European Court of Justice.³⁸ The main question is whether

³⁵ Facebook Inc., Facebook Ireland Ltd., & Facebook Deutschland GmbH v. Federal Cartel Office, VI-Kart 1/19 (V) 1, 6–7 (Düsseldorf Court of Appeals Aug. 26, 2019).

³⁶ *Id.* at 28.

³⁷ Press Release, Bundesgerichtshof, Federal Court of Justice provisionally confirms allegation of Facebook abusing dominant position (June 23, 2020) <https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020080.html>.

³⁸ Mario Tavares Moyrón & Petar Pešić, *One Way Ticket to Luxembourg - Facebook v. Bundeskartellamt at the ECJ*, INST. FOR INTERNET & THE JUST SOC'Y, (Apr. 14, 2021), <https://www.internetjustsociety.org/one-way-ticket-to-luxembourg-facebook-v-bundeskartellamt-at-the-ecj..>

competition authorities are allowed to enforce data protection rules through competition laws.³⁹

In this regard, on September 20, 2022, Advocate General (AG) Rantos issued its opinion regarding the preliminary ruling.⁴⁰ According to the AG, the Bundeskartellamt did not sanction a GDPR infringement, but an alleged abuse of a dominant position that took into consideration, among other aspects, Meta's non-compliance with such regulation.⁴¹

Rantos addressed four issues related to the preliminary ruling. Two of them are especially relevant to our paper.

The first one refers to the GDPR enforcement by a competition agency. The AG concluded that a competition authority, within the framework of its powers, can analyze a possible GDPR non-compliance as an incidental issue.⁴² It should be noted that, according to the AG, the analysis carried out by the competition authority must be consistent with the interpretations developed by the authority responsible for enforcing the GDPR, as well as having mechanisms for cooperation that ensure uniform application of the rule to specific conduct.

The second issue is related to the validity of the consent for the processing of personal data given to an undertaking in a dominant position. The AG considered the validity of consent should be examined on a case-by-case basis, taking into account all circumstances of the case and the responsibility of the controller to demonstrate that consent was given freely. In that sense, the market power of a personal data controller operating a social network is a factor when assessing whether users have given their consent freely. This market power could lead to an imbalance between the data subject and the controller. However, the mere fact of having a dominant position cannot, on its own, invalidate consent.⁴³

A. Exploitative abuse: Harmful to consumers, but according to whom?

The main difference between the Bundeskartellamt decision and the ruling of the German Federal Court of Justice resides in the theory of harm coming from Meta's collection and processing of its users' personal data.

³⁹ For more detail, see 2023 O.J. (C 252/21) 1.

⁴⁰ *Opinion of Advocate General Rantos*, 2022 O.J. (C 252/21) 1.

⁴¹ *Id.* at ¶ 18.

⁴² *Id.* at ¶ 78.1.

⁴³ *Id.* at ¶ 78.4.

For the Bundeskartellamt, the sole violation of the data protection legislation is a clear example of consumer harm that could not be counterbalanced by any efficiency defense or similar justifications. For the German Federal Court of Justice, the negative impact on consumer welfare is manifested by the restriction on consumers' choice: Facebook users were obliged to consent to the collection, use, and combination of their personal data if they wanted to continue using the services of the social network. Both theories of harm have been subject to some criticism. We will address a particular aspect of that critique: the neglecting of consumers' welfare.

1. Data protection law does not necessarily reflect consumer welfare

Although German Competition Law and case law consider the infringement of a different regulation as a valid threshold for an abuse of dominance, a more traditional standard of competition law enforcement from a comparative perspective demands a practice to reduce consumer welfare in order to be considered anticompetitive.

Accordingly, that demands a query into the goals of data protection laws and competition legislation. In other words, does the GDPR also protect consumer welfare?

Several data protection rules enacted in the European Union and exported to different countries around the world include several principles for the lawful processing of personal data, such as fairness, transparency, adequacy, accuracy, or necessity. Data subject's consent is the cornerstone of the regulation and the permission key for the processing of personal data. Notwithstanding that the idea of consent might be considered relatable to consumer's welfare in the sense of self-determination, the GDPR is full of obligations and prohibitions that go far beyond the requisite of consent⁴⁴. Anne Witt perspicuously noted that the German authority "did not rely on an economic concept of consumer welfare [...] and outright rejected Facebook's attempts to translate the implications of this infringement into quantifiable economic terms."⁴⁵

Recent studies have shed light on the potential anticompetitive effects resulting from the implementation of data protection

⁴⁴ Commission Regulation 2016/679, art. 7–11, 2016 O.J. (L 119) 1.

⁴⁵ Witt, *supra* note 1, at 297.

regulations,⁴⁶ consequently putting into question the supposed equivalence between consumer privacy and consumer welfare.

Geradin et al., argue that GDPR not only reinforced the position of large companies like Google, which can better absorb the implementation costs and deal with the restrictions on the collection and processing of data than small companies, but it has also been used as an excuse to engage in restrictive practices.⁴⁷

Johnson et al., for instance, point out that GDPR had an increasing effect on the levels of concentration in certain data-driven markets.⁴⁸ In a previous work, the same authors showed that small companies obtained a lower rate of consent from users, possibly affecting their competitive stand.⁴⁹

Jia et al., study exhibits negative effects on EU ventures after the initial enforcement date of the GDPR, in comparison with their counterparts in the US and the rest of the world, and particularly for newer, data-related, and consumer-facing ventures⁵⁰.

Chen et al., found that large tech companies did not experience a significant reduction in profits or sales as a result of the GDPR, and that the main burden fell on small firms, which is consistent with other studies that argue that the GDPR has increased online market concentration.⁵¹ However, they suggest that such findings should be adopted with caution because, among other reasons, the study does not take into account the aggregate welfare effects.⁵²

⁴⁶ Michal Gal & Oshrit Aviv, *The Competitive Effects of the GDPR*, 16 J. COMPETITION L. & ECON. 349, 386 (2020).

⁴⁷ Damien Geradin, Theano Karanikioti & Dimitrios Katsifis, *GDPR Myopia: How a Well-Intended Regulation Ended up Favouring Large Online Platforms - the Case of Ad Tech*, 17 EUR. COMPETITION J. 47, 47 (2020).

⁴⁸ Garrett Johnson, Scott Shriver & Samuel Goldberg, *Privacy & Market Concentration: Intended & Unintended Consequences of the GDPR*, MGMT. SCI. (forthcoming Mar. 2023) (manuscript at 36–37) (on file with authors).

⁴⁹ Garrett Johnson, Scott Shriver & Samuel Goldberg, *Regulating Privacy Online: An Economic Evaluation of the GDPR* (Law & Economics Center at George Mason University Scalia Law School Research Paper Series, Paper No. 22-025, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3421731

⁵⁰ Jian Jia, Ginger Zhe & Jin Liad Wagman, *The Short-Run Effects of GDPR on Technology Venture Investment*, 40 MKTG. SCI. 661 (2021).

⁵¹ Chinchih Chen, Carl Benedikt Frey & Giorgio Presidente, *Privacy Regulation and Firm Performance: Estimating the GDPR Effect Globally* 24 (Oxford Martin Working Paper Series on Tech. & Econ. Change, Paper No. 2022-1, 2022).

⁵² *Id.* at 25–26.

The legislative standard imposed by the GDPR might be at odds with the consumers' welfare and could even be counterproductive for consumers inasmuch as that regulation could hinder competitive alternatives that would be advantageous for them.

2. "Consumer choice" may not coincide with consumer welfare

The idea behind the reasoning of the German Federal Court of Justice is that privacy is a value appreciated by some consumers who do not wish to share their data with Meta notwithstanding the positive aspects of a more personalized platform that may come with granting access to more personal data to the social network.⁵³

The main problem with that argument is that it overemphasizes the value of privacy without contrasting it with actual consumers' preferences.⁵⁴ Do consumers actually care about how much data they are sharing with a social media platform? This brings the topic of the 'privacy paradox' to the table.⁵⁵ Consumers claim to care about their privacy online, but behave against their alleged interest by not reading privacy policies or not restricting the amount of data they share online.⁵⁶

The excessive collection and combination of users' information might well be detrimental to those users' interests, but not because it inherently reduces their welfare. Social network users actually do not seem to perceive they are losing anything of value as users do not associate personal data with money; they do not feel they are missing a precious asset when they pour information into a platform.

Instead, the harm to consumers comes from a different root. Consumer welfare is lessened when a dominant firm gains access to consumers' data because it diminishes their ability to influence said firm and put competitive pressure on it. In this regard, data collection may reinforce the firm's dominance. Excessive collection of data may or may not be exploitative but it can certainly restrain competition.

⁵³ Nicholas Economides & Ioannis Lianos, *Restrictions on Privacy and Exploitation in the Digital Economy: A Market Failure Perspective*, 17 J. COMPETITION L. & ECON. 765, 803 (2021).

⁵⁴ Miram C. Buiten, *Exploitative Abuses in Digital Markets: Between Competition Law and Data Protection Law*, 9 J. ANTITRUST ENFT 270, 277 (2021).

⁵⁵ Daniel J. Solove, *The Myth of the Privacy Paradox*, 89 GEO. WASH. L. REV. 1, 51 (2021).

⁵⁶ Regarding the privacy paradox effect in the Facebook case before the Bundeskartellamt, see Witt, *supra* note 1, at 285.

B. Can the collection of data be exclusionary?

The German Facebook case has drawn attention to the study of the collection of data as an exploitative conduct and of the different theories and standards of harms as such. Alternatively, we address the next question in this chapter: Can this type of behavior be approached from an exclusionary perspective?

1. Access to data as a key factor to competition law analysis: A case law review

Whilst data extraction by social media and search engines, among other online platforms, has been a subject of recent attention by academics and competition authorities, garnering valuable information as a means for abuse of dominance or monopolization is not a completely novel activity in the eyes of competition enforcers.

In this chapter we take a look at the most prominent cases in which the collection and processing of data has been considered an exclusionary anticompetitive practice by competition authorities in Europe.

Thus, this section is organized as follows. First, the collection of data will be described as a competition risk from a merger control perspective. Then, cases related to anticompetitive conduct in which data played a role in the decision will be analyzed.

a. Merger control cases involving data accumulation

We find the importance of data collection and its plausible anticompetitive effects in several merger control cases. *Siemens/VA Tech* is a good example.⁵⁷ The operation consisted of the acquisition of VA Tech shares by Siemens Österreich, a Siemens subsidiary. Hence, Siemens acquired full control of VA Tech. Siemens is a firm dedicated to various activities related to power generation and distribution, as well as infrastructure construction. On the other hand, VA Tech is active in areas related to the generation, transmission and distribution of energy, infrastructure construction and power plant engineering.

The Commission's decision held that Siemens' minority shareholding in SMS Demag, a major competitor in various markets

⁵⁷ 2006 O.J. (L 353) 19.

affected by the merger, would imply that Siemens, by having access to commercially sensitive information as a shareholder, could allow its use in favor of VA Tech. Thus, competition between VA Tech and SMS Demag would be reduced, as the former could anticipate its competitor's behavior and act accordingly. The Commission assumed that having access to competitor's data could discourage competition in the market.

Another merger example is *ENI/EDP/GDP*.⁵⁸ Energias de Portugal S.A. (EDP) and Eni Portugal Investment S.p.A. (ENI) acquired joint control of Gás de Portugal SGPS S.A. The merger had effects on the energy and gas market. EDP focuses its business on generating, distributing and supplying electricity across Portugal. On the other hand, ENI is an Italian energy company dedicated to energy supply and distribution. The acquired firm GDP is an incumbent gas manufacturing company in Portugal.

The European Commission considered the deal incompatible with the European common market, despite the presentation of a series of commitments addressing the anticompetitive risks. One of the threats that was taken into account by the competition authority was the access to information from current and potential competitors.

Gas is an essential input in the electricity market, and as a result of the merger, EDP could gain access to GDP's customer and market information. Therefore, as a vertically integrated firm, EDP would have been in a position to know the gas supply costs incurred by its main competitor in the electricity market, Turbogás. Consequently, the Commission declared that the merger would have generated irreparable damage to effective competition.⁵⁹

The Commission followed a similar approach in the *ENBW/ENI/GVS* case⁶⁰. Energie Baden-Württemberg AG ("EnBW") and ENI S.p.A. ("ENI") acquired joint control of Gasversorgung Süddeutschland GmbH ("GVS"). EnBW is a firm that participates at various levels of the electricity sector, while ENI was dedicated to the exploration and production of oil and natural gas worldwide. GVS's activity was focused on the distribution and transportation of gas using a transportation system. According to the competition authority's analysis, EnBW's minority stake in competing firms of GVS would have generated an incentive for the former to access sensitive information and

⁵⁸ 2005 O.J. (L 302) 69.

⁵⁹ *Id.* at 378.

⁶⁰ 2003 O.J. (L 248) 51.

use it to give GVS a competitive advantage.⁶¹ Despite these concerns, the Commission approved the operation under certain conditions.

In the *Blackstone/Thomson Reuters Financial and Risk Business* case⁶² the authority assessed Blackstone's acquisition of Thomson Reuters Financial and Risk Business (TR), in which it obtained full control. Blackstone is a global asset manager, while TR is a data and financial technology platform that supplies information and data analytics, among other related services.

Among the various risks assessed, we are interested in highlighting the one related to the input foreclosure. The input was the consolidated real-time data feeds,⁶³ which were traded by TR. The Commission, however, took into consideration that the acquired company faced competition by several players, therefore, the combined entity would not have the ability to foreclose.⁶⁴

The potential anticompetitive effects of data collection have been a subject of growing interest for competition authorities especially in digital markets. The *Google/DoubleClick* case is a good example.⁶⁵ The merger involved the acquisition of 100% of the shares of Click Holding Group Corp, the parent company of DoubleClick Inc, by Google. Google is a multinational company dedicated to a wide field of technological services, whose main economic activity is online advertising through its web search engine. DoubleClick is a company dedicated to the sale of ad serving, management and reporting technology worldwide to website publishers, advertisers and advertising agencies.

The European Commission approved the merger unconditionally, although it analyzed a possible anticompetitive risk that is of interest to our study. The authority evaluated the possibility that the combination of companies' datasets could give them an advantageous position over

⁶¹ *Id.* at 56–57.

⁶² 2018 O.J. (C 228) 33.

⁶³ *Case M.8837 - Blackstone/Thomson Reuters Financial and Risk Business Commission decision pursuant to Article 6(1)(b) of Council Regulation No. 139/2004 and Article 57 of the Agreement on the European Economic Area*, at 23 COM (2018) 4953 final (Jul. 7, 2018) (describing on a consolidated real time data feed as a virtual pipeline that supplies periodically updated market information that involves the aggregation of feeds from various sources into a single one).

⁶⁴ *See supra* note 62, at 70.

⁶⁵ 2008 O.J. (C 184) 10.

their competitors.⁶⁶ Nevertheless, the Commission ruled that an eventual combination of datasets would not affect them, since the data involved was not exclusive to one company, hence the potential affected firms would be able to obtain it by their own means⁶⁷.

The *Google/Fitbit* case is another good example.⁶⁸ The concentration involved the acquisition of 100% of Fitbit's shares by Google. Fitbit is a company dedicated to the manufacture and distribution of wearable devices, software and services in the health and fitness sector.

The European Commission considered that the access to data and data collection capabilities of Google raised concerns about horizontal and vertical effects. Regarding horizontal effects, the concentration would allow Google to strengthen its position in the online search market and display advertising services. In particular, the mix of the database and collection capacity of both firms would allow them to offer more personalized ads than their competitors. However, the Commission ruled that the combination of the databases and the capacity to collect them would not generate a significant impact on competition.⁶⁹ Concerning the vertical effects, the Commission took into consideration a possible strategy by Google to prevent or disturb the use of the Fitbit API to the detriment of other firms. While this concern remained, it was mitigated by the compromises offered by the notifying parties, according to the Commission.

Another relevant decision issued by the European Commission is *Facebook/WhatsApp*.⁷⁰ The merger consisted of Meta's acquisition of WhatsApp and subsequent merger. At that time, Meta's main products were the social networking platform "Facebook," the consumer communications app "Facebook Messenger" and the photo and video-sharing platform "Instagram." On the other hand, WhatsApp only provided the consumer communications services via the mobile app "WhatsApp."

One of the theories of harm analyzed by the European authority was that the merged entity could start collecting data from WhatsApp users to improve the accuracy of targeted ads served on Facebook to

⁶⁶ *Id.*

⁶⁷ *See supra* note 65, at 365.

⁶⁸ 2021 O.J. (C 194) 7.

⁶⁹ *Id.*

⁷⁰ 2014 O.J. (C 417) 4.

WhatsApp users who were also users of the social network.⁷¹ Specifically, the competition agency considered that data collection would raise competition concerns if it allowed the merged entity to improve its position in the advertising market.⁷² In this regard, the Commission pointed out that Facebook's share of data collection across the web was not the largest and that there were more companies collecting data; therefore, after the transaction there would continue to be data of internet users that would not be under the exclusive control of the merged parties.⁷³

The *Apple/Shazam*⁷⁴ merger also draws our attention. The operation involved the total acquisition of Shazam, a company dedicated to the distribution of music recognition applications by Apple.

Shazam collected information related to the presence of certain applications on the user's device. Likewise, it allowed users to connect to Spotify, a music streaming service that competed with Apple Music. Shazam application also allowed the collection of its users' personal data. In that sense, due to the merger, Apple could indirectly gain access to certain data from its competitors, in particular, Spotify.⁷⁵

The Commission concluded this scenario would not prevent effective competition, since data stored by Shazam was not exclusive to this company. Moreover, information regarding the interests of users was also collected by other apps, such as Facebook or Twitter. Hence, Apple's ability to attract users of competing music streaming services would not increase, according to the European agency.

Another fitting case is *Microsoft/GitHub*,⁷⁶ in which the European Commission assessed the acquisition of GitHub Inc. by Microsoft. GitHub is a firm dedicated to the supply of development and operation tools and, in particular, the source code hosting the web platform known as "GitHub.com."

The authority focused on the data under GitHub control. Its analysis was divided into two: a) data currently accessible to third parties, and b) data currently not accessible to third parties.⁷⁷

⁷¹ 2014 O.J. (C 417) 4.

⁷² *Id.* ¶ 187.

⁷³ *Id.* ¶ 189.

⁷⁴ 2018 O.J. (C 417) 4.

⁷⁵ *Id.* ¶¶ 210, 214–15.

⁷⁶ 2018 O.J. (C 428) 1.

⁷⁷ *Id.* ¶ 140.

Regarding the first set of resources, the Commission stated the combined entity could face problems if it chooses to block access to the data due to technical and economic reasons. According to the Commission, Microsoft would not be able to restrict access to most data currently accessible to third parties on GitHub, including source code, revision history, and the identity of authors. It would not have the incentives to block access to issues data, projects data, pull request data, and integrators data through the GitHub APIs either, as doing so would reduce the attractiveness of GitHub, degrade interoperability with third-party tools, and potentially lead to the loss of customers. Such a strategy would also undermine the trust gained by GitHub with modern developers by keeping its platform open.⁷⁸ Furthermore, according to the authority, the majority of competitors did not see this data as essential to their activities and there were alternative data sources available.⁷⁹

Concerning the second type of information, the Commission declared that it was not likely that this data would have competitive value.⁸⁰ The data on private repositories on GitHub was similar to the data on public repositories or on competing platforms such as GitLab and Bitbucket. Therefore, for the Commission, this information was not a uniquely critical input.

b. Data access and processing as anticompetitive behavior

Within the universe of anticompetitive cases involving access to and uses of valuable information, we can make a distinction between cases involving refusals to grant access to information and cases where the accumulation and certain uses of information could be seen as problematic from a competition law perspective.

c. Refusals to deal

Among the first group of cases we can find various examples, some of them leading back to the origins of competition law doctrine in the EU.

⁷⁸ *Id.* ¶¶ 141–44.

⁷⁹ *Id.* ¶¶ 146–50.

⁸⁰ *Id.* ¶ 152.

For instance, three TV stations were found guilty of abuse of dominance for refusing to give access to their weekly listings of their programs in Ireland and Northern Island in *Magill*.⁸¹ A similar subject was discussed in *IMS Health*,⁸² in which the famous market research company prohibited a competitor from using the format that it had designed to measure and report sales of individual pharmaceutical products in Germany (a ‘brick structure’).⁸³

The *Microsoft* case,⁸⁴ which dealt with the firm’s refusal to provide rivals with the interoperability information needed to develop and distribute products that competed with Microsoft’s also falls into this category.

Interoperability, portability, data sharing, data silos, among others are topics of current discussion when dealing with refusals to give access to valuable information required to compete. But the subject exceeds the scope of our investigation, which is more focused on the collection and combination of data.

d. Other cases related to data accumulation

We can start this section with the famous case *Hoffmann-La Roche & Co. AG v Commission of the European Communities*. The Court of Justice of the EU found Hoffman LaRoche guilty of abuse of dominance in the vitamins market, by concluding with twenty-two purchasers of its vitamins selling agreements containing an obligation upon the purchasers to buy all or most of their stock exclusively (or in preference) from Hoffman LaRoche.⁸⁵

While the decision analyzes many topics relevant to Competition Law, our interest for the purpose of this paper resides in the study of English clauses. An English clause allows a buyer to trade with a different seller, if the first seller does not match the offer made by the latter.⁸⁶

⁸¹ Joined Cases C-241 & C-242/91, *Radio Telefis Eireann v. Comm’n*, 1995 E.C.R. I-743.

⁸² Case C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, 2004 E.C.R. I-5039.

⁸³ ELEANOR M. FOX & DAMIEN GERARD, *EU COMPETITION LAW: CASES, TEXTS AND CONTEXT* 184–85 (2017).

⁸⁴ Case T-201/04, *Microsoft v. Comm’n*, 2007 E.C.R. II-3601.

⁸⁵ Case 85/76, *Hoffmann-La Roche & Co. AG v. Comm’n*, 1979 E.C.R. 464.

⁸⁶ *Id.* ¶ 102.

When analyzing this aspect of the theory of harm of Hoffman LaRoche's conduct, the Court considered that the English clause allowed Hoffman LaRoche to know its competitors' offers, providing the dominant firm with significant knowledge that could allow it to restrict competition when deemed appropriate. It was information that Hoffman LaRoche's clients would have preferred to keep in reserve.⁸⁷

The case *Solvay S.A. v the Commission of European Communities* is also pertinent for our study. The European authority sanctioned Solvay for abusing its dominant position in the communitarian market for soda ash. Soda ash is an important input for production of various products, including glass.

Solvay had entered into several contracts with main glass manufacturers in continental western Europe. According to the Commission, certain contractual conditions constituted an abuse of dominance, such as exclusivity clauses and 'competition clauses,' also known as 'English clauses.'⁸⁸ These served to limit the customers' ability to change suppliers and make it more difficult for competitors to enter the market. These clauses allowed Solvay to be informed of its competitors' activities in detail, since its clients were forced to communicate every offer they received.⁸⁹ Although the decision was appealed and confirmed by the General Court, the Court of Justice decided to annul the decision due to procedural issues⁹⁰.

All the above-summarized cases show the importance of access to information as a key competitive element by itself, notwithstanding the possible courses of action taken by those who are in possession of that valuable good. A refusal to share a precious asset can be construed as an anticompetitive behavior. Nevertheless, concluding an exclusivity agreement to access and withhold information could also be deemed anticompetitive. In the next section we address the exclusionary theory in the collection of information.

⁸⁷ *Id.* ¶ 107.

⁸⁸ 2003 O.J. (L 10) 10, ¶ 112.

⁸⁹ *Id.* ¶ 116.

⁹⁰ Case C-110/10 P, Soda ash-Solvay v. Comm'n, 2011 E.C.R. I-10487.

2. Collection and combination of data: the bricks of the wall

Data is a critical input to social media platforms. Its business model requires large amounts of data to provide their services.⁹¹ Facebook, for instance, uses data to provide a tailored experience, to attract and keep its users active on its platform. The more time users spend on social media, the more data can be collected.⁹² In contrast, newcomers in the market may experience some hurdles to learning enough information about their users.

First, a company may need to incur significant fixed costs in order to collect and analyze massive amounts of data. This kind of investment would discourage new entrants from providing similar services aiming to compete with large incumbents.⁹³

Second, in social media markets, the quality of the service depends on the platform's customer base size. Then, new entrants' ability to build a large customer base is not only limited by network effects and scale economies, but also by the ability to accumulate enough information from the users and the users' willingness to give access to their data to new entrants.⁹⁴

Those switching costs that consumers face when deciding whether to move from one provider to another and to learn and adapt to the functionalities of the new brand might be so relevant that consumers are deterred from doing it.⁹⁵

Switching costs prevent rivals from attaining scale. The accumulation of information over a large period of time makes it harder for a user to switch from social media platforms, eventually locking themselves in the incumbent's. This is especially true when customers cannot predict long-run costs derived from interacting with one social media platform, or when they are not capable to measure the quality of the services over time.⁹⁶

⁹¹ ALLEN GRUNES & MAURICE STUCKE, *BIG DATA AND COMPETITION POLICY* 170 (2016).

⁹² *Id.* at 191.

⁹³ AUTORITÉ DE LA CONCURRENCE & BUNDESKARTELLAMT, *COMPETITION LAW AND DATA* 38 (2016).

⁹⁴ *Id.*

⁹⁵ W. KIP VISCUSI, JOSEPH E. HARRINGTON & DAVID E. M. SAPPINGTON, *ECONOMICS OF REGULATION AND ANTITRUST* 189 (2005).

⁹⁶ GRUNES & STUCKE, *supra* note 91, at 292.

Furthermore, network effects influence market structure and lead to high entry barriers. According to Kathuria “[I]t is not difficult to see that direct network effects lead to an increase in the size of a social network platform. Further, critical mass achieved due to direct network effects on the user side makes the platform more attractive to advertisers, triggering one-sided positive indirect network effects.⁹⁷ These direct and indirect network effects lead to high entry barriers in the social media market. In this sense, the combination of the use of large amounts of data, switching costs and network effects can represent significant barriers to entry and, thus, close off access to the market to potential entrants.⁹⁸

As Grunes and Stucke have put it in simple words, users would normally remain in a social network “unless they can get their friends, family, and acquaintances to switch,” producing a lock-in effect.⁹⁹

Indirect network effects are also strengthened by the positive feedback loops created by the accumulation of data. Better data generates better-targeted ads, which in turn provides the financial capabilities to attract more users and incentivize them to “spend more time on the service’s site, which then generates more data that improves the service,” as Rubinfeld and Gal have clearly depicted.¹⁰⁰ These feedback loops can be classified into two: user feedback loops and monetization feedback loops. The first one occurs when the company uses the collected data to improve the service offered, while the second one occurs when it allows it to increase revenue, such as for targeted advertising.¹⁰¹

The moment when data is collected is also paramount to the dynamics of market competition. The information that a user shares might depict the evolution not only of its personality, but also of its interests, likes and dislikes, affections, contacts, mobility, demographic, among other aspects, whose value also varies over time. That real-time

⁹⁷ Vikas Kathuria, *Greed for Data and Exclusionary Conduct in Data-Driven Markets*, 35 COMPUT. L.&SEC. REV. 89, 94 (2019).

⁹⁸ Anja Lambrecht & Catherine Tucker, *Can Big Data Protect a Firm from Competition?* 14 (Dec. 18, 2015) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2705530.

⁹⁹ GRUNES & STUCKE, *supra* note 91, at 292.

¹⁰⁰ Daniel Rubinfeld & Michal Gal, *Access Barriers to Big Data*, 59 ARIZ. L. REV. 339, 356 (2017).

¹⁰¹ DIGITAL COMPETITION EXPERT PANEL, UNLOCKING DIGITAL COMPETITION: REPORT OF THE DIGITAL COMPETITION EXPERT PANEL 33 (2019).

information helps a social media provider to better understand its users and to personalize their features in accordance with each user's preferences. That is why the access to past data –via the transfer of information or interoperability– might not be enough to contest the competitive advantage of the continuous and permanent gathering of information. In Kathuria's words, "just past data is not important enough to stay ahead in the business."¹⁰² In this regard, the configuration of a new entrant's social media algorithm might be insufficient to pose a competitive threat if real-time and continuous access to information is lacking.¹⁰³

While benefiting from the switching costs associated with network effects is not illegal, increasing those costs could be.¹⁰⁴

For instance, if a dominant social media company prevents new entrants from building a large customer base, those competitors will not have access to critical input and will not be able to offer its users a tailored experience. In our hypothetical example, if a dominant firm blocks its customers' ability to pour their data into a rival's platform even if technologically possible, that would raise antitrust concerns.¹⁰⁵

In relation to the above, Condorelli and Padilla propose an exclusionary theory of harm generated by the collection, combination and use of data. If a firm, which is dominant in one market - called the origin market - manages to gain control of the users database of another -called target market-, then it would obtain a competitive advantage in both markets. The dominant could drive the competition out of the target market, and also discourage the entry of competition into the origin market.¹⁰⁶

This strategy, called by the authors "privacy policy tying," consists of linking the privacy policies in the origin market and the target market. In this way, the dominant firm can combine data from both markets, monetize the combined data and gain an insurmountable data advantage in the origin market.¹⁰⁷ Likewise, the advantage gained allows it to

¹⁰² Kathuria, *supra* note 97, at 93.

¹⁰³ GRUNES & STUCKE, *supra* note 91, at 201.

¹⁰⁴ *Id.* at 292.

¹⁰⁵ *Id.*

¹⁰⁶ Daniel Condorelli & Jorge Padilla, *Harnessing Platform Envelopment in the Digital World*, 16 J. LAW & ECON. 143, 169 (2020).

¹⁰⁷ *Id.* at 161.

compete aggressively in the target market and prevent the incumbents from obtaining the necessary data to enter the origin market.¹⁰⁸

In our view, behavior that involves some forms of collection and combination of data can, by itself, have the same anticompetitive effects of an English clause that compels the party of a contract to provide valuable information to a dominant firm.

While in English clauses, the customer is forced to provide valuable information about himself and sometimes about other providers because of a specific contractual provision, in cases like the one under dispute between Meta and the Bundeskartellamt, the alleged dominant firm would collect by itself the information from the user's interaction with its platform and with third-parties' websites and applications. The collection and combination of data, nevertheless, is supported by Meta's terms of services and agreements with third parties. Both, English clauses and Meta's alleged collection and combination of information aim at the same target: locking their customers in, without the need to use an exclusivity agreement.¹⁰⁹

The more information users give to a dominant firm in a data-driven market such as social media, the more difficult it would be for those customers to switch to a competing new entrant. The sunk costs of duplicating such information to a different company would be so high that customers would be deterred from migrating. Furthermore, the vast amount of data possessed by one company provides the incumbent with all the tools needed to adopt commercial decisions to prevent its users from switching towards a competitor, creating a *de facto* exclusivity. Analogous to an English clause or an obligation to supply sensitive information, the profuse collection of data by a dominant firm - reinforced by the combination of said data- could be the bricks of an insurmountable wall to market entry.

Consequently, we argue that an undue access to valuable information that, in turn, would provide the accessor with a competitive edge in the market could be subject to competition law examination.

3. A concealed practice, subject to balancing

According to Kemp, a concealed data practice occurs when a firm provides weak privacy protections but the actions involving consumers'

¹⁰⁸ *Id.* at 168.

¹⁰⁹ AUTORITÉ DE LA CONCURRENCE AND BUNDESKARTELLAMT, *supra* note 93.

data and its consequences are hidden from them. Thus, firms are allowed to collect, retain, use, or disclose personal information beyond the customers' reasonable expectations of what is necessary for the provision of a service.¹¹⁰

Following the description of the conduct implemented by Meta according to the Bundeskartellamt, the social media company might have engaged in this type of behavior¹¹¹ when it aggregated its users' information from multiple sources to create detailed profiles, tracked their location, collected special data categories, among others.¹¹²

Notwithstanding (non)compliance with the GDPR, all this information gives the social media platform an advantage in comparison with its competitors, without the consumers realizing it, because they are not aware of how their data will be used.

Furthermore, consumers are probably neither aware of the switching costs they are helping to create when their data is being collected, nor of the *de facto* exclusivity bond they are forging with the incumbent social media platform.

The information that consumers provide to a social media platform can be seen as 'specific investments' that reinforce the locked-in effect. After consumers have made those investments, firms have the ability and incentives to engage in opportunistic behavior. For instance, a social media company could, afterwards, change the rules for the use of the information gathered from consumers and they would still be unwilling to leave the platform.¹¹³

Concealed data collection imposes long-run costs on consumers. "[I]f they are locked-in, will continue to supply the monopoly (rather than its competitors) with data. The basic premise is that as the time and cost needed to switch products or services increase, the greater the customer is locked-in, the harder it will be for rivals to attract users and achieve scale. This is especially the case where consumers cannot readily predict the long-run costs in using that platform or its quality levels over time."¹¹⁴

¹¹⁰ Katherine Kemp, *Concealed Data Practices and Competition Law: Why Privacy Matters*, 16 EUR. COMPETITION J. 628, 639 (2020).

¹¹¹ Witt, *supra* note 1, at 289.

¹¹² Kemp, *supra* note 110, at 644–45.

¹¹³ GRUNES & STUCKE, *supra* note 91, at 196.

¹¹⁴ *Id.* at 292.

Users are often unaware of this situation. Consumers do not ponder the competitive costs of the specific conditions associated with the use of a particular social media platform, and they do not take into account that the more time they spend on a platform that engages in the concealed collection and processing of their data, the more difficult it is for a competing newcomer to enter into the market. Furthermore, even if social media users are aware of the potential market effects, they would not necessarily be able to assess them properly.¹¹⁵

To be sure, in spite of the potential exclusionary effects of the massive collection of data that we have previously described, a social media platform could still put forward some efficiency defenses to justify its actions.

Abuse of dominance consisting of unfair terms of contract or terms that contravene mandatory legislation—such as data protection rules—did not require a balancing analysis of the anticompetitive effects and efficiency defenses, according to the Bundeskartellamt. However, this would not be the case in a traditional exclusionary case.

Exclusionary abuse is normally subject to a deep examination of the probable effects in the market, both in the EU and in the United States.

The Guidance on the Commission's enforcement priorities pursuant to Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings establishes that the aim of the competition authority concerning exclusionary conduct is “to ensure that dominant undertakings do not impair effective competitive [...] thus having an adverse impact on consumer welfare.” Those effects could be manifested in the form of higher prices, lower quality or the reduction of consumer choice.¹¹⁶ Nevertheless, the assessment of the potential outcomes of the exclusionary conduct will be contrasted against the efficiency defenses put forward by the defendant to examine if those “outweigh any anti-competitive effects on consumers.”¹¹⁷ Balancing exclusionary effects and efficiency justifications of said practice is a common criterion set by the EU Court of Justice.¹¹⁸

¹¹⁵ With regard to consumers' bounded rationality and short-term preferences, see Daniel Rubinfeld & Michal Gal, *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*, 80 ANTITRUST L.J. 521, 540 (2016).

¹¹⁶ 2009 O.J. (C 45) 7, 9–19.

¹¹⁷ *Id.* at 28.

¹¹⁸ Case C-95/04, *British Airways Plc v. Comm'n*, 2007 E.C.R. I-2331, 86.

Before the competition authorities in Germany, Meta suggested many justifications for the collection and combination of data that allegedly benefited its users, by giving them a more personalized experience when using the social media platform. However, it would be dubious -to say the least- to argue that a business practice is advantageous to consumers when they were not fully aware of the characteristics and scope of said practice.

To substantiate such an argument, it would be required that the social media company made a prominent disclosure to its users of the dimension of the data that was being collected and of the features involving the processing and combination of such data. Furthermore, the dominant company would also have to provide clear evidence in order to demonstrate the connection between the data that is being collected and processed and the improvement of the platform in favor of its users.

In other words, data collection and combination could be justified if they work in the interest of consumers, and could be deemed anticompetitive if they help an exclusionary purpose and go beyond what was necessary for the provision of the service.

We believe that a possible defense presented by a social media company should not be discarded under the argument that it might violate data protection regulations. As we have expressed in the second chapter of this article, data protection rules do not inherently enhance consumer welfare. It should be noted that some consumers may prefer services that do not necessarily meet privacy-friendly standards but do have some other attractive features. After all, privacy enhancement might be a subject of interest for policymakers but not necessarily for antitrust enforcers.¹¹⁹

Therefore, a balancing analysis needs to be performed to check whether the efficiency justifications are real and whether they outweigh the potential exclusionary effects of a concealed collection of data that, by itself, restrict competition in the social media market, creating switching costs and a locked-in effect to the detriment of consumers.

III. CONCLUSION

Data has rapidly become one of the most valuable sources of competitive advantage in many markets including social media.

¹¹⁹ Colangelo & Maggiolino, *supra* note 12, at 36.

The response from competition law enforcement agencies, such as the Bundeskartellamt, placed the attention on the alleged exploitative effects of the massive collection of data, depending on a debatable theory that equates consumer welfare with personal data protection rules that, in our view, struggles to achieve strength and coherence.

However, the underlying concern of the exclusionary effects of the vast and concealed accumulation and processing of data has been mostly neglected.¹²⁰ This practice can have the similar effects of an English clause or a refusal to give access to information, two types of conduct that have been subject to antitrust scrutiny without hesitation from competition agencies both in Europe and in the U.S.

An exclusionary theory of harm for the collection of data can be posed and its examination would require a balancing exercise between the anticompetitive consequences including the switching costs and the locked-in effects it may produce, on one hand, and the efficiency defenses presented by the dominant firm regarding the hypothetical benefits of a more personalized experience for social media users.

The lack of a prominent disclosure of the activities conducted by a dominant provider (such as Meta in the social network market) might play against its efficiency defense. This could lead to a demand for more transparency from social media players if they wish to continue with their practice of accumulating and combining massive amounts of data.

Consumers need to be aware not only of the type of information it is being shared with a company, but also if that information might be used against them, to keep them locked into a single platform.

¹²⁰ See Witt, *supra* note 1, at 290 (discussing a short theoretical reference to an exclusionary effect coming from Facebook's conduct in the Bundeskartellamt decision).