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ABUSE OF GLOBAL PLATFORM DOMINANCE OR COMPETITION ON THE MERITS?

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Abstract

Contrary to mainstream opinion, suggesting that dominant online platforms compete on their own merits and that their abuse of the large-scale accumulation of data should fall under data or privacy laws, this article argues that competition law should investigate whether global platform competition has been established on merit alone and how digital dominance has been strengthened through the downfall of emerging competition (the exclusionary harm) and the excessive combination of individuals' data (exploitative harm). To frame the theory of competitive harm in a global context, this article compares several of the most recent cases involving digital giants such as Google, Facebook, and Amazon in both pro-active jurisdictions, as well as in less interventionist jurisdictions. In doing so, the author challenges the existing categorization of abuse of a dominant position, especially self-preferencing and the excessive disclosure of data. This article advances the constitutional dimension of competition law by recognizing the principle of nondiscrimination and equal treatment in *Google Shopping* and the principle of autonomous self-determination in *Facebook* as embedded in quasi-constitutional EU freedoms of free and fair competition for businesses and free choice for consumers.

Keywords: competition law; digital dominance; behavioral discrimination; online platforms

Introduction

Decades ago, the immensurable role of competition law in the digital age was unforeseen. It was unthinkable to predict that algorithms or artificial intelligence (AI) data would have anything to do with competition between online platforms, or that the latter would shape modern competition law. Since then, resistance has surfaced with scholars looking for newly emerging data specialists to take responsibility for and ownership of the problems created by the platforms' lack of meaningful consent from their users. Increasing popular sentiment means the very soul of competition law and its well-established principles are at risk of crumbling.

How can competition law walk away from its doctrine of consumer harm instead of embedding fundamental economic rights such as privacy? Why should competition law be concerned about data sharing for anticompetitive purposes, third-party advertising, or data brokering? In reality, and despite entrenched divisions in scholarship, the basic concept of voluntary consent dates back to the early days of competition law, where weaker contractual parties were at risk of exploitative behavior by the party in a powerful, and thus dominant, position.

Safeguarding individual autonomy and freedom of contract was the theoretical standpoint for the emergence of competition law from the law of contracts. Competition investigates the abuse of monopoly power against weaker market players. Any imbalance in bargaining power that did not fit within the monopoly power theory still fell under contract law. Later, the contractual paternalism toward weaker parties suffered metamorphosis to embrace *consumers*. Over time, competition law has also recognized consumer welfare as its foremost economic goal. With the advent of digital technology giants, consumers have developed into *individual users* of global platforms. Unfortunately, these users are unaware of the pitfalls of sharing their

data in exchange for online services such as universal search, social networking, or marketplaces.

In contract theory, gratuitous transactions are still contractual, despite an obvious lack of monetary consideration. However, even highly regarded competition authorities worldwide still grapple with complex economic concepts such as dual- or multi-sided platforms, and the excessive price users pay with their data for the use of online platforms. From the outset, global platforms have purposively found a way to evade a binding promise by camouflaging data as an unpaid monetary consideration to attract more users to a platform instantly.

Successful acquisition of more platform users and combinations of data leads to significant profits from lucrative avenues. Targeted advertising analyzes users' behavioral preferences and choices through sophisticated online tracking or digital fingerprinting to predict users' reservation price by engaging in *behavioral discrimination*.[1] Despite few empirical studies evidencing this, recent legislative regulations have aimed to tackle online discrimination by geo-blocking location tracking to promote the fairness and transparency of intermediation platforms.[2] The first recital of Regulation (EU) 2019/1150 considers the tendency of platforms

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[1] For empirical evidence of targeted advertising and personalized pricing, *see* the COMMISSION FINAL REPORT: CONSUMER MARKET STUDY ON ONLINE MARKET SEGMENTATION THROUGH PERSONALIZED PRICING/OFFERS IN THE EUROPEAN UNION, EUR. COMM'N, 60, 240, 266 (Jul. 19, 2018) [hereinafter "*Eur. Comm'n*"]. For a study on the location data, preferences, and online profiling, *see* OPINION 06/2014 ON THE NOTION OF LEGITIMATE INTERESTS OF THE DATA CONTROLLER UNDER ARTICLE 7 OF DIRECTIVE 95/46/EC, ARTICLE 29 DATA PROTECTION WORKING PARTY, 844/14/EN WP 217 at 32 (Apr. 9, 2014). The UK Information Commissioner highlighted platforms' business models driven by sophisticated behavioral advertising to achieve personalization. *See* ONLINE PLATFORMS AND THE DIGITAL SINGLE MARKET, HL PAPER 129, 56. (April 20, 2016); *See also* Anca D. Chirita, *The Rise of Big Data and the Loss of Privacy*, in PERSONAL DATA IN COMPETITION, CONSUMER PROTECTION AND INTELLECTUAL PROPERTY LAW: TOWARDS A HOLISTIC APPROACH? 153, 165 (Mor Bakhoum et al. eds., 2018) (in favor of behavioral discrimination); *See also* Maurice E. Stucke, *Here are All the Reasons It's a Bad Idea to Let a Few Tech Companies Monopolize our Data*, HARV. BUS. REV. (Mar. 27, 2018), https://hbr.org/2018/03/here-are-all-the-reasons-its-a-bad-idea-to-let-a-few-tech-companies-monopolize-our-data; *See also* ARIEL EZRACHI & MAURICE E. STUCKE, VIRTUAL COMPETITION: THE PROMISE AND PERILS OF THE ALGORITHM-DRIVEN ECONOMY 110 (2016); *See also* CHRIS J. HOOFNAGLE, FED. TRADE COMM'N PRIV. L. AND POL'Y 147 (2016) (on first-degree price discrimination and why privacy is not the solution); *See also* MARGRETHE VESTAGER, Comm'r for Competition, SPEECH at CEPS Corporate Breakfast, GETTING THE BEST OUT OF technology 2 (Sep. 10, 2018) (on the use of automatic price-tracking software by manufacturers) (transcript available on Thomson Reuters Practical Law); *See also* UK COMPETITION AND MARKETS AUTHORITY (CMA), PRICING ALGORITHMS: ECONOMIC WORKING PAPER ON THE USE OF ALGORITHMS TO FACILITATE COLLUSION AND PERSONALIZED PRICING 36 (Oct. 8, 2018) (on personalized pricing); *See also* Zuiderveen F. Borgesius & J. Poort, *Online Price Discrimination and EU Data Privacy Law*, 40 J. CONSUMER POL'Y 347, 349 (2017);) (on Amazon's price changes due to cookies' deletion). Amazon's tailored pricing is not a "hypothetical power," *see* Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017).

[2] As cosmologist, Martin J. Rees, once said: "Absence of evidence wouldn't be evidence of absence", *see* FROM HERE TO INFINITY: SCIENTIFIC HORIZONS 109 (2011). For empirical evidence, *see* Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 AM. ECON. REV. 304 (1995). For women and black shoppers offered higher prices for cars, *see* Anne Fitzpatrick, *Shopping While Female: Who Pays Higher Prices and Why?*, 107 AM. ECON. REV. 146 (2017), and O.C. Ferrell et al., *Expectations and Attitudes Toward Gender-based Price Discrimination*, 152 J. BUS. ETHICS 1015 (2018), on violations of equal treatment. For targeted advertising and price discrimination confer monopoly power over captive shoppers, *see* Rosa-Branca Esteves & Joana Resende, *Competitive Targeted Advertising with Price Discrimination*, 35 MKTG. SCI. 582 (2016), on customers' exploitation of location data for geofencing (GPS recording of individual movements), and for geo-conquesting (targeting consumers near competitors). For legislative progress, *see* REGULATION (EU) 2018/302 ADDRESSING UNJUSTIFIED GEO-BLOCKING AND OTHER FORMS OF DISCRIMINATION BASED ON CUSTOMERS' NATIONALITY, PLACE OF RESIDENCE OR PLACE OF ESTABLISHMENT WITHIN THE INTERNAL MARKET

with superior bargaining power to behave unilaterally and unfairly towards businesses and consumers. Where platforms unilaterally determine contractual terms and conditions, a case-by-case assessment could reveal unfair competition irrespective of the relative size of the parties and whether they had negotiated the terms.[3] Under perfect competition, parties negotiate in good faith or the spirit of fair dealing.[4]

Similar to the global reach of EU competition law, Recital 9, in conjunction with Article 1 (2) of the above regulation, confers extraterritorial application to transnational corporations if they offer intermediation platforms to businesses and consumers inside the EU. Notable examples include search engines, social media, and online marketplaces, which mirror the competition concerns over Google, Facebook, and Amazon as landmark cases in this article.

Defenses based on product design and internal algorithms have not always proven successful before the competition authorities, and much less a defense based on providing a free online service alone. However, institutional choices of leaving the conundrum of data-driven global platforms to data-protection authorities alone, or even to future regulation, reflect a divided international landscape. This author argues that the cause of such inherent tensions lies in divergent regulatory regimes with economics attempting to bridge the divide. Therefore, beyond a follow-up effect present in a few jurisdictions, there is ambivalence regarding how competition authorities approach global platform dominance issues, which has inspired the present research.

This article argues that competition law should investigate whether global platform competition has been established on merit alone and how digital dominance has been strengthened through the downfall of emerging competition (the exclusionary harm) and excessive combination of individuals' data (exploitative harm). To frame the theory of competitive harm in a global context, this article compares several of the most recent cases involving digital giants such as Google, Facebook, and Amazon in both pro-active jurisdictions in the European Union, Germany, and India, as well as in less interventionist jurisdictions such as the US, Canada, and the UK. The author challenges the existing categorization of abuse of a dominant position, especially self-preferencing and excessive data disclosure. The jurisdictional divide in dealing with global platform dominance captures the convergence built by competition authorities on a common ground approach to online dominance and the dissent from the former. Ultimately, this article advances the constitutional dimension of competition law by recognizing the principle of nondiscrimination and equal treatment in *Google Shopping* and the principle of autonomous self-determination in *Facebook* as embedded in quasi-constitutional EU freedoms of free and fair competition for businesses as well as free choice for consumers.

However, this article opposes an antitrust mind-set that looks disapprovingly at cases involving innovative technologies such as Google, Facebook, and Amazon as going into the unchartered territory of competition law. These cases are early-stage tests for modern competition laws. As the digital economy is rapidly expanding, global platforms replace traditional trade with stock storage by manufacturing on demand. Therefore, anticompetitive

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and amending Regulations (EC) No. 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, 2018 O.J. (L 601) recital 18, Art. 5 [hereinafter REG. *2018/302*]. *See also* Regulation (EU) 2019/1150 ON PROMOTING FAIRNESS AND TRANSPARENCY FOR BUSINESS USERS OF ONLINE INTERMEDIATION SERVICES, 2019 O.J. (L 186) 57 [hereinafter *Reg. 2019/1150*].

[3] *See Reg. 2019/1150*, *supra* note 2, at recital 14.

[4] *Id.* at recital 32, Art. 8.

practices should be carefully revisited. In some instances, the changes are merely cosmetic; in others, they are more dramatic. For the latter, public belief is an attempt to punish monopolists that pioneer their users' digital experience unduly. Thus, instead of crowning such digital monopolists as winners, the public will often remember their anticompetitive conduct vis-à-vis global users, namely individual consumers, intermediate customers, or rival competitors.

The Comparative Context

Without any doubt, Google has been the bane of competition authorities worldwide, including in the EU, the US, the UK, Canada, India, Turkey, South Korea, Russia, and Brazil.[5] Nothing has been more dramatic than the EU Commission's (hereafter, the Commission) triple fine of €8.25 billion imposed on Google for its EU market performance. Due to these developments, competition law has become more international than ever. In contrast to the legendary *Microsoft* case,[6] triggered by its rival, Sun Microsystems, and Microsoft's duty to ensure interoperability with its operating system, the *Google Shopping* case was fueled by a torpedo of complaining competitors that included Microsoft, Foundem, Yelp, Streetmap, Expedia, and TripAdvisor, as well as publishers, consumer associations such as BEUC, and the Italian competition authority.[7] Striking similarities among such digital giants include being remarkably capable of offering their customers additional services free of charge. For example, Microsoft offers Media Player and Explorer at no cost, Google offers a universal search and Android's Apps Store, and Facebook offers a social network. Thus, global competition authorities, realizing something had gone wrong, have placed digital monopolies under intense scrutiny.

Reshaping Data in the Assessment of Digital Dominance

Digital data or big data have received global recognition from competition authorities through their assessment of the dominance of big data in digital markets. In line with previous case law, the *European* Commission ("*EC*") considers free offerings as an economic activity.[8] A year ago, the *Canadian* Competition Bureau ("CBC") similarly recognized that, although users do not pay for search engines, they provide data with each query.[9] The *EC* provided further credit for data. Despite a lack of monetary consideration for universal search services,

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[5] *See* Bahadir Balki, *Google Fined—This Time by the Turkish Competition Watchdog*, KLUWER COMP. L. BLOG (Nov. 5, 2018) http://competitionlawblog.kluwercompetitionlaw.com/2018/11/05/google-fined-this-time-by-the-turkish-competition-watchdog/?print=print; *See also* Sarah Perez, *Google Reaches $7.8 Million Settlement in its Android Antitrust Case in Russia*, TECHCRUNCH (Apr. 17, 2017) https://techcrunch.com/2017/04/17/google-reaches-7-8-million-settlement-in-its-android-antitrust-case-in-russia/; *See also* Sohn JI-young, *Google Play under FTC Investigation in Korea for Alleged Abuse of Market Position*, KOREA HERALD (Apr. 16, 2018) www.koreaherald.com/common/newsprint.php?ud=20180416000718; *See also* Paulo Burnier da Silveira & Victor O. Fernandes, *Google Shopping in Brazil: Highlights of CADE's Decision and Takeaways for Digital Economy Issues*, CONCURRENCES E-BULL. (Aug. 9, 2019) https://ssrn.com/abstract=3435159.

[6] *See* Case T-201/04, Microsoft v. Comm'n, 2007 E.C.R II-03601.

[7] *See* Council Regulation 1/2003 of Jun. 6th 2017 Relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area, 2017 O.J. [hereinafter *EC*], pending appeal, 2018 O.J. (C445) 21, 21-22.

[8] *See EC*, *supra* note 7, at 152 (referring to Case T-201/04 Microsoft v. Comm'n, at 966–70); *See also* Competition — Concentrations — European markets for internet communications services — Decision declaring the concentration compatible with the internal market — Manifest errors of assessment — Obligation to state reasons (Cisco Sys. & Messagenet v. Comm'n), 2013 ECLI 635 at 65–74.

[9] CBC, COMPETITION BUREAU'S STATEMENT REGARDING ITS INVESTIGATION INTO ALLEGED ANTI-COMPETITIVE CONDUCT BY GOOGLE (Apr. 19, 2016), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04066.html; *See also EC*, *supra* note 7, at 158.

users monetize their own Internet data in accordance with Google's contractual terms of service on privacy.[10] The Competition Commission of *India* ("CCI") also successfully applied the latest understanding of how Google's search-engine generates AI data drawing on users' IP addresses and locations.[11] *The CCI* found Google to be the dominant platform for both universal search and advertising.[12] Due to the significant value attached to data, the *German* Supreme Court ("*SC*") also considered, in its case against Facebook, that a lack of monetary consideration cannot deny the existence of a market for social media under the statutory requirements of Section 18 (2) (a), as introduced by the 9th Amendment to the Act against Restraints of Competition ("ARC").[13] This section was intended to address dominance in digital markets where a good or service is provided free of charge. Both the *Bundeskartellamt* ("*BKartA*") and the *SC* recognized that any monetary consideration comes from the targeted advertising of Facebook's users.[14] It was irrelevant that these users did not pay anything, as by using Facebook, they met an economic demand and supplied their data to advertisers.[15] Under Section 19 (2) no 2 ARC, one could interpret "other terms" to include gratuitous transactions with a zero-priced service where data is the price to be paid in exchange for the service.[16] Therefore, the *SC* recognized that Facebook receives an economic benefit by facilitating the acquisition and commercial exploitation of users' data, irrespective of whether such data are proprietary.[17] Nonetheless, the acquisition of "more" data increases its economic value.[18] Concomitantly, due to the attractiveness of its global platform, Google generates significant revenues from advertising ($79.4 billion in 2016), while Amazon reached €198 billion in 2018 with a 40% share of the German e-commerce market.[19]

However, while Section 18 ARC came into force in June 2017, the investigation of Facebook had already begun in March 2016. For this reason, the Higher Regional Court of Düsseldorf ("*HRC*") did not retroactively apply the new provisions applicable to digital markets.[20] Similarly, Regulation 2019/1150 was the first to acknowledge that an intermediation platform *shares* data, which is unnecessary for the platform's functioning and *monetizes* such

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[10] *See EC, supra* note 7, at 320; *See also* number 82 at 158, on Google's Privacy Policy.

[11] *See* Joined Cases 07 & 30/2012 *Google LLC, Google India, & Google Ireland*, CCI, (Decision of Feb. 8, 2018), at 6, 31, 158 [hereinafter *CCI*].

[12] *Id.* at 8.

[13] *See* Press Release, 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?nn=3591568; *See also Bundesgerichtshof* [BGH] [Federal Court of Justice] Jun. 23, 2020, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ], 60, 27, (excluding free services offered without any economic purpose) [hereinafter *SC*].

[14] *See* B6-22/16 *Facebook*, at 239, 240, and 243 Feb. 6, 2019, at 28, 32 (acknowledges EU developments regarding transactions without monetary consideration, e.g., *Microsoft*, *Google*, *Facebook/WhatsApp*, and *Microsoft/Skype*; *SC* and *Facebook*) [hereinafter *BKartA*].

[15] *Id.* at 246; *See also SC, supra* note 14, at 29, 62.

[16] *See BKartA, supra* note 14, at 378–9. The same applies to Art. 102 (a) on unfair trading conditions.

[17] *See SC, supra* note 13, at 61, (relying on its earlier ruling of Apr. 12, 2016, KZR 30/14 *Net Cologne I*, WIRTSCHAFT UND WETTBEWERB 427 (2016), but dismissing the controversy of internally generated data); *See* e.g., Michael Eichberger, *Rechte an Daten—Verfassungsrechtliches Eigentum an Daten*, 12 VERSICHERUNGSRECHT 709 (2019).

[18] *See SC, supra* note 13, at 62.

[19] *See EC, supra* note 7, at 296; *See also* Case B2–88/18 *Amazon*, BUNDESKARTELLAMT ,Jul. 17, 2019, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B2-88-18.pdf?__blob=publicationFile&v=5.

[20] *See* Case VI-Kart 1/19 (V) Facebook v. BKartA, Higher Regional Court of Düsseldorf (*Oberlandesgerich*), 7 (Aug. 26, 2019),http://www.olg-duesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20190826_PM_Facebook/20190826-Beschluss-VI-Kart-1-19-_V.pdf [hereinafter *HRC*] (the *HRC* expressed serious doubts over *BKartA*'s administrative decision).

data for trading purposes.[21] These platforms will also be held accountable for sharing *aggregated* data, which is a huge step forward in addressing behavioral discrimination.[22]

Offering search services free of charge is a smart strategy for dual or multi-sided platforms such as Google or Facebook. Both act as intermediaries between advertisers and users.[23] Following the German amendment to the assessment of dominance in digital markets, access to data is a relevant factor to be considered.[24] This prompted *BKartA* to paradoxically advance that there is a greater willingness to share data than to pay for social networking. Indeed, Facebook users have no other realistic choice but to consent to data sharing.[25] This author agrees that consent is neither effective nor voluntary but forced onto users.[26] Similarly, the *CCI* recognized that consumers lose control over their data through intrusive advertising or behavioral discrimination.[27] By attracting more users to its platform, Google increases its appeal to potential advertisers that fund or cross-subsidize[28] Google's zero-priced service.

The *SC* also realized the danger of cross-subsidization favoring Facebook's advertising side of the market, which has been supplied with the personal data of active users on the market for social networking.[29] The *SC* stressed that Facebook's combination of these data increased the usefulness and value of data, but dismissed the *HRC*'s argument that users are not precluded from making that data available to other businesses.[30] As users do not have access to their data, which is used for a more personalized experience, they cannot make the data available to third parties.[31] For the *SC*, Facebook's personalized experience went beyond what Facebook had stipulated in its contractual terms by morphing users into intermediaries. Relying on Article 3 concerning the scope of application of Directive (EU) 2019/770, the *SC* acknowledged consideration in personal data.[32] This provision does not apply only where consumers pay a price, but also where consumers offer their data in exchange. In other words, to supply digital products or services, businesses will process consumer data.

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[21] *See* Reg. 2019/1150, *supra* note 2, at recital 34.
[22] *Id.* at Art. 9(2)(c).
[23] *See EC, supra* note 7, at 159; *See Facebook*, at 219–20 (referring to indirect network effects).For advertising funded services, consumers pay with their data, see JASON FURMAN ET. AL., REPORT OF THE DIGITAL COMPETITION EXPERT PANEL: UNLOCKING DIGITAL COMPETITION 22 (Mar. 2019).
[24]), *See BKartA, supra* note 14, at 108, 136 (the 9th Amendment to Section 18 (3a), on monopolization through market-tipping).
[25] *Id.* at 107-8; *Cf. HRC, supra* note 20, at 29 (dismissing the privacy paradox); *See also* Torsten Körber, *Die Facebook-Entscheidung des Bundeskartellamtes—Machtmissbrauch durch Verletzung des Datenschutzrechts?*, 4 N.Z.KART. 192 (2019). For the GDPR's unintended consequences which may limit data sharing between platforms, *see* Michal S. Gal & Oshrit Aviv, *The Competitive Effects of the GDPR*, 16 J.COMP. L. & EC. 349, (2020).
[26] *See BKartA*, *supra* note 14, at 184-6.
[27] *See CCI, supra* note 11, at 31-32.
[28] For recognition of cross-subsidization, see *Id.*, at 33.
[29] *See SC, supra* note 13, at 62; *See also* Jochen Mohr, *Kartellrechtlicher Konditionenmissbrauch durch datenschutzwidrige Allgemeine Geschäftsbedingungen—Die Facebook-Entscheidung des Bundeskartellamts v. 6.2.2019*, 19 EUZW 7, 265–68 (2019); Mohr, *Wettbewerbsrecht und Ökonomie im digitalen 21. Jahrhundert: Zugleich ein Beitrag zur Intel-Entscheidung des Europäischen Gerichtshofs und zum Facebook-Verfahren des Bundeskartellamts*, 69 ORDO 1 259 (2019).
[30] *See SC, supra* note 13, at *62*.
[31] *Id.*
[32] *See* Directive 2019/770, of the European Parliament and of the Council of May 20 2019 on certain aspects concerning contracts for the supply of digital content and digital services, 2019 O.J. (L136) 1 (EU); *See SC supra* note 13, at 63 (referring to Facebook's terms of service).

However, Google can be credited with competing on the merits of the speed and relevance of its results and the depth of its content.[33] Compared to Bing's or Baidu's low market shares, Google has dominated a universal search with an 80.47% share of the PC market and 94.87% of the mobile market.[34] Based on the number of daily and monthly users, Facebook dominates the market for social networking with 90% and 80 to 85% share of the market.[35] Thus, the *SC* agreed that *BKartA* had established Facebook's dominance based on an examination of all relevant factors, not just paramount market shares.[36]

From the multitude of services offered by Google, such as flights, hotels, or restaurants, the *EC* examined the anticompetitive effects in the market for comparison shopping.[37] There is certainly merit in that online retailers do not provide customers with comparison offers from elsewhere. Other platforms, such as Amazon Marketplace or eBay, act as sales intermediaries.[38] There is also merit in the *CCI*'s finding of market leveraging through Google's flight unit.[39] Thus, in search of originality, the *CBS* was the first to acknowledge Google's exclusionary conduct vis-à-vis rival services, including maps, local reviews, and travel, and Google's preferential placement due to subjective ranking criteria. [40] In India, Google's Flight Unit was displayed more prominently than its rivals due to Google's dissimilar algorithm, effectively forcing rivals to acquire traffic through paid advertising.[41]

As comparison-shopping websites rely on being shown in a universal search, they incur significant additional costs.[42] Indeed, comparison-shopping services earn revenues when customers click on their websites.[43] As an intermediary agent, Google Shopping offered a price comparison service that included various traders but excluded rivals.[44] In turn, a different ranking algorithm was applied to Google Shopping.[45]

As Google had exceptionally large shares of the market for a longer period, it enjoyed economic strength as an unavoidable trading partner.[46] In the spirit of *Hoffmann-LaRoche*,[47] Google prevented effective competition. Likewise, the *CCI* effectively mirrored the same doctrine of dominance, recognizing Google as an unavoidable trading partner to advertisers.[48]

Apart from market circumstances where large market shares turn out to be ephemeral, especially due to shorter innovation cycles, the prohibition of abuse of a dominant position under Article 102 TFEU could, nonetheless, be triggered where there is no sign of instability.

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[33] *See EC, supra* note 7, at 160.
[34] *Id.* at 184 (noting Bing enjoys 7.15% and Baidu 5.59%).
[35] *BKartA*, *supra* note 14, at 393; Ger. Sup. Ct., *supra* note 13, at 38.
[36] *See* Ger. Sup. Ct., *supra* note 13, at 90 (referencing Facebook's paramount market position).
[37] *Eur. Comm'n, supra* note 1, at 192.
[38] *Id.* at 210, 216.
[39] *CCI*, *supra* note 11, at 248.94; *see* Competition & Mkt. Auth., *supra* note 1, at 41 (showing evidence of online discrimination by hotels and ticket sales among affluent, budget conscious, and clean browsing profiles).
[40] Can. Competition Bureau, *supra* note 9, at 6.
[41] *CCI*, *supra* note 11, at 159 ; *cf.* with Dissent Note at 169-70.
[42] *Eur. Comm'n*, *supra* note 1, at 195.
[43] *Id.* at 226.
[44] *Id.* at 220 (noting a vertical business relationship with Amazon).
[45] *Id.* at 203; Margrethe Vestager, Speech at the Eur. Comm'n: When Technology Serves People (Jun. 1, 2018).
[46] *Eur. Comm'n*, *supra* note 1, at 264, 266.
[47] Case 85/76, Hoffman-La Roche & Co. AG v. Comm'n of the Eur. Comm'n, 1979, at 38; *Eur. Comm'n*, *supra* note 1, at 333.
[48] *CCI*, *supra* note 11, at 21, 103; *see id.* at 6, 330 (explaining how Google is an unavoidable trading partner).

Instead, that market has a stable hierarchy.[49] In contrast, the *CCI* examined how Google consistently maintained its dominance for a shorter period.[50] Later, the *CCI* recognized that innovation could disrupt established market positions.[51] Similarly, Section 18 (3) (a) ARC considers competitive pressure in highly innovative markets. Such pressure could become highly disruptive.[52] Thus, after seven years of Facebook's dominance, *BKartA* had no similar indications. The *SC* agreed that the competitive pressure caused by such disruptive innovation must be assessed carefully; it cannot become an abstract matter either substantively or temporarily.[53] This pressure barely caused any vulnerability to Facebook's dominant market position.[54]

When assessing Google's dominance, the *EC* recognized the paramount role that the volume of data plays in the relevance of search results.[55] This partially explains the lack of success of alternative search engine solutions. Other reasons accounted for the lack of reliance on location data, more limited indexing, or slower updating.[56] Google uses a large volume of data that is amassed from its users. Comparatively, this resonates with the US dissenting opinion, where the Federal Trade Commission (hereafter *FTC*) closed its investigation against Google. Similarly, Google's monopolistic power stemmed from "the control over user data" through deceptive means, which is an unfair method of competition.[57] Indeed, any new entrant to a universal search would face significant investments, but only a minority of users would use an alternative for searching the Internet.[58] Owing to its reputation, users trust Google to offer the most relevant search results.[59]

However, Google could reduce the quality of its service without the risk that a significant number of users would eventually switch to its rivals.[60] Similarly, Facebook's lock-in effects on users have led to high barriers to switching due to technical incompatibility and a lack of data portability.[61] According to the *SC*, in the absence of these lock-in effects, namely, under effective competition, Facebook would offer its users the choice of greater autonomy over access to their data and, ultimately, the choice of a personalized experience as to whether the latter should include Facebook data or not.[62] As Facebook's behavior is not choice-driven, the *SC* found it to be exploitative of users.[63]

A Special Responsibility to Equality and Fairness: Dismissing Self-Favoring for Exclusionary Demotion

Following the previous case law, the *EC* has drawn on the special responsibility of a dominant undertaking not to distort competition in the market by ensuring that the principle of equality

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[49] *Eur. Comm'n*, *supra* note 1, at 267, 271, 274 (describing Google's strong and stable market shares).
[50] *CCI*, *supra* note 11, at 20.
[51] *Id.* at 197.
[52] Bundeskartellamt, *supra* note 14, at 501-02, 521, 550.
[53] Ger. Sup. Ct., *supra* note 13, at 51.
[54] *Id.* at 52.
[55] *Eur. Comm'n*, *supra* note 1, at 288.
[56] *Id.* at 289.
[57] 111-0163 Concurring and Dissenting Statement of Comm'r J. Thomas Rosch Regarding Google's Search Practices, *In the Matter of Google Inc.*, F.T.C. File No. 111-0163 (January 3, 2012).
[58] *Eur. Comm'n*, *supra* note 1, at 291, 306.
[59] *Id.* at 312.
[60] *Id.* at 324.
[61] Bundeskartellamt, *supra* note 14, at 452, 461, 469.
[62] Ger. Sup. Ct., *supra* note 13, at 86.
[63] *Id.* at 87.

among all economic operators is safeguarded.[64] This responsibility is legally construed as an obligation imposed on dominant undertakings, not to abuse their position by restricting competition. Otherwise, there is potential for leveraging that position in the market where undertakings are dominant or in "separate, but related markets."'[65] The *BKartA*, too, referred to Facebook's special responsibility not to unilaterally impose business terms on its users over which they cannot exert any influence.[66] Furthermore, the *SC* embraced a unique special responsibility for designing the platform's terms of use in line with Facebook users' right to informational self-determination.[67] Inspired by the European principle of nondiscrimination, the *CCI* found that Google had behaved discriminatorily regarding both search and advertising, thus harming advertisers and, indirectly, consumers.[68]

As mentioned previously, the exclusion of comparison-shopping websites from Google Shopping was one of the *EC*'s first concerns. This conduct became exclusionary as Google had not only positioned its Shopping Unit "more favorably" but also diverted traffic from rival comparison-shopping services.[69]

This article dismisses the mainstream categorization of Google's conduct as naked self-favoring.[70] It argues that its practical novelty can be much better, captured as an exclusionary *demotion* of rival services through *different algorithms* than those applicable to Google Shopping, which, in turn, leads to consumer harm.[71] This categorization follows the *EC*'s well-established standard of anticompetitive foreclosure, leading to consumer harm. Otherwise, a

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[64] *Eur. Comm'n*, *supra* note 1, at 341; *see* Margrethe Vestager, The Future of European Values (Oct. 3, 2018) (noting the equality of opportunity rarely appears in the policy discourse; for example, equality before the law). *See also* Jan Wouters, *Constitutional Limits of Differentiation: The Principle of Equality*, THE MANY FACES OF DIFFERENTIATION IN EU LAW (Dec. 2001).

[65] EUR. COMM'N, FINAL REPORT FROM THE COMM'N TO THE PARLIAMENT, THE COUNCIL, THE EUR. ECON. AND SOC. COMM. AND THE COMM. OF THE REGIONS COMM'N at 9 (Jul. 15, 2019).

[66] Bundeskartellamt, *supra* note 14, at 677, 894.

[67] Ger. Sup. Ct., *supra* note 13, at 124.

[68] *CCI*, *supra* note 11, at 3.

[69] *See* Eur. Comm'n, *supra* note 1, at 331 (arguing in favor of exclusionary conduct but no self-favoring or discrimination; *see also* Renato Nazzini, *Unequal Treatment by Online Platforms: A Structured Approach to the Abuse Test in Google*, THE NOTION OF RESTRICTION OF COMPETITION: REVISITING THE FOUNDATIONS OF ANTITRUST ENFORCEMENT IN EUROPE (2017).

[70] *See* Nicolo Zingales, *Google Shopping: beware of 'self-favouring' in a world of algorithmic nudging*, CPI Antitrust Chron. (Feb. 13, 2018); Pedro Carlo Sousa, *What Shall We Do About Self-Preferencing*, CPI Antitrust Chron. (Jun. 24, 2020); Alessandra Tonazzi & Gabriele Carovano, *Digital Platforms and Self-Preferencing*, CPI Antitrust Chron. (Jun. 24, 2020); Rod Carlton & Rikki Haria, *Self-Preferencing—Legal and Regulatory Uncertainty for the Digital Economy (and Beyond?)*, CPI Antitrust Chron. (Jun. 24, 2020). *See also* Niamh Dunne, *Public Interest and EU Competition Law*, 65 ANTITRUST BULL. (2020) at 278 (recognizing self-preferencing as "the most prominent theory of harm"); cf. for a more nuanced categorization of "salient bias and undue prominence" to Google's own vertically integrated platform, *see* Amelia Fletcher, *The EU Google Decisions: Extreme Enforcement or the Tip of the Behavioural Iceberg*, CPI ANTITRUST CHRON. (Jan. 2019); opposing self-favouring as misleading and obscure legal category, *see* Pablo Ibáñez Colomo, *Self-Preferencing: Yet Another Epithet in Need of Limiting Principles*, (2020) at 4; for a balanced approach, *see* Inge Graef, *Differentiated Treatment in Platform-to Business Relations: EU Competition Law and Economic Dependence*, 38 YEL (2019) at 452–53 (distinguishing naked self-preferencing from differentiated treatment and secondary-line discrimination).

[71] *Eur. Comm'n, supra* note 1, at 344; Furman, *supra* note 23, at 63 (describing the demotion of rivals due to Google's algorithmic design).

standalone categorization of self-favoring belongs to unfair competition[72] because it harms competitors, rather than consumers or the competitive process.

However, even exclusionary demotion lacks originality as it is the product of a legal "transplant"[73] from the *FTC*'s findings of Google's algorithm and product design. Google had "demoted all but one or two comparison shopping" services from the first to a later page of its universal search, causing rivals to lose traffic.[74] Neither the *FTC* nor the *CBC* found any conclusive evidence[75] to support a successful claim that Google had manipulated its search algorithm to engage in unfair competition vis-à-vis Google's vertically integrated services. This does not mean that there was no substantive merit in their cases; rather, the *FTC* and *CBS* had insufficient robust evidence to go ahead further. There can be little if no doubt that exclusionary demotion leads to anticompetitive harm. One major cross-jurisdictional difference is that the *FTC* found Google's conduct objectively justified.[76]

Another legal transplant considered by the *CCI* concerns the EU commitments offered to Google, especially the demotion of advertisers due to search manipulation.[77] This caused frustration due to such commitments being extraterritorially applied to a different statutory architecture in India.[78] Partially concurring with the *EC*, the *CCI* found Google's services prominently displayed. Critical for online visibility, this was likely to eliminate competition through search bias and manipulation.[79] In addition, Google denied access and refused to license content to rival search engines as a universal gateway to the Internet.[80] Again, the *CCI* relied on another legal transplant from the EU, namely Google's special responsibility to ensure fairness in online searches and advertising.[81]

Why have commentators *preferentially* labeled Google's conduct as the lesser of the above two evils, namely "self-favoring"?[82] One tentative answer is that this categorization is eye-catching through simplification. However, the definitive answer is that by eliciting the exclusionary harm through demotion and differentiated algorithms, it loses sight of the wider picture. Furthermore, the principle of *equality* of opportunity—often referred to as fair

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[72] For the view that self-favoring leads to unfair competition, *see* Andrei Hagiu, et. al., *Should Amazon be allowed to sell on its own marketplace?* (Aug. 18, 2020) at 2.

[73] 08-03 *See* e.g., Michal Gal, *The 'Cut and Paste' of Article 82 of the EC Treaty in Isr.l: Conditions for a Successful Transplant*, 9 EUR. J. OF L. REFORM, N.Y. UNIV. L. & EC. RSCH. PAPER NO. 08-03 (2007) (noting how this has proven to be a "Trojan horse").

[74] *In the Matter of Google Inc.*, F.T.C. File No. 111-0163 (January 3, 2013).

[75] Can. Competition Bureau, *supra* note 9, at 2.

[76] MARK R. PATTERSON, ANTITRUST L. IN THE NEW ECON.: GOOGLE, YELP, LIBOR, AND THE CONTROL OF INFORMATION. 122 (Harvard Univ. Press 2017).

[77] *CCI*, *supra* note 11 at 23, 129.

[78] *Id.* at 161. India's extraterritoriality in Section 32 of its competition law empowers the CCI to impose fines on transnational corporations, *see* Vinod Dhall, *India: The Competition Act and its Enforcement*, in COMPETITION LAW TODAY: CONCEPTS, ISSUES, AND THE LAW IN PRACTICE 574 (Vinod Dhall ed., 2019).

[79] *CCI*, *supra* note 11, at 5–6, 22, 24; *see id.* at 262. for the lack of a manual manipulation of algorithms that are automatically generated by machines.

[80] *Id.* at 11, 325.

[81] *Id.* at 202.

[82] *See* Margrethe Vestager, Speech at the Lisbon Web Summit: Clearing the Path for Innovation (Nov. 7, 2017); see also, Case C-525/16 *Serviços de Comunições e Multimédia SA v. Autoridade da Concurrêcia* ECLI:EU:C:2018:270, at 24. [hereinafter *Serviços*]

competition—and *nondiscrimination* are all enshrined in the Preamble of the Treaty of Lisbon.[83]

As a matter of prevailing principle, the same standard[84] of algorithmic ranking should apply to *all* comparison-shopping websites. Deviations are, therefore, subject to unequal or differentiated treatment such as demotion, dimming, or manipulation, as mentioned in Regulation 2019/1150. Usefully, only *ex-post*, this regulation imposes a *duty to reveal* the main parameters—but not algorithms—on intermediation platforms, determining the rankings and including any payment received that might influence such rankings.[85] Where there is no contractual relationship between a search engine platform and its users, no such duty is applicable. For Google, such a duty exists due to its privacy policy, which includes standard terms and conditions for businesses and individual users.[86] In addition, for vertically integrated marketplaces such as Amazon, there is an obligation to refrain from the *differentiated treatment* of rivals, which could undermine fair competition and restrict consumer choice.[87]

The Principle of Non-Discrimination Applicable to Rankings

This article argues that the *EC*'s legal reasoning in *Google Shopping* originates in a wider interpretation of nondiscrimination, which safeguards an equal treatment norm: Google should rank all comparison-shopping websites in the same way, irrespective of affiliation to or ownership by Google. Concomitantly, the *EC*'s decision did not apply the discrimination test of Article 102 (c), which applies to "dissimilar conditions to equivalent transactions"[88] for two reasons.

First, this article argues that Google's conduct is unequal treatment of rival comparison websites through *naked* discrimination. The latter does not necessarily demand the exclusion of rivals if it distorts competition in the downstream market for comparison shopping and offers an advantage to another trading partner, namely the Shopping Unit, which is vertically integrated into Google.[89] This also fits much better into the context of the second limb of Article 102 (a) on imposing "unfair trading conditions" or even unfair terms of service.

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[83] First mentioned in the Spaak Report in 1956 and later in the preamble of the Treaty of Lisbon, *see* Anca D. Chirita, *A Legal-Historical Review of the EU Competition Rules*, 63 I.C.L.Q 304 (2014); on the distinction between fair competition and unfair trading, Johannes Laitenberger, COMMISSION'S DIRECTOR-GENERAL FOR Competition, SPEECH: EU COMPETITION LAW IN INNOVATION AND DIGITAL MARKETS: FAIRNESS AND THE CONSUMER WELFARE PERSPECTIVE 4 (Oct. 10, 2017).

[84] *See Eur. Comm'n*, *supra* note 1 at 440 (there is nothing wrong with Google applying *certain* relevance standards); FURMAN, *supra* note 23, at 33, 61 (for platform prominence, rankings, and reviews to be designated on a fair, consistent, and transparent basis).

[85] Recitals 26 & 28 in conjunction with Comm'n Regul. 2019/1150, art. 5, 2019 O.J. (L 186) 15, 16.

[86] *See* Google's Privacy Policy, https://policies.google.com/privacy.

[87] Recitals 30 & 31 for intermediation platforms in conjunction with Comm'n Regul. 2019/1150, art. 7, 2019 O.J. (L 186) 16,17.

[88] For the latest ruling on first-degree price discrimination, *see Serviços*, *supra* note 82, at 19 (the court clarified that proof that this conduct can restrict competition is required, affecting direct competitors in the same relevant market; categorically against a classical discrimination but supportive of a standalone abuse that leads to market distortion downstream),; *See also* Nazzini, *supra* note 69 relies (relies on the principle of legal certainty and Art. 7 E.C.H.R, both of which are not applicable to Google).

[89] Thomas Eilmansberger, *Article 82*, in COMPETITION LAW: EUROPEAN COMMUNITY PRACTICE AND PROCEDURE 1138, at 2.15.246 (Günther Hirsch, Frank Montag & Franz J. Säcker eds., 2008) (on *mere* discrimination against a contractual partner); Miguel de la Mano, Renato Nazzini & Hans Zengler, *Article 102*, *in* THE EU LAW OF COMPETITION 525 at 4.895 (Jonathan Faull & Ali Nikpay eds., 2014); Rhodri Thompson, Christopher Brown & Nicholas Gibson, *Article 102*, *in* BELLAMY & CHILD EUROPEAN UNION LAW OF COMPETITION 802, at 10.083 (Vivien Rose & David Bailey eds., 2013).

Nondiscrimination originates from the moral theory of business ethics.[90] Unfortunately, unfair pricing leading to the exploitation of consumers has been under-enforced because of an overly defensive attitude towards classical price discrimination. In contrast, global platforms often engage in dynamic price discrimination due to automated software algorithms that offer precise information about consumers' willingness to pay.[91]

Second, even in the absence of monetary considerations, the *EC* has a compelling case due to an algorithmic[92] competitive advantage; for example, the volume of data that Google amassed from its users. The latter enjoy no bargaining power vis-à-vis Google other than leaving its platform. The *CCI* also recognized data as a competitive advantage in relation to Google Flights' prominent display and the algorithmic demotion of rivals.[93] As a dominant distribution platform, Amazon also uses its customers' data to gain a competitive edge over its rivals in the marketplace.[94]

In addition, the Court of Justice (hereafter *CJEU*) clarified in *MEO* that under Article 102 (c), the discriminatory conduct hinders the competitive position of a dominant undertaking's business partners.[95] The same could be said of rival comparison-shopping services. Google excluded rivals from its shopping unit in the absence of a direct purchase functionality.[96]

One feature of the European enforcement of Article 102 (a) is the wide variety of unfair contractual agreements beyond traditional sales, including copyright licensing for nonperformance in *GEMA*, a compulsory assignment of copyrights in *SABAM II*, a trademark agreement in *Grünes Punkt*, an unreasonable duration and automatic renewal of a commercial lease in *Tetra Pak II* and *Alsatel*, and industrial supply.[97] One could, therefore, argue that the

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[90] Juan M. Elegido, *The Ethics of Price Discrimination*, 21 BUS. ETHICS Q. 634 (2011); for price discrimination leading to consumer welfare, *see* Richard Schmalensee, *Output and Welfare Implications of Monopolistic Third-Degree Price Discrimination*, 71 AM. ECON. REV. 242 (1981); Marius Schwartz, *Third-degree Price Discrimination and Output: Generalizing a Welfare Result*, 80 AM. ECON. REV. 1259 (1990); price discrimination is worse for consumers, even if it increases efficiency for firms, *see* Oren Bar-Gill, *Algorithmic Price Discrimination: When Demand is a Function of Both Preferences and (Mis)perceptions*, 86 U. CHI. L. REV. 242 (2019).

[91] Oliver Hinz, II-H Hann & Martin Spann, *Price Discrimination in E-commerce? An Examination of Dynamic Pricing in Name-your-own Price Markets*, 35 MISS. Q. 81 (2001); Nawel Ayadi, Corina Paraschiv & Xavier Rousset, *Online Dynamic Pricing and Consumer-perceived Ethicality: Synthesis and Future Research*, 32 RECHERCHE & APPLICATIONS EN MARKETING 50 (2017); *cf.* on doubting that the collection of behavioral data favors producers, *see* Dirke Bergemann, Benjamin Brooks & Stephen Morris, *The Limits of Price Discrimination*, 105 AM. ECON. REV. 953 (2015); *cf.* on dynamic prices that could be justified by buyers' uncertainty, *see* Daniel F. Garrett, *Intertemporal Price Discrimination: Dynamic Arrivals and Changing Values*, 106 AM. ECON. REV. 3291 (2016); however, consumer welfare declines as more information about consumers becomes available, *see* Daniele Condorelli & Jorge Padilla, *Harnessing Platform Envelopment in the Digital World*," 16 J. COMP. L. & EC. (2020), 164.

[92] Competition & Mkt. Auth., *supra* note 39, at 5.23; due to limited empirical evidence, historical search data would confer less of a competitive advantage, *cf.* Lesley Chiou & Catherine Tucker, *Search Engines and Data Retention: Implications for Privacy and Antitrust*, N.B.E.R. 19 (2017); for a gap in the literature on algorithmic fairness, discrimination, and empiricism, *see* Talia B. Gillis & Jann L. Spiess, *Big Data and Discrimination*, 86 U.C.L.R. 465 (2019).

[93] *CCI*, *supra* note 11 at 294.

[94] Khan, *supra* note 1, at 7 on Amazon's exploitation of its customers' data; for Booksellers Association's concerns, HL, *supra* note 1, at 145.

[95] *Serviços*, *supra* note 82 at 25.

[96] *Eur. Comm'n*, *supra* note 1 at 439.

[97] Case COMP/IV/29971, GEMA, 1982 O.J. (L 94) 12; Case C-127/73 BRT v. SABAM II, ECLI:EU:C:1974:25; Case COMP/D3/34493, *Der Grüner Punk—Duales System Deutschland,* 2001 O.J. (L 166) 1; Case

scope of unfair trading is open-ended. In the absence of any negotiation with the dominant undertaking, rival platforms have no choice but to accept standard terms and conditions. Thus, rivals suffer a disadvantage vis-à-vis a vertically integrated platform. Furthermore, any inclusion in a universal search must pursue fair, objective, and nondiscriminatory ranking criteria.

In contrast, the *CCI* applied the statutory prohibition of unfair conditions to trademark owners that had no choice but to bid for AdWords. As such, consumers were confused by rival bids that were better ranked than trademark owners.[98] One unfair condition identified was the contractual termination of licensing without any reason.[99] The practice bears striking similarities with the *Google France* case and exacerbates a free-rider problem.[100] Although a literal interpretation of the Indian statute places unfairness in the context of sales, the *CCI*'s approach is appropriate for online platforms subject to one caveat; it upsets the dividing line between competition and IP law. In addition, Google expected exclusivity from advertisers. Otherwise, advertising for the concurrent use of rival platforms was "prohibitively expensive."[101]

The *CCI* did not substantiate exclusivity in Google's distribution agreements with browsers, making Google the default option for universal searches.[102] Google's intermediation agreements demanded that publishers not show search engines that are "the same or substantially similar" to those offered by Google.[103] This conduct was captured by unfair conditions imposed on publishers.[104] As Google "marginalized" its rivals,[105] it strengthened its dominant position, which is similar to its European counterpart. In the *AdSense* case, Google prohibited publishers from placing rival ads on universal searches, insisting that they place a minimum number of ads and prevent ads being shown in a visible spot that would attract traffic.[106]

Although in its early days, the *EC*'s investigation into Amazon's marketplace focused on its use and analytics of "competitively sensitive information," including pricing data about sellers' products and their customers' preferences.[107] As the most popular online marketplace, Amazon clashes with the neutral role of global distribution.[108] Despite limited empirical research to

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COMP/IV/31043, Tetra Pak II, 1992 O.J. L 72/1; Case C-247/86, Alsatel, ECLI:EU:C:1988:469; Thompson, *supra* note 89, at 10.143.

[98] *CCI*, *supra* note 11 at 26, 278.

[99] *Id.* at 325.

[100] Case C-236/08, Google France & Google, ECLI:EU:C:2010:159.

[101] *CCI*, *supra* note 11, at 329.

[102] *Id.* at 367.

[103] *Id.* at 374, 394, 398.

[104] *See cf. CCI*, *supra* note 11 at 414 (Google argued that such agreements are subject to negotiation with publishers). Thus, publishers have a weaker bargaining power vis-à-vis Google.

[105] *CCI, supra* note 11 at 395.

[106] Case COMP/40411 Google Advertising (AdSense), not yet available; pending appeal Case T-334/19 Google & Alphabet v. Comm'n, 2019 E.C.R.; Eur. Comm'n PRESS RELEASE IP/19/1770, COMMISSION FINES GOOGLE €1.49 BILLION FOR ABUSIVE PRACTICES IN ONLINE ADVERTISING (Mar. 20, 2019).

[107] Case COMP/AT/40462 Amazon; COMMISSION EUR. COMM'N PRESS RELEASE IP/19/4291, COMMISSION OPENS INVESTIGATION INTO POSSIBLE ANTI-COMPETITIVE CONDUCT OF AMAZON (Jul. 17, 2019).

[108] On Amazon's role as a marketplace and reseller versus hosting by inviting rivals to sell on top of its offerings, *see* Andrei Hagiu & Joshua Wright, *Marketplace or reseller?*, 61 MGMT. SCI. (2015), 184; Hagiu & Wright, *Controlling vs. enabling*, 65 MGMT. SCI. (2019), 577; HARVARD BUS. SCHOOL WP 16-002 (July 2015); Hagiu, Jullien, & Wright, *Creating platforms by hosting rivals*, 66 MGMT. SCI. (2020), 7.

support cogent evidence of abuse, Amazon could prove a replica of *Google Shopping*,[109] where a distribution platform with paramount bargaining and market power prominently displays its own brands, and through vertical foreclosure, disproportionately charges rival sellers for inclusion or abruptly terminates contractual relations as in the German *Amazon* case.[110] The real difference is that of degree.[111] In *Google Shopping*, users make no purchases, so the likelihood of vertical foreclosure effects was sufficient. On Amazon's marketplace, customers make purchases that could leave them worse off in case of reduced choice, but further evidence of downgrading or de-listing rival sellers is required. Amazon's friendly pricing for consumers to disguise a long-term selective predatory strategy could not be entirely excluded, where lower prices first build customers' trust in Amazon's platform with captive customers paying higher prices later.[112]

The Principle of Fairness Applicable to Combinations of Data

While Facebook has achieved a similar competitive advantage to Google based on the large-scale collection of data, the *HRC* disagreed.[113] For any competitive disadvantage vis-à-vis Facebook's competitors, there must be an "objective impairment"' of their freedom of action. Unlike *Gegenwert I* and *II*, the *HRC* emphasized that there is inconclusive evidence that Facebook's consolidation of data is a barrier to market entry or makes entry more difficult for rivals.[114] On closer examination, Facebook offers privileged access to AI data analytics, which is not matched elsewhere by its rivals.

One may argue that the use of data analytics and combinations of data from other platforms strengthened Facebook's global dominance. However, *Facebook* surpassed *Equifax*'s data protection issue,[115] and thus, Facebook's behavior cannot be captured as a "privacy-policy tying" or "bundling of user data."[116] That terminology denotes separate services, whereas a

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[109] For Amazon's prominent display of its own products due to a secret algorithm, *see* Hagiu et. al., *supra* note 72, at 2 and 4, with Amazon more likely to compete with most successful sellers.

[110] Bundeskartellamt, *supra* note 19 (BKartA closed its investigation against Amazon for blocking merchants' accounts, exclusionary terms concerning liability and for manipulation of customer reviews).

[111] Feng Zhu & Qihong Liu, *Competing with Complementors: An Empirical Look at Amazon.com*, 39 STRATEGIC MGMT J. 2632 (2018); speculative media claimed that Amazon had forced rivals to charge lower prices, Dana Mattioli, *Amazon Changed Search Algorithm in Ways That Boost Its Own Products*, WALL ST. J. (Sep. 16, 2019); Amazon could exclude rivals by charging higher fees for listings, JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 126 (2019).

[112] For predation, *see* Baker, *supra* note 111, at 137; Khan, *supra* note 1, at 753 criticizing recoupments as a bar to antitrust intervention; for skepticism about a *genuine* predatory strategy, *see* CHRIS SAGERS, UNITED STATES V. APPLE: COMPETITION IN AMERICA 232 (2019).

[113] Bundeskartellamt, *supra* note 19 at 498; cf. Higher Reg'l Ct. of Dusseldorf, *supra* note 20 at 32; *cf.* Serviços, *supra* note 82 at 9 (where the Court dismissed a *de minimis* threshold for the seriousness of a competitive disadvantage); on significant competitive advantage in mergers, *see* Salvatore De Vita & Eleonora Ocello, *Apple/Shazam: A Remix of Your Favorite Tunes of Data Issues in Merger Control*, COMP.*in* COMP. MERGER BRIEF 3 (2019); for a data competitive advantage (feedback loop), *see* Furman, *supra* note 23, at 33.

[114] Higher Reg'l Ct. of Dusseldorf, supra note 20 at 34, 36; Ger. Sup. Ct., BGH KZR 58/11 *VBL-Gegenwert I* (Judgment of Nov. 6, 2013); Ger. Sup. Ct., BGH KZR 47/14 *VBL-Gegenwert II* (Judgment of Jan., (Judgment of Jan. 24, 2017); greater access to big data by a dominant platform may exclude rivals, exploiting data as a competitive advantage through personalization and selective targeting of customers, *see* Baker, *supra* note 111, at 128 and 134.

[115] Wouter P.J. Wils, *The Obligation for Competition Authorities of the EU Member States to Apply EU Antitrust Law and the Facebook Decision of the Bundeskartellamt*, 13 CONCURRENCES (2019); Case C-238/05, *Asnef Equifax*, EULI:EU:C:2006:734, at 63.

[116] *See* Condorelli & Padilla, *Data-driven Predatory Entry with Privacy-Policy Tying*, available on SSRN (May 13, 2020); thus, better captured as a "combination of data across multiple platforms … without infringing privacy laws," *see* Condorelli & Padilla, *supra* note 91, at 146.

"personalized" experience involves a blend of big data by combining different sets of personal data. Facebook's unique triple target has been to *monetize*, *monopolize*, and *combine* its users' data across multiple platforms to obtain an unparalleled data-driven competitive advantage.

As *BKartA* is not responsible for consumer protection, Section 19 (2), no 2 ARC was inapplicable.[117] This section is a general clause against unfair terms. In his economic evidence in support of Facebook, the former chairman of the Monopolies Commission, Professor Haucap, argued that Facebook's incorporation of users' data across several of its platforms, including WhatsApp, Oculus, Masquerade, Instagram, and Facebook, is efficient, as it improves the quality of Facebook's targeted advertising.[118] This position can be rebutted for three reasons. First, national consumer protection authorities in the EU do not necessarily deal with privacy breaches, as in the US.[119] Second, the general clause relates to the unfair conduct of a dominant undertaking, which requires a careful distinction between Section 19's unfair *business* terms and conditions and unfair *contractual* terms. Regardless of whether targeted advertising is beneficial, one should also examine the *privacy* angle rather than efficiency alone. Third, compared to a data protection authority, *BKartA* can better perform an economic analysis of Facebook's super-dominance. The Federation of Consumer Associations has welcomed this development.[120] In contrast, the *HRC* was overcritical of the *Facebook* decision. The latter is a test case of whether competition could extend its application to AI data-driven global platforms. The *HRC* did not follow the spirit of a flexible approach to digital markets, as advanced by Schweitzer, Haucap, Kerber, and Welker, as it considered unfair business terms as a matter of contract law.[121]

The legal context of the German provision in question refers to a dominant undertaking's imposition of "business terms and conditions" that are dissimilar to those applicable under the conditions of effective competition, and, where possible, comparable markets. The *BKartA* applied Section 19 (1), no 2 to Facebook's abuse of a dominant position through abusive business terms and conditions.[122] The latter enabled Facebook to amass users' data—without their consent—across several platforms owned by Facebook.[123] Such terms include cookies to

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[117] Federal O.J. I-1750, Jun. 26, 2013, as later amended Jun. 1, 2017; *BKartA*, at 156; cf. for business practices, unfair competition (Section 3 (1) & 4 (10) of the Unfair Competition Law) intersects competition law (Section 19 of the Act against Restraints), so the former applies to individual claims from competitors and to market obstruction, *generally* HELMUTH KÖHLER & JOACHIM BORNHAM, GESETZ GEGEN DEN UNLAUTEREN WETTBEWERB 101, at 6.17 (2011); for a brief review, ANCA D. CHIRITA, THE GERMAN AND ROMANIAN ABUSE OF MARKET DOMINANCE IN THE LIGHT OF ARTICLE 102 142–3 (2011).

[118] *BKartA*, *supra* note 14 at 163; *cf.* beyond conglomerate mergers' contribution to economies of scale, data combinations could expand dominance, *see* JACQUES CRÉMER, YVES-ALEXANDRE DE MONTJOYE & HEIKE SCHWEITZER, COMMISSION FINAL REPORT: COMPETITION POLICY FOR THE DIGITAL ERA 108 (2019).

[119] Most eloquently, *CMA*: privacy can play a role in competition and consumer law enforcement where competition is driven by *privacy*, in the presence of an *unfair* commercial practice or *term*, *see* WRITTEN EVIDENCE (IRNO100) TO THE HOUSE OF LORDS' SELECT COMMITTEE ON COMMUNICATIONS, THE INTERNET: TO REGULATE OR NOT TO REGULATE, at 57 (2018); for the view that antitrust should not embed privacy concerns but strengthen privacy laws, *see* D. Daniel Sokol, *Antitrust's 'Curse of Bigness' Problem*, 118 MICH. L. REV. (2020) 22.

[120] *BKartA*, *supra* note 14 at 966; *cf. HRC*, *supra* note 20 at 28.

[121] SCHWEITZER ET AL., REPORT FOR THE FEDERAL MINISTRY FOR ECONOMIC AFFAIRS AND ENERGY: MODERNIZING THE LAW ON ABUSE OF MARKET POWER, at 1, 12 (2018), https://www.bmwi.de/Redaktion/DE/Downloads/Studien/modernisierung-der-missbrauchsaufsicht-fuer-marktmaechtige-unternehmen-zusammenfassung-englisch.pdf?__blob=publicationFile&v=3; at 11 for a duty to share data; *cf.* Commissioner Rosch that such a duty could discourage innovation, *supra* note 121, at 6.

[122] *BKartA, supra* note 14 at 559, 561, where Facebook's terms of service in conjunction with its data and cookies policies are terms and conditions within the meaning of section 19; cf. Facebook's claims that the legal basis is data protection, at 566.

[123] *Id.* at 522.

allow online retailers to recognize a returning customer and match their browsing history, previous purchases, and delivery location. The latter is indicative of the average market value of their houses and their income.[124]

Facebook's terms and conditions are standard terms. As Facebook users cannot negotiate such terms, they are unilaterally imposed on a "take-it-or-leave-it" basis.[125] The *SC* agreed that the ease with which users accept Facebook's standard terms is a formal manifestation of information asymmetries and consumers' indifference.[126] Furthermore, for an abuse of dominance, such terms are not required to be illegal.[127]

This author argues that even if users consent to Facebook's policies, consent could still be meaningless. Otherwise, through mechanical box-ticking, Facebook could record voluntary consent and remain safe from any intervention by data protection laws, as the latter cannot challenge the abuse of a dominant position through *exploitative data consolidation* following mergers and acquisitions (*ex-post*).[128]

Similar to the imposition of unacceptable contractual conditions by a dominant undertaking, the *SC* held that Facebook's product extension could harm competition, which requires protection under the Act against Restraints.[129] As in the *Oberhammer* case on forced contractual tying, harmful effects can arise if the imposition of a product extension exploits customers or threatens competition.[130] Contrary to the *HRC*'s view, the *SC* stressed that the behavior of a dominant undertaking imposing unacceptable conditions on its customers could, nonetheless, be abusive even though that behavior did not lead to their exploitation.[131] Therefore, one cannot deny the applicability of Section 19 (1) to the present scenario, as, under effective competition, the harmful effects on consumers would not have occurred.[132] This happens in dual-sided markets, where the exploitation of intermediaries on one side of the market could also harm competition on the other side of the market.[133] Therefore, the *SC* dismissed Facebook's claim that the prohibition of data mining and processing without consent was a data protection measure only, but recognized *BKartA*'s empowerment under Section 32 (2), no 1 ARC.[134] In this section, *BKartA* may undertake behavioral or structural remedies to address Facebook's behavior. Furthermore, the *SC* dismissed Facebook's claim against *BKartA*'s decision to be primarily based on a violation of data protection as regards to

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[124] For excellent insights, Arupratan Daripa & Sandeep Kapur, *Pricing on the Internet*, 17 OXFORD REV. EC. POL'Y 209 (2001).

[125] On the birth of competition from contract law, STEPHEN A. SMITH, ATIYAH'S INTRODUCTION TO THE LAW OF CONTRACT 12 (2005): "Competition has even been given as a solution to the problem that contracting parties often do not understand or even read … complex contractual terms"; similarly, Hugh Beale, *Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts*, in GOOD FAITH AND FAULT IN CONTRACT LAW 232 (Jack Beatson & Daniel Friedmann eds., 1995): "even if a customer is aware of what is in the standard term and protests, it is likely to be met with a take-it-or-leave-it attitude."

[126] *SC, supra* note 13 at 91.

[127] *Id.* at 99.

[128] For a lack of competence of data-protection authorities for an abusive exploitation of data by monopolists, and especially following M&As, *see* Chirita, *supra* note 1, at 111; on under-enforcement, CMA'S CHIEF EXECUTIVE, ANDREA COSCELLI, SPEECH: COMPETITION IN THE DIGITAL AGE: REFLECTING ON DIGITAL MERGER INVESTIGATIONS (Jun. 3, 2019).

[129] *SC*, *supra* note 13 at 64.

[130] *Id.*; *see* also *SC*, KZR 1/03, *Der Oberhammer* (Judgment of Mar. 30, 2004), BGHZ 158, 334.

[131] *SC, supra* note 13 at 65.

[132] *Id.* at 72; *see* also Condorelli & Padilla, supra notes 91 and 174, where data combinations are thought to lead to higher price, lower quality, loss of privacy and less innovation.

[133] *Id. See also SC supra* note 13 at 60, 27.

[134] *SC, supra* note 13 at 127.

Facebook's terms of use and reiterated that Facebook's abuse consists of a lack of *genuine* or *free* choice of users to deny or withdraw consent for their data without harm.[135] This is a long-awaited, outstanding victory for consumers' *freedom of choice*.

The Mechanics of a Tripartite System and Its Enforcement Gap

In recent years, a *lacuna* in the General Data Protection Regulation (*GDPR*) 2016/679 has been acknowledged by the European Data Protection Supervisor (*EDPS*).[136] Accordingly, users may become locked into a platform because of the time and effort to switch to an alternative provider. An exploitative abuse could consist of the price paid for the data entrusted to such platforms, which could, in turn, become excessive compared to the value of the service itself. Most importantly, the principle of fairness permeates consumer contracts, competition, and data protection legislation on unfair terms; Article 102 (2) (a)'s imposition by a monopolist of unfair trading conditions and unfair data processing, respectively.

Due to the mechanics of a tripartite enforcement system, this author argues that this mix of regulatory powers over unfair terms becomes a vicious circle. This can only occur when the competition authorities leave the issue of exploitative abuse of consumers to the consumer protection authorities, while the latter leaves the issue of unfair terms to data protection authorities. In *Facebook*, *BKartA* had been in close coordination with the data protection authority, which agreed that *BKartA* should take the matter in its remit. This is consistent with the *EDPS*'s concerns[137] about grounds for intervention under data protection, consumer protection, and competition laws to address potential negative implications of micro-targeting for individuals' fundamental rights.

This article argues that *BKartA*'s assessment is legally sound. Neither the GDPR[138] nor civil contracts, for example, individual liability for unfair terms, can address Facebook's unfair business terms and conditions, especially its exploitative use of AI data. The European counterpart prohibition of unfair trading under Article 102 (a) does not exclude the application of more severe provisions of national competition law.[139] Furthermore, a national intervention under the Act against Unfair Competition[140] applies to cases of the abuse of *relative* bargaining power. Thus, Facebook enjoys a quasi-monopolistic, superior bargaining position.[141]

On appeal, the *HRC* dismissed the claim of an exploitative abuse under Section 19 (2), no 2. In the *HRC*'s view, this section applies exclusively to the sale of goods or services for which

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[135] *Id.* at 131.

[136] Vestager's Answer P-001183/2019 given to Parliament on behalf of the Commission (May 8, 2019) that the GDPR 2016/679 closes an enforcement gap; for a nuanced opinion that online price discrimination could fall under the GDPR, and thus the latter cannot be applicable to all cases and remains silent on the lawfulness of price discrimination, Richard Steppe, *Online Price Discrimination and Personal Data: A General Data Protection Regulation Perspective*, 33 COMPUTER L. & SECURITY REV. 773, 776 (2017); *cf.* initially, *EDPS*, PRELIMINARY OPINION: PRIVACY AND COMPETITIVENESS IN THE DIGITAL AGE: THE INTERPLAY BETWEEN DATA PROTECTION, COMPETITION LAW AND CONSUMER PROTECTION IN THE DIGITAL ECONOMY 29, para 4.2 (Mar. 2014); *EDPS*, OPINION 8/2016 ON COHERENT ENFORCEMENT OF FUNDAMENTAL RIGHTS IN THE AGE OF BIG DATA 8 (Sep. 23, 2016).

[137] *BKartA*, *supra* note 14 at 555; *EDPS*, OPINION 8/2016, at 9; *EDPS*, OPINION 3/2018 ON ONLINE MANIPULATION AND PERSONAL DATA 17 (Mar. 19, 2018).

[138] *Cf. BKartA*, *supra* note 14 at 536 and 540.

[139] Eilmansberger, *supra* note 89, at 2.15.231; on unfair terms, de la Mano, *supra* note 89, at 516.

[140] *BKartA*, *supra* note 14 at 540, 544 where *BKartA* could have clarified why the Unfair Competition Act does not apply to Facebook and the data-protection loophole for abuse of a dominant position.

[141] *Id.* at 646, 784, and 786 on Facebook's clear imbalance vis-à-vis users, especially the young and inexperienced.

a dominant undertaking demands payment *or* other terms and conditions. The latter are different from those that would ordinarily arise under effective competition. In particular, the *HRC* criticized *BKartA* for not having assessed competition in comparable markets. This author argues that following an ordo-liberal mantra of as-if-competition[142] is unpalatable as *BKartA* had, indeed, examined social media markets comparable with Facebook. Thus, such an analysis is irrelevant in the absence of an unfair price. However, consumers rarely pay for the use of social media services other than their data. Therefore, it is unclear why the *HRC* referred to Facebook's business terms, including data and cookie, as directives instead of a notice or privacy policy. However, the *SC* disagreed with Facebook's claim of a global advertising market, instead of a national market for social media.[143]

Global Behavioral Discrimination

The *HRC* did not completely dismiss the idea that consumer harm could amount to a distortion of competition, and as such, competition law could incorporate a consumer-protection function[144] following EU case law. Furthermore, under Section 19 (2), no 2, especially on price discrimination, prices or other terms and conditions have only rarely been found to be unfair without an analysis of "as-if-competition" in comparable markets. That said, the as-if-competition standard requires a comparison with the conditions that would exist under natural competition. In classical economics, Alfred Marshall warned against this misunderstanding, saying that "only those economic results are normal, which are due to the undisturbed action of free competition."[145] The latter is an ideal model of perfectly free competition whose natural conditions do not exist in reality. From this, it follows that *BKartA* was expected to investigate whether the combination of Facebook's data with the data acquired from other platforms falling under Facebook's ownership, such as Instagram, WhatsApp, Masquerade, and Oculus, harmed competition in comparable markets by examining *inexistent* comparable prices.[146] The *SC* formidably identified this non-existent market price tag to combine users' data from third-party sources as the culprit for the *HRC*'s denial of an exploitative abuse through excessive disclosure of personal data.[147]

This article had previously argued against behavioral discrimination by global platforms such as Facebook, which are heavily reliant on their users' combination of data. Therefore, this

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[142] *HRC*, *supra* note 20 at 7; Daniel Zimmer, *Section 19 GWB*, in KOMMENTAR ZUM DEUTSCHEN KARTELLRECHT, at 8 (Ulrich Immenga & Erst-Joachim Mestmäcker eds., 2007); for a historical evolution of this concept and the judicial difficulty with a hypothetical competitive price, *see* DAVID J. GERBER, LAW AND COMPETITION IN THE TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS 252, 311 (1998).

[143] *SC, supra* note 13 at 20. For users, Facebook is not interchangeable with platforms for professional networking or jobs (such as Xing, LinkedIn, Indeed, or Stepstone); communications (Snapchat, WhatsApp, or Skype); or social media (YouTube, Twitter, or Pinterest), *see* at 25 and 41; for an earlier view that Facebook's dual-sided market nature will be unhelpful to a swift antitrust focus from social networking to advertising, *see* Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preferences for Privacy*, 16 BERKELEY BUS. L. J. (2019), 86.

[144] Case C-85/76 Hoffmann-La Roche, at 125 does not mention consumers but discusses a system ensuring that competition is not distorted; cf. *HRC, supra* note 20 at 8 refers to the consumer-protection function, at 125.

[145] ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 29 (2013).

[146] Indeed, one cannot determine the economic value of data as for tangible products or services, *see* Nicholas Economides & Ioannis Lianos, NET INSTITUTE WP 20-05, J. COMP. L. & EC. (2020), 40; *cf.* that such an insurmountable step would be necessary, *see* Viktoria Robertson, *Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data*, 57 C. M. L. REV. (2020), 161.

[147] *SC, supra* note 13 at 9; also, at 85, where a considerable number of users are against the disclosure of personal data.

behavior cannot be treated in the same way as classic second-degree price discrimination.[148] Of course, one would have expected the *HRC* to adopt a more flexible approach to the as-if-competition standard. Fortunately, the *SC* came to its rescue by upholding that the above Section 19 (2) is not subject to a stricter "as-if" standard, which is limited and even inappropriate in situations where there is no prospect of effective competition.[149]

Due to the sharing of users' data, which is free of charge and impossible to compare, behavioral discrimination is, nonetheless, close to a contemporary interpretation of *third-degree discrimination*.[150] This is where Facebook or third-party analytics can identify categories of users with a different willingness to pay and subsequently divide them based on economic preferences, interests, geo-location, and reservation price. Retrospectively, one could argue that the EU enforcement against unfair pricing has not been very successful when considering the difficulties associated with a price-cost analysis of comparable products or services.[151] Comparatively, the US Robinson-Patman Act (1936) has not been enforced since 1977 due to similar expectations of price comparisons for like products.[152] Again, the *SC*'s bold recognition is a huge step in the right direction.

An Intuitively Speculative Theory of Consumer Harm Through Combinations of Data

The *HRC* unacceptably asserted that Facebook did not exploit users because any further combination of data could have easily been duplicated. Consumers were not worse-off but free to share such data with third parties and Facebook's competitors.[153] As the constitutional right to privacy must be safeguarded, it appears nonsensical to encourage users to share their data with everyone.

The *HRC* criticized *BKartA* for the lack of "meaningful" findings of the combination of data.[154] This suggests that such a combination did not amount to an "excessive" disclosure of data. This criticism is not waterproof because users share various types of relevant data with other platforms, but *BKartA* noted this.

This author argues that the sole large combination of data offers Facebook a unique competitive advantage vis-à-vis its competitors. With its ownership of Instagram, WhatsApp, Masquerade, and Oculus, Facebook could only enrich the type of relevant data available in its possession and share it with third parties for both advertising and analytics. Unreasonably, the *HRC* expected *BKartA* to find the market value of such data, contrary to the view[155] cited by the *HRC*, which is indeed difficult to quantify. However, Körber's argument that there is no exploitative abuse because Facebook's combination of data improves the quality of its service and because users suffer no detriment is incorrect for two reasons. First, it is unclear how users'

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[148] For Pigou's classical definition of price discrimination, A.C. PIGOU, THE ECONOMICS OF WELFARE 279 (2013), namely (i) *first degree*, if a monopolist charges a different price against all different product units; (ii) *second degree*, if it were able to charge different prices; and (iii) *third degree*, if the monopolist were to distinguish amongst groups of customers. In favor of a ban on price discrimination, *see* John Vickers, *Regulation, Competition, and the Structure of Prices*, 13 OXFORD REV. EC. POL'Y 22 (1997); cf. the welfare consequences of price discrimination in monopoly markets are ambiguous, Baker, *supra* note 111, at 133.

[149] *SC*, *supra* note 13 at 82.

[150] For a classical definition of third-degree price discrimination, *see* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 770 (2016).

[151] Eilmansberger, *supra* note 89, at 2.15.205.

[152] HOVENKAMP, *supra* note 150, at 775–6.

[153] *HRC, supra* note 20 at 9.

[154] *Id.* at 8.

[155] Körber, *supra* note 25, at 191.

behavior, rather than technical data, could improve the social network's engine. Second, it is very doubtful that Facebook users have suffered no detriment where third parties have analyzed their economic preferences and location data to make predictions about the reservation price and willingness to buy.

Unfortunately, the *HRC*'s judgment relied on the speculative assumption that there is no exploitative abuse by acquiring users' data by third-party companies because the users were neither harmed nor exploited.[156] Instead, the *HRC* favored proof that Facebook's terms were different from those arising under effective competition. However, this bar is ludicrous, as Facebook's market shares and acquisitions of other platforms demonstrate that there is no effective competition. It is tantamount to agree that if Facebook's competitors offer *similar* terms and conditions, sharing such data combinations with third-party analytics makes Facebook's conduct pro-competitive.

The analogy with the *VBL-Gegenwert* cases of civil liability for unfair terms illustrates the *SC*'s application to data processing.[157] As in *Gegenwert II*, where the *SC* did not examine whether competitors were using similar terms and conditions, *BKartA* recognized that Facebook would compete less effectively with Google if it did not rely on its users' data.[158] Contrary to the *HRC*, the *SC* followed *BKartA*'s approach, which did not dismiss an infringement of competition law, as users have not expressly consented to the collection, processing, and combination of their data.[159]

Perhaps, one may agree with the *HRC* that the legal interpretation in the *Facebook* decision was not highly persuasive.[160] On substance, both the decision and the *HRC* ruling leave much to be desired. In the words of Einstein, "Only daring speculation can lead us further and not the accumulation of facts." The latter is prevalent throughout, while legal interpretation holds certain flaws. The *HRC* was unprepared to accept what it had perceived to be a speculative consumer harm theory based on global platforms' combination of data. There was no empathy towards contractual unfairness, even when a monopolistic platform caused it.

Consideration of Fundamental Human Rights Such as Privacy in the Public Interest

Both the EU Charter of Fundamental Rights and the German Constitution require that an assessment of unfair terms and conditions follows the hierarchy of laws: privacy is a fundamental human right, and subsequently, it is above other norms.[161] Following the *Pechstein* ruling, the assessment of the parties' interests must consider constitutionally protected rights, such as individual autonomy against commercial interests.[162] In *Pechstein*, the *SC* stated that when examining the relevant interests under Section 19, one must consider

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[156] *SC*, *supra* note 13 at 9.
[157] *BKartA*, *supra* note 14, at 523–4.
[158] *Id.* at 874,881; *SC*, BGH, Jan. 24, 2017, KZR 47/14, juris (Ger.) http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=77833&pos=0&anz=1.
[159] *SC*, *supra* note 13 at 129; also, at 130 on Facebook's lack of express consent for combinations of data.
[160] *BKartA*, *supra* note 14, at 525; *HRC*, *supra* note 20 at 9.
[161] *BKartA*, *supra* note 14, at 526, 529 on the right to informational self-determination; *cf.* skeptical that privacy could overcome surveillance credited to national security but for corporate data tracking; *see* Benjamin W. Cramer, *A Proposal to Adopt Data Discrimination Rather Than Privacy as the Justification for Rolling Back Data Surveillance*, 8 J. INFORMATION POL'Y 28 (2018).
[162] *BKartA*, *supra* note 14, at 527–8, 900; *SC*, BGH, Jun. 7, 2016, KZR 6/15, juris (Ger.) http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=75021&pos=0&anz=1, at 56 on heteronomy where general clauses of civil (Section 138) and competition law (Section 19) must take fundamental rights into account.

fundamental rights such as the freedom to exercise a profession.[163] In *Facebook*, the *SC* held that whether a dominant position is abusive depends upon an overall assessment of the relevant interests with regard to the ARC's goal of free competition.[164] Although undertakings decide the nature of their economic activity, the freedom to design their business model exists solely within the ARC limits.[165] In other words, this entrepreneurial freedom cannot lead to the abuse or a restriction of competition, which runs counter to the goal of "free competition."[166] As users deserve protection due to their increasing dependence on Facebook, the *SC* agreed with BKartA's findings of anticompetitive effects, which justify a restriction of entrepreneurial freedom. Where the freedom of choice has been weakened, due to Facebook's paramount position and lock-in effects, and, as a result of actual or residual competition, consumers are disempowered from implementing their preferences, the prohibition of abuse under Section 19 (1) requires consumer choice to be considered when examining all relevant interests.[167]

Comparatively, the English test of reasonableness evaluates an imbalance of bargaining power. There is a gross imbalance of bargaining power[168] between Facebook and its users. Facebook unilaterally dictates business terms to users. Therefore, adopting a paternalistic approach to this context could correct the issues of asymmetric market power.[169] In the same spirit, the Federation of Consumer Associations recognized data policies as standard business terms.[170]

There are striking similarities with the transparency requirement for drafting contracts where such terms have to be intelligible, easily accessible, and written in clear and plain language.[171] Therefore, one cannot agree with the outdated way of thinking expressed by the *HRC*, that is, that the average Facebook user behaves rationally. It assumed that users had autonomously controlled such data combinations with their consent, as users had not been unfairly "coerced," "pressured," or subjected to external constraints.[172] Regarding the latter, one may agree with both the *HRC* and Körber[173] that this is not the case. However, this is an incredibly low bar for intervention in unfair contracts, especially where a powerful party forces the weaker party to agree to data combinations. It is unacceptable and inapplicable to Facebook.

Fortunately, the *SC* recognized that users expect their data collection and processing to be limited for Facebook's funding, and not inclusive of third-party data. Contrary to *HRC*, users should autonomously make their decisions about using the network according to their personal preferences and moral concepts.[174] In the absence of a suitable alternative to Facebook's service, users make no autonomous decisions unless one can relinquish Facebook's

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[163] *Id.* at 58.
[164] *SC*, *supra* note 13 at 98.
[165] *Id.* at 122.
[166] *Id.*
[167] *Id.* at 123.
[168] *BKartA*, *supra* note 14, at 861; gross imbalance comes at the expense of users' self-determination; dominant platforms enjoy strong bargaining power over users and could impose unfair terms; Furman, *supra* note 23, at 36.
[169] *BKartA*, *supra* note 14, at 530; *cf.* Facebook objected to the applicability of unfair terms and data processing, at 533.
[170] *Id.* at 534, 625 for *BKartA*'s reference to *standard* clauses unilaterally imposed.
[171] *Id.* at 568 for transparency under Art. 307 (1) no 2 Civil Code; according to Art 4 (2) of the Dir. 93/13/EEC on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29 unfairness cannot touch upon monetary consideration in so far as terms are written in plain, intelligible language.
[172] *HRC, supra* note 20 at 9, 25.
[173] Körber, *supra* note 25, at 187.
[174] *SC*, *supra* note 13 at 100.

indispensability.[175] Interestingly, the SC considered that users deserve protection from exploitation even when a dominant undertaking does not offer essential products or services.[176] Relying on the constitutionally safeguarded right to "informational self-determination"' in the context of the considerable political, social, and economic importance of Internet communications, especially due to the size and depth of data, the *SC* afforded users protection from Facebook's exploitative abuse through an undue disclosure of data.[177] This offers individuals the opportunity to participate in the decision-making process regarding the context and how their data are used.[178] More recently, the German Constitutional Court applied the right to informational self-determination for public security purposes to protect the privacy of Internet telecommunications subscribers, especially their dynamic IP address and traffic data.[179] Otherwise, by matching a dynamic IP address, online movements can be traced back to a specific point in time.

The *SC* stressed that the right to informational self-determination had been significantly affected, where a dominant undertaking such as Facebook has disproportionately capitalized on its unlimited access to users' data, both from *within* and *outside* of the social network for the sole purpose of commercialization.[180] However, Facebook's collection and processing of personal data outside of its network has *not* been of public interest as required by the data protection laws, nor is it necessary to protect an individual's life or vital interests.[181] Facebook's interest in the collection and processing of third-party data has primarily been for targeted advertising, analysis and research, financial, security, and legal reasons.[182] Although the above interests are legitimate, especially third-party data processing for advertising purposes, exceptions from data protection must be strictly limited.[183]

The *SC* did not agree that Facebook's legitimate interests cannot be adequately protected without collecting data from outside of its platform.[184] Facebook's abusive behavior has harmful effects on potential competitors that would not have arisen under effective competition.[185] Although potential competitors are not protected from such effects when weighing up the above interests, there are special market conditions that leave users no real choice between a personalized experience and excessive data processing.[186] Furthermore, the *SC* disagreed with the *HRC*'s earlier finding that a horizontal impediment to competition—vis-à-vis Facebook's competitors— would not depend on a lack of user consent for data processing purposes.[187] Due to Facebook's paramount market position, users deserve the free choice between a more personalized experience and one for which the collection and processing of "off-Facebook" data, which has not been subject to users' express consent, is dispensable.[188]

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[175] *Id.* at 101.
[176] *Id.* at 102.
[177] *Id.* at 103.
[178] *SC*, *supra* note 13 at 104.
[179] Press Release, German Constitutional Court: *Bundesverfassungsgericht*, Legal provisions on providing and obtaining information on subscriber data are unconstitutional, BUNDESVERFASSUNGSGERICHT (Jul. 17, 2020), https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-061.html.
[180] *SC*, *supra* note 13 at 110.
[181] *Id.* at 114, 116.
[182] *Id.* at 118.
[183] *Id.* at 119.
[184] *Id.*
[185] *Id.* at 120.
[186] *Id.* at 129, reference to the vulnerability of Facebook's competitors.
[187] *Id.*
[188] *SC*, *supra* note 13 at 121.

However, the *SC* found that processing off-Facebook data was not justifiable for security reasons.[189]

Irrational Consumers?

This article argues that *HRC*'s assumption that there is no unfair exploitation of users' weaknesses to leave the popular platform is flawed. The *HRC* criticized *BKartA*'s lack of statistical evidence that, once Facebook had changed its terms, it had massively lost users. On the contrary, the *HRC* simply assumed that most users behave as rational consumers, making autonomous decisions as they are not on Facebook (50 million),[190] leaving the other 32 million to remain on Facebook at their peril. Therefore, it does not come as a surprise that the *SC* dismissed this assumption as not being a valid argument to deny Facebook's abusive behavior.[191] For example, the *HRC* suggested that *BKartA* did not prove that the "average" user would prefer paying for the use of Facebook rather than supplying data for advertising.[192] In contrast, the *SC* recognized the interest of users in remaining on Facebook and their legitimate expectation of having a limited collection and processing of data that solely benefits Facebook.[193] The *SC* criticized Facebook's additional offering of a personalized experience as something that users did not wish, especially the acquisition of their data from third-party sources, and for which they did not even grant access. It was questionable whether this was a tie-in of two separate products or solely a product enhancement. The *SC* opted for the latter as, in addition to social networking, users did not receive an *indispensable* personalized experience.[194]

Contrary to the *HRC*'s view, the *SC* stated that one cannot dismiss the examination of Facebook's abuse of dominance through the imposition of a product enhancement solely because such a personalized experience was free of charge.[195] Furthermore, the *SC* stressed that by imposing a product enhancement, which is not even worth pursuing, Facebook abused its dominant position because of the disadvantages brought about to users who do not wish their data to be accessed for a personalized experience and because of the latter's adverse effects on users. By examining all the circumstances of the case, an outstanding competition concern was the *increase* in the consideration paid by users for Facebook's *unwanted* product enhancement, as their data had been collected outside of users' *desired* social networking service.[196]

The *HRC* ultimately blamed 32 million users for their indifference to and failure to take notice of Facebook's terms and conditions.[197] This is despite evidence to the contrary; for

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[189] *Id.* at 128.
[190] *HRC, supra* note 20 at 29, 34; *SC, supra* note 13 at 57.
[191] *Id.* at 58.
[192] *HRC, supra* note 20 at 29.
[193] *SC, supra* note 13 at 58.
[194] *Id.* at 58 (relying on Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 9, 1982, WuW/E BGH 1965, 1966 (Ger.)).
[195] *Id.* at 97.
[196] *Id.* at 59.
[197] *Id.* at 11, 31; against users who do not read standard terms, *see* Jens-Uwe Franck, *Eine Frage des Zusammenhangs: Marktbeherrschungsmissbrauch durch rechtswidrige Konditionen*, 14 Z.W.E.R 157 (2016); *cf.* on the failure of notice-and-choice and arguing in favor of a higher standard; *see* ARI EZRA WALDMAN, PRIVACY AS TRUST: INFORMATION PRIVACY FOR AN INFORMATION AGE 83–5 (2018); since the early 1960s, standard terms have been enforceable where signed, though not understood, but, nonetheless, subject to the unfair standard terms statutes (1999 Unfair Terms in Consumer Contracts Regs and 2015 Consumer Rights Act, Section 64); JONATHAN MORGAN, CONTRACT LAW 91 (2015).

example, a user survey showed that four-fifths or, according to the *SC*, 80% of users did not read Facebook's standard terms.[198] It is astonishing to say that nearly a third of this population is elderly or too young for Facebook. However, the *HRC* was not interested in demographics. Instead, it regarded concerns over Facebook's combination of sensitive data,[199] including political views, as meaningless.

In summary, the above legal arguments put the *HRC* on a collision course with the approach adopted by the EC in the historic *Microsoft* case, while the *SC* adopted a paternalistic approach benefitting several million users. Overall, the average user did not behave rationally due to users' inertia, being locked in the default version of Microsoft's Media Player and Explorer. In contrast, the *HRC* dismissed the idea that users are dependent on Facebook when they agree to the standard terms of service.[200] As the issue of sensitive data falls under data protection laws, *BKartA* had previously consulted with the relevant authority. Nevertheless, the latter is unable to evaluate Facebook's paramount economic power.

Summary of Findings

The *EC* concluded that Google did not compete on the merits of its service alone; it undermined the market's competitive structure.[201] Google's prominent display and position vis-à-vis comparison-shopping services was a defensive measure intended to protect its revenues derived from advertising.[202] Rival services were unable to attract users to their platforms, as it was necessary to compete with Google effectively. Similarly, the *CCI* concluded that before 2010, relevance alone was not the hallmark of Google's universal search results.[203] In other words, it was not "competition on the merits".

In its defense, Google criticized the imposition of a "duty to promote competition" and disputed that access to its universal search was "indispensable"' for it to compete.[204] However, in *Google Shopping*, the *EC* did not rely on the earlier case law on refusals. Google's universal search was not an indispensable facility, especially given its replicability by Bing and others.[205]

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[198] *HRC*, *supra* note 20 at 30; cf. HL, *supra* note 1, at 237 (online platforms' privacy notices are inaccessible to the average consumer being "too long and expressed in complex language"); *SC*, *supra* note 13 at 91.

[199] For risks involved in the collection of sensitive social data, for example, bias and negative stereotypes, Betsy A. Williams, Catherine F. Brooks & Yotam Shmargad, *How Algorithms Discriminate on the Basis of Data They Lack: Challenges, Solutions, and Policy Implications*, 8 J. INFORMATION POL'Y 106 (2018).

[200] *HRC*, *supra* note 20 at 25.

[201] *EC*, *supra* note 7 at 600; *See also*, *CCI*, *supra* note 11 at 171, (suggesting that search is not determined by relevance).

[202] *EC*, *supra* note 7 at 642.

[203] *CCI*, *supra* note 11 at 420 (a).

[204] *EC*, *supra* note 7 at 645; T-612/17, Google & Alphabet v. Comm'n., 2017 http://curia.europa.eu 37 (*pending appeal*); Crémer, *supra* note 118, at 7 (there is *no* need to establish that Google's universal search is an essential facility); Google funded a highly provocative article by former President of the General Court of the EU, Bo Vesterdorf, *Theories of Self-preferencing and Duty to Deal—Two Sides of the Same Coin?*, 4 COMP. L. & POL'Y DEBATE 9 (2015) (arguing that self-favoring can *only* exist where universal search is an essential facility, which contradicts the EU case law, and that comparison-shopping websites could viably attract traffic from Bing, Yahoo, social media, and traditional advertising, which is impossible given Google's super-dominance). On substance, one can agree with Nicolas Petit, *Theories of Self-preferencing under Article 102 TFEU: A Reply to Bo Vesterdorf,* COMP. POL'Y INT. (2015); *see* Condorelli & Padilla, *supra* note 91, at 159; cf. that self-preferencing may increase the market price and drive competitors out of the market.

[205] *See* Anca D. Chirita, *Google's Anti-Competitive and Unfair Practices in Digital Leisure Markets*, 11 COMP. L. REV. 122 (2015) (against an essential facility); *cf.* Vesterdorf, *supra* note 204 (in favor of a duty to deal); *See* Nazzini, *supra* note 69 (in favor of a constructive refusal to supply which contradicts the EU case law and lack of a contractual obligation between Google and rivals).

Furthermore, paragraph 649 reiterated that Google's anticompetitive conduct does *not* stand for novel abuse. In addition, the *EC* chose not to frame the conduct under preexisting forms of abuse under Article 102 (a) or (c). In contrast to the *Microsoft* case, the *EC* divided its enforcement against Google into three separate decisions: *Comparison Shopping*, *Android* (tying), *and AdSense* (advertising).[206] While this could be commended for pragmatism, one may raise transparency issues due to the administrative delay in granting access to the other two cases to protect Google's business secrets.

The *BKartA*'s concluded that Facebook users could not determine how their data had been misused.[207] However, more ambitious is the finding that Facebook engaged in detailed profiling of a large volume of user data for personalized and targeted advertising.[208] Nonetheless, although users might have eventually consented to advertising, they could not have been assumed to have also given consent to their data being consolidated into Facebook's sole ownership.[209]

The Standard of Proof: Actual or Likely Effects on Competition?

Once more, the requisite legal standard for demonstrating that Google's conduct was anticompetitive enters a controversial territory. Whether it was restrictive of competition, or if it was capable of having, or likely to have had an anticompetitive effect (Google made market access more difficult or impossible) followed the *Post-Denmark I* ruling.[210] Accordingly, Google's conduct should be objectively necessary, or its exclusionary effects are outweighed by efficiency gains that also benefit users.

Post-Denmark II makes it unnecessary to prove that Google's conduct has *actual* effects in concrete terms, where rival comparison-shopping services stop trading.[211] The same standard can be derived from *MEO*, where the *CJEU* made it clear that there is no need for an additional proof of an "actual, quantifiable deterioration in the competitive position of the business partners taken individually."[212] It is necessary to examine whether price discrimination "produces *or* is capable of producing" a competitive disadvantage. This is in line with the earlier standard of actual or probable effects. The *SC* followed the same approach when applying Section 19 (2), no 1 for which it is unnecessary to prove actual effects.[213]

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[206] Case COMP/40099 Google Android, which is beyond the comparative purpose of this article.
[207] *BKartA*, *supra* note 14 at 571.
[208] *Id.* at 598, 627, and 655 where opt-out does not prevent the combination of data; *cf. Id.* at 616 (data protection could apply to Instagram and Facebook's combination of data. An automated profiling of users' economic preferences, behavior and location infringes art 22 (1) GDPR).
[209] *BKartA*, *supra* note 14 at 655.
[210] C-209/10, Post Denmark v. Konkurrencerådet, 2012 E.C.R. II-40, ¶ 1; *EC*, at 339.
[211] *EC*, *supra* note 7 at 602 referring to C-23/14, *Post* Danmark v. Konkurrencerådet, 2015 E.C.R. *II*-66 that "the effect does not necessarily have to be concrete";C-52/09 Konkurrensverket v. TeliaSonera Sverige AB 2009 E.C.R. I-64 (the as-efficient-competitor test); cf. Alexander M. Waksman, *Bad Science: Abuse and Effects in Online Markets*, COMP. POL'Y INT. (2017) (on how the hypothesis of probable effects is ill-suited for digital markets).
[212] *Serviços*, *supra* note 82 at 27, 37 (having regard to *all* the circumstances of the case); Opinion of Advocate-General Wahl C-525/16; *Serviços*, supra note 82 at 70; C-95/04 P British Airways v. Comm'n, 2007 E.C.R. III 145.
[213] *SC, supra* note 13 at 83.

It was sufficient to establish an exclusionary effect on comparison-shopping services that are as efficient as Google Shopping, as in *Intel* and *MEO*.[214] The *CCI* also adopted a version of this as an efficient competitor test. The investigation report initially found that, due to reduced visibility, equally efficient search-service providers could not attract enough users. However, a minimum efficiency level was necessary to compete effectively with Google and survive competitive pressure without rivals leaving the market.[215]

Practitioners, especially those defending Google or Alphabet, would like to stymie the above rule of evidence and push for *actual* rather than probable anticompetitive effects. For their purposes, such a move would be beneficial. It would ask the EU Courts to seek evidence that following the implementation of a different ranking algorithm, traffic to comparison-shopping websites had decreased and that they had exited the market or that Google had removed rival websites from its index.[216] In and of itself, that would be an extremely high bar for intervention and would not be in the spirit of prevention. It would ask competition authorities to contemplate doing nothing until Google's rivals have exited the market. What is precisely the point of an actual exit if, on a balance of all probabilities, the likelihood is that alternative websites receive no traffic at all? According to Aristotle, "probable impossibilities" are better than improbable possibilities.

In *Facebook*, the *HRC* also attempted to impose a higher bar for competition intervention when arguing that, for an exploitative abuse under Section 19 (2), no 2, the BKartA had to prove it was "highly" likely that Facebook's terms were different than they would have been under effective competition.[217] On the contrary, the *SC* held that under Section 19 (1), market conditions could be adversely affected even in the absence of a higher likelihood, as required under Section 19 (2).[218] Furthermore, the objective capability to produce adverse effects cannot be denied based on direct network effects.[219] Ultimately, this capability is given by the quality and quantity of the users' data and, due to the dual-sided nature of the market, the behavioral effects on both markets must be considered together rather than in isolation.[220] As a result, the chances of both actual and potential competitors are lowered.[221] However, even good access to data cannot compensate for the lack of adequate direct network effects.[222] One cannot deny the existence of negative effects on the advertising market. Contrary to *HRC*, the *SC* held that there is no need to establish a separate market for advertising.[223] This follows an earlier case law that found negative effects on non-dominant, tertiary markets.[224]

The US Theory of Leveraging and its EU Transplant

The *EC* has demonstrated that Google used dedicated algorithms such as Panda to "automatically demote" competing websites and, in turn, to ensure its Shopping Unit and

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[214] C-413/14, P Intel v. Comm'n, 2017 E.C.R. I-132; *Serviços*, *supra* note 82 at 31 (on a dominant undertaking's negotiating power over tariffs, conditions, and arrangements).
[215] *CCI*, *supra* note 11 at 244 *Google (investigation report)*; *Google (decision)*, at 253.
[216] *EC*, *supra* note 7 at 346.
[217] *SC*, *supra* note 13 at 9.
[218] *Id.* at 81.
[219] *Id.* at 93.
[220] *Id.*
[221] *Id.* at 94.
[222] *Id.* at 95.
[223] *Id.* at 96.
[224] *Id.*, referring to *SC, supra* note 13 at 96; Strom und Telefon II WuW/E DE-R 2004 1210, 1211.

website acquired the lost traffic.[225] Google did so with the sole intention of expanding its universal-search dominance over comparison shopping. Widely known as leveraging, this theory has been transplanted in several jurisdictions, most notably *Facebook* and *Google*.[226] In *Griffith*, *Paramount Pictures* (1948) and *Eastman Kodak* (1980), the *US* forbade the use of monopoly power in a primary market to acquire a competitive advantage in a secondary market, especially in cases of vertical integration, such as Google's Shopping Unit, obtaining an unfair advantage over rivals in the comparison-shopping market.[227] However, the Ninth Circuit subsequently rejected this in *Alaska Airlines* (1991), as *US* dicta in *Spectrum Sports* (1993), where leveraging had to actually monopolize or dangerously threaten to do so and, finally, in *Trinko* (2004).

By contrast, one could argue that, although the EU approach is harsher than its US counterpart, a strategy of leveraging by vertically integrated platforms could be successfully devised to expand dominance from one digital market to another while having long-term exclusionary effects on the latter market.[228] This strategy becomes dangerous where dominance is strengthened by mergers with innovative firms having no other commonality than the exploitation of a large-scale combination of data as a conglomerate competitive advantage over rivals. The historical context of multiple acquisitions by Google, Facebook, and others means that strategic leveraging is no longer pro-competitive.[229]

Thus, in *Google*, traffic was essential to improve the relevance of a search engine.[230] The *EC* arrived at this conclusion by applying a behavioral economics analysis of users' inertia, where their attention focused on the "first three to five" search results shown on the first page.[231] Indeed, it would be implausible for an average user to act as a careful and diligent researcher. It would expect users to be mindful of unconscious bias because they believe that the results would ordinarily be ranked based on relevance alone: whichever result appears higher would also be the most relevant for their search.[232] In addition, the Commission relied on user surveys and analyses of traffic data.[233] Consequently, the traffic to rival comparison-shopping websites recorded a lasting decline.[234]

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[225] *Id.* at 348, 379, 420, 452, and 514 (for Google, its shopping unit and website are a single service experience).
[226] On leveraging, *EC*, *supra* note 7 at 386; *CCI, supra* note 11 at 248; *CBC*, *supra* note 9, at 3 (Google was able to leverage data to improve its product and attract more users); *Google Shopping* in Brazil, *supra* note 3; *BKartA*, *supra* note 14 at 747 and 887–8; MARGRETHE VESTAGER, Executive Vice President, SPEECH: FAIR MARKETS IN A DIGITAL WORLD 5 (Mar. 9, 2018); Furman, *supra* note 23, at 58 (platforms give preferential treatment to their own products to extend their position into associated markets); WALDMAN, *supra* note 197, at 87 (with suggestions for a code of conduct; data leveraging causes unfair discrimination against users and abuse of their trust).
[227] HERBERT HOVENKAMP, PRINCIPLES OF ANTITRUST CONCISE 294 (2017); HOVENKAMP, *supra* note 150, at 426; EINER ELHAUGE, UNITED STATES ANTITRUST LAW AND ECONOMICS 358 (2018), (Monopolistic leveraging could be successful if monopoly power was leveraged to acquire or maintain monopoly power in another market).
[228] For an approach to leveraging that makes self-preferencing subject to an effects test, *see* CRÉMER, *supra* note 118, at 7, 66; on a systematic strategy, 37; vertically integrated platforms could inhibit rivals, Ezrachi & Stucke in HL, *supra* note 1, at 144.
[229] On acquisitions of smaller firms by Google, Facebook, and Microsoft, *see* ANCA D CHIRITA, WRITTEN EVIDENCE TO THE HM TREASURY'S DIGITAL COMPETITION EXPERT PANEL 12 (Dec. 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785548/DCEP_Public_responses_to_call_for_evidence_from_individuals.pdf; Anca D. Chirita, *Data-Driven Mergers under EU Competition Law*, in THE FUTURE OF COMMERCIAL LAW: WAYS FORWARD FOR CHANGE AND REFORM 147–83 (Orkun Akseli & John Linarelli eds., 2020).
[230] *EC*, *supra* note 7 at 447.
[231] *Id.* at 453, 455, and 535.
[232] *Id.* at 598.
[233] *Id.* at 437, 518 (2), and 615.
[234] *Id.* at 479, 481, and 496.

How could websites compete and then recover such lost traffic? One alternative was to increase the spending on advertising. However, this was not economically viable.[235] In addition, users are disinclined to look at ads.[236] The findings are based on Google's conduct, which has the potential to foreclose rival comparison-shopping websites as they cannot recover the lost traffic. In the long run, they have no other choice than ceasing to offer their services or even discontinuing their investment altogether.[237] With no competing services, Google would have more incentives to increase prices to traders for being included in its Shopping Unit and fewer incentives to improve the quality of its service.[238]

Objective, Subjective, or No Acceptable Justifications at All?

The final crucial question is whether there is an acceptable justification for Google's conduct, as Google did not demonstrate that its conduct was objectively necessary or that beneficial efficiencies to consumers outweighed the exclusionary effects on rivals.[239]

First, Google contended that, despite its engagement in the demotion of its direct competitors, it was entitled to *reasonable* discrimination by applying adjustment mechanisms to maintain the relevance of its universal search.[240] This is not a difficult question for the courts to answer. According to the earlier case law, a meeting-competition defense is unacceptable. Although a dominant undertaking is permitted to take reasonable steps to protect its commercial interests, it cannot strengthen or abuse its dominant position.[241] Google claimed to rank sites on the merits of relevance alone, but it had subjected its direct competitors to a different algorithm. This is not evidence of fair competition.

Second, Google relied on quality improvement as a defense.[242] In *Astra Zeneca*, in the absence of any legitimate interests, the *CJEU* dismissed the appeal, adding that a dominant undertaking cannot use "regulatory procedures" to prevent or make difficult the market entry of competitors. This was not competition "on the merits."'[243] Nonetheless, the *CJEU* dismissed the imposition of pharmacovigilance obligations on a dominant undertaking as an objective justification for deregistering a marketing authorization.

Following *Post-Denmark II*, the *CJEU* looked for an objective justification that the exclusionary effects might be outweighed by beneficial efficiencies to consumers.[244] In addition, justifications from the area of consumer law, such as public health and product liability for dangerous or inferior quality products, have both been rejected in *Tetra Pak I* and

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[235] *Id.* at 544, 562, 564 (2) (due to higher prices displayed at the top of the universal search or monopolistic AdWords prices); Furman, *supra* note 23, at 64; cf. Google's position, at 567.
[236] *EC*, *supra* note 7 at 548.
[237] *Id.* at 593 and 595.
[238] *Id.* at 594–5.
[239] *Id.* at 653.
[240] *Id.* at 655a.

[241] C-27/76, United Brands v. Comm'n., 1978 E.C.R.-209, ¶ 189; T-65/89 *BPB* Indus. & British Gypsum v. Comm'n., 1993 E.C.R. II-392, ¶ 117; C-395/96 P, Compagnie Maritime Belge v. Comm'n., 2000 E.C.R. I-1442, ¶ 117; T-228/97 Irish Sugar v. Comm'n., 1999 E.C.R. II-2975, ¶ 186; T-219/99 British Airways v. Comm'n., 2003 E.C.R. II-5925, ¶ 243; T-340/03 *France Télécom* v. Comm'n., 2007 E.C.R. II-117, ¶ 185.

[242] *EC*, *supra* note 7 at 656.
[243] C-457/10 P, AstraZeneca v. Comm'n., ECLI:EU:C:2012:770, ¶¶ 671–2 (Dec. 6, 2012).
[244] C-209/10, Post Denmark II v. Konkurrenceråde, ECLI:EU:C:2012:172, ¶ 41 (Mar. 27, 2012).

Hilti.[245] In *Tetra Pak II*, the *CJEU* dismissed the appeal, as it was not for a dominant undertaking to impose measures based on "technical considerations or considerations relating to product liability, protection of public health or protection of its reputation."[246]

Comparatively, things stand differently according to different institutional cultures. In the US and the UK, competition authorities are also responsible for consumer protection. However, it remains puzzling why the *FTC* considered product design to be an important parameter of "competition based on quality" rather than consumer protection, and how Google's product improvements through algorithmic changes did not harm consumers.[247] The evidence before the *FTC* had then indicated that following Google's design changes, the anticompetitive effects on rivals were negligible.[248] In the dissenting opinion, there is skepticism expressed over how it would be best for Google to distribute its search space among organic searches and paid advertisements, and over its algorithms for ranking websites. In contrast, the *CBC* had evidence that Google used certain AdWords clauses with an exclusionary intent vis-à-vis rival search-engines.[249] With no technical or efficiency justifications, Google accepted commitments. Compared to the *EC*, it is submitted that both the *CBC* and the *FTC* adopted a lenient approach to Google, compelled by the evidence adduced before it to accept Google's justification of demotion. Particularly, in Canada, an algorithmic demotion was necessary to prevent an artificial increase in ranking[250] that was not based on content quality or relevance alone. Again, the bar was set too high, as the *CBC* awaited actual effects on rivals, such as lost sales or revenues.

A similar reasoning was behind Justice Roth's ruling in the UK *Streetmap* case. As the CCI had also noted, with approval, Google could not, technically, display rival maps without seriously damaging Google Maps.[251] Although Article 102 has no corresponding defense similar to Article 101 (3), the case law can illuminate this further. The authority relied upon by Justice Roth is *Post Denmark II*, with emphasis on the principle of proportionality.[252] In addition, J. Roth referred to paragraph 30 of the *EC*'s soft-law on Article 102 (the Guidance Paper), where beneficial efficiencies to consumers may also consist of "technical improvements in the quality of goods."'

Third, it would be unprecedented for the EU courts to accept a similar recognition. Otherwise, any decision by a dominant undertaking looking to improve product quality could serve as a defense. However, to pass the proportionality test, the defense would need to be objectively necessary and benefit consumers in the public interest. Similarly, in the US,

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[245] T-83/91 Tetra Pak I v. Comm'n., 1994 E.C.R. II-762, ¶ 83; T-30/89 Hilti v. Comm'n., 1991 E.C.R. II-1441, ¶ 118.

[246] C-333/94 P, Tetra Pak II v. Comm'n., 1996 E.C.R. I-5987, ¶ 36.

[247] *FTC*, *supra* note 74, at 3 (discussing an attempt to second-guess a firm's product design decisions, which embraced Hovenkamp's opinion that, even where product design injures rivals, antitrust should not second-guess the judgment of consumers; otherwise, this frustrates innovation incentives); *see also* HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLES AND EXECUTION 274 (2008).

[248] *See* John D. McKinnon & Robert McMillan, *Google Draws House Antitrust Scrutiny of Internet Protocol*, WALL STREET J. (Sep. 29, 2019) (detailing the ongoing scrutiny of Google's competitive advantage due to its users' data).

[249] *CBC*, *supra* note 9, at 5.

[250] *Id.* at 6.

[251] *CCI*, *supra* note 11, at 189.

[252] Streetmap EU Limited v. Google Inc. Google Ireland & Google UK 2016 EWHC 253 (Ch), at 142–3.

networks that create or prolong a monopoly must demonstrate a reasonable business justification *proportionate* to the harm.[253]

Even if, out of sentimentality for an efficient monopolist such as Google, one was to accept an argument based on the proportionality of applying reasonable adjustments, the third ground is particularly weak as it relies on a purely *subjective* justification that Google cannot rank itself in the same way as it ranks direct competitors. Otherwise, this would affect Google's revenues, for example, the ability to monetize space on universal search.[254] So far, any commercial justification has had to be objectively justifiable; for example, a sale under costs due to a liquidation of stock caused by insolvency would threaten the economic viability of the undertaking in question. In the real world, would this be the case for Google with billions of dollars from advertising?

Fourth, Google relied on infringements of its fundamental freedoms to conduct its business and impart information.[255] Again, these claims are particularly weak in this context because Google continues to operate its business in the EU, and, in the worst-case scenario, such fundamental rights are yet to be balanced against the fundamental right to privacy, and the principle of nondiscrimination and undistorted competition, as embedded in Protocol 27.[256]

Ex post, Regulation 2019/1150 will apply to constructive refusals to deal with customers of intermediation platforms. Should the latter suspend or terminate the service by demoting individual listings or dimming a business through a lowering of rankings, such platforms must offer a statement of reasons to the businesses concerned.[257] Otherwise, an unfair refusal by intermediation platforms with *superior* bargaining power can be challenged.

Retroactively, this regulatory response comes a little too late for Google, but it clarifies that Google has a duty to offer reasons for its algorithmic changes to businesses that depend on Google for universal search *inclusiveness*. Overruling the earlier limitations of the case law on objective justifications could still be difficult for corporations with superior market power, which, beyond a special responsibility, not to abuse their position, will now have an *additional* responsibility for transparency and fairness. However, this excludes disclosures of trade secrets[258] to businesses or users. A waiver of the notice period is possible for illegal incidents, for example, fraud or cyber threats, which makes exclusiveness an exception rather than the norm.[259]

Similar to Google's unsuccessful defense, Facebook's policies adopted a broad interpretation that justified the collection and combination of users' data for the performance of the service. *BKartA* adopted a narrower interpretation of what could, automatically, be necessary for such performance.[260] In particular, for the consolidation of data from multiple

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[253] HOVENKAMP, *supra* note 227, at 292 (advocating for greater antitrust scrutiny beyond a refusal to share).
[254] *EC*, *supra* note 7, at 657.
[255] *Id.* at 658; Arts. 11, 16 & 17 (EU) Charter of Fundamental Rights.
[256] *EC, supra* note 7, at 667.
[257] Recital 22 Reg 2019/1150 in conjunction with Arts. 4 & 11 (discussing effective redress for businesses).
[258] Recital 27 Reg. 2019/1150 reference to Dir. (EU) 2016/943 of the Parliament and Council of 8 June 2016 the Protection of Undisclosed Know-how and Business Information (Trade Secrets) against Unlawful Acquisition, Use and Disclosure, 2016 O.J. (L 157) p. 1).
[259] Recitals 23 & 24 in conjunction with Art. 3 (4) (a) & (b) Reg. 2019/1150 (referring to an unforeseen and imminent danger to providing an intermediation service such as fraud, malware, spam, data breaches, or other cyber security risks as justifications for differentiated treatment through demotion or dimming).
[260] *BKartA*, *supra* note 14, at 679.

independent platforms, subsequently falling under Facebook's ownership, such as WhatsApp, Oculus, and Masquerade, *BKartA* did not accept a "common" contractual purpose as a legal justification.[261]

Similar to Google, Facebook sought to defend itself by suggesting that limiting its data processing would unreasonably interfere with Facebook's product design.[262] On the contrary, *BKartA* contended that product design could enable "unlimited" data processing serving Facebook's sole commercial interests.[263] Irrespective of how this serves Facebook's business model, it could not be objectively justified.[264] Instead, Facebook's reliance on AI data clashes with the German understanding of privacy, as "informational self-determination"[265] Thus, contractual autonomy could explain any lack of consent.

Upon a closer look at all the special justifications offered by Article 6 (1) GDPR, *BKartA* found no objective justification for Facebook's conduct beyond Facebook's subjective commercial interests.[266] It also dismissed efficiency or quality as a justification for personalization.[267] Thus, an efficiency defense for Facebook's social networking remained limited due to its data-driven business model, especially the combination of data for targeted advertising.[268]

Furthermore, *BKartA* recognized that service integration based on data combinations between Facebook and Instagram or WhatsApp could leverage market power, exclude potential competitors, and erect barriers to others such as Snapchat.[269] On the positive side, it was recognized that such combinations are beneficial to platform users for direct communication.

However, as switching becomes unnecessary, this induces a lock-in effect on users with the risk of entry barriers.[270] On the negative side, Google Analytics is far better than Facebook Analytics, as the former anonymizes the IP addresses of its users.[271]

On careful consideration of the relevant interests, none of Facebook's commercial interests outweighed the legitimate interests of its users, including their privacy rights.[272] While the

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[261] *Id.* at 681.
[262] *Id.* at 691.
[263] *Id.* at 693.
[264] *Id.* at 706 (discussing combinations for the purpose of data analytics).
[265] *Id.* at 696, 797, and 835–6 (relating to protection of privacy and autonomy).
[266] *Id.* at 735, 738 (discussing personalization and targeted advertising, analytics, security, research, and responding to legal requests but without detailed reasons).
[267] *Id.* at 744; *cf. Digital Platforms and Antitrust Law*, 19 BOSTON U. L. & EC. RESEARCH PAPER 21 (2019) (stating that Google's dominance is the result of efficiency attributed to economies of scale, Keith N. Hylton); *cf.* Furman, *supra* note 23, at 3.165, (discussing efficient personalization (higher last-minute flight prices)).
[268] *BKartA*, *supra* note 14 at 964. The European Parliament considers a ban on targeted advertising, see EU Parliament, 'MEPs spell out their priorities for the Digital Services Act', press release (28 September 2020), <https://www.europarl.europa.eu/news/en/press-room/20200925IPR87924/meps-spell-out-their-priorities-for-the-digital-services-act>; 'Motion for a European Parliament Resolution with recommendations to the Commission on the Digital Services Act: Improving the functioning of the Single Market' 2020/2018(INL), (20 October 2020), <https://www.europarl.europa.eu/doceo/document/TA-9-2020-0272_EN.pdf>.
[269] *BKartA*, *supra* note 14 at 747 and 887–8, (discussing that Facebook could expand its competitive edge through data combinations); *cf. HRC*, *supra* note 20, at 35 (relating to where the Court criticized *BKartA* for not having defined a market for advertising to prove the leveraging of Facebook's dominance from social networking to targeted advertising).
[270] *BKartA supra* note 14, at 748–9.
[271] *Id.* at 826.
[272] *Id.* at 765.

average user would expect some tracking to occur, it could never be at a "level of intensity" that comes across as a "massive invasion of privacy with active fingerprinting."[273] The *BKartA* clearly articulated that users' reasonable privacy interests[274] "must take precedence" over Facebook's purely subjective commercial reasons.

Finally, it was concluded that there is a "gross imbalance" between Facebook's commercial interests and its users' fundamental rights.[275] For such an imbalance, it would be nearly impossible to calculate the economic harm caused to consumers. However, this lack of quantification could not, ultimately, be used as a defense.[276] Irrespective of the above arguments' soundness, the *HRC* took the view that *BKartA* cannot balance either other legitimate interests against unfair terms or the previous case law (*Gegenwert I and II*) to infer an abuse of market power. The former balancing refers to unequal bargaining power, while the latter implies the consideration of interests under the general clause of competition law.

The *HRC* remained skeptical that Facebook had breached the data protection law and, moreover, that Facebook's combination of data from its other services that fall under its ownership amounts to an exploitative abuse of consumers. The *HRC* required that Facebook's conduct harms competition in accordance with the as-if-competition standard under Section 19 (2), no. 2, followed by a comprehensive consideration of the relevant interests, especially free competition with open markets.[277]

However, the *HRC* adopted a different interpretation of *Gegenwert II*[278] to suggest that an unfair condition imposed by a dominant undertaking, which breaches the *general* law on unfair contractual terms, does not automatically trigger an unfair condition under the special clause of Section 19. For this to be the case, there is a need for *behavioral causality* and an exploitative abuse of the other market participants.[279] This is in line with the special responsibility of the dominant undertaking.

Following *Gegenwert I* and *II* and *Pechstein* rulings, several commentators had previously argued that, in contrast to the comparable market price for excessive pricing under Section 19 (2), no 2, for the application of Section 19 (1), there is no need for a *behavioral* or an *instrumental* causal link between a dominant position and abusive conduct.[280] Unsurprisingly, the *SC* did not follow the *HRC* when it had argued that an exploitative abuse under Section 19 (1) does not always require the existence of a direct link between the dominant position and the alleged anticompetitive behavior. Rather, an *outcome* or *effects-based* causal link between that position and its effect on the market would suffice.[281] This is indeed the case where the

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[273] *Id.* at 782–3 and 847.
[274] *Id.* at 848 and 858 (discussing reasonable expectations of Facebook Business Tools' users).
[275] *Id.* at 870.
[276] *Id.* at 908 (highlighting that Evans defended Facebook because there is no evidence of consumer harm).
[277] *HRC, supra* note 20, at 12.
[278] *Id.* at 28 (explaining that the Court took the view that, compared to *Gegenwert II*, users can leave Facebook without further restrictions such as an exit fee).
[279] *Id.* at 13, 17, 27 (discussing behavioral causality 16); Franck, *supra* note 197, at 2, 137; irrespective of the distinction between Section 19 (2) no 1 & 2, a causal link for no 1 is difficult to establish, Lorenz, *Section 19 GWB Missbrauch einer marktbeherrschenden Stellung*, in DEUTSCHES AND EUROPÄISCHES KARTELLRECHT 93, at 11 (Werner Berg & Gerald Mäsch eds., 2015).
[280] *See* Schweitzer et. al., *supra* note 121, at 108.
[281] *SC*, *supra* note 13 at 66 (referring to the controversial discussion of causality); cf.b*see* Tobias Lettl, *Missbräuchliche Ausnutzung einer marktbeherrschenden Stellung nach Art. 102 AEUV, § 19 GWB und Rechtsbruch*, 5 WUW (2016), 214 (a causal link); *see* Franck, *supra* note 197, at 137; Torsten Körber, *Ist Wissen*

dominant undertaking's behavior has led to certain effects on that market, which would not have arisen under effective competition, and the alleged behavior is not only exploitative but also capable of impeding competition. Finally, the *SC* recognized the normative nature of causality, which does not demand an instrumental causality between exploitative abuse and dominance.[282] *HRC*'s stricter requirement for causality is unnecessary.[283] Although one cannot dispense causality altogether in a classic case of tying caused by a dominant position,[284] a flexible approach to causality was justifiable because Facebook's behavior was objectively capable of obstructing competition.[285] Following a paternalistic approach to causality, the *SC* stated that a stricter requirement would burden users with the harmful effects of Facebook's behavior.[286] Such effects cannot be looked upon in isolation due to the dual-sided nature of Facebook's online platform.[287]

Most importantly, the *SC* went on to acknowledge an effects-based causality for dual-sided platforms where the exploitative behavior of a dominant platform's intermediaries affects competition in the market found to be dominant as well as the other side of the said market.[288] Accordingly, there is an exploitative abuse of a dominant position where, although Facebook has undertaken in its terms of use to offer a "personalized" experience to its users, Facebook collects and thereby acquires its users' data when accessing Internet pages outside Facebook. The latter's subsidiaries, such as Instagram, WhatsApp, Masquerade, and Oculus, have acquired users' data. For harvesting personal data, Facebook Business Tools also allow third-party companies to tie their Internet pages or mobile apps to Facebook. Furthermore, Facebook Analytics provides these companies with their users' behavioral data.[289]

However, *HRC*'s criticism of *BKartA*'s "short-sighted" approach[290] to causality is incorrect. Facebook's market dominance has been further strengthened by the combination of data acquired from previously independent platforms for social networking such as WhatsApp (mobile phone numbers), Instagram (photos), Oculus (games and virtual reality), and Masquerade (selfies and videos).

According to the *HRC*, in both *Gegenwert I and II*, there was "obvious" harm to competition.[291] In addition, in *Gegenwert II*, there was an exploitative abuse of a long-standing contractual relationship where termination of and withdrawal from the relationship had been made difficult due to a stronger bargaining position.[292] By analogy, the *HRC* ruled out rather inflexible that there was no harm to "free and open" competition and no exploitative abuse of Facebook's users through the combination of their data across all platforms.

Marktmacht? Überlegungen zum Verhältnis von Datenschutz, "Datenmacht" und Kartellrecht, N. Z. KART. (2016), 348 (in favor of an instrumental causal link); *see also id.* at 71.

[282] *SC*, *supra* note 13 at 71.

[283] *Id.* at 72,78 (especially for § 19 (2), no 1, there is no need for a stricter requirement following the earlier case law); *see SC* KZR 38/02 (judgment of Nov. 4, 2003) Strom und Telefon I WuW/E DE-R 2004, 1210.

[284] *Id.* at 73.

[285] *Id.* at 77.

[286] *Id.* at 79.

[287] *Id.* at 80 (stressing that harmful effects could also affect potential competition, not only contractual partners).

[288] *Id.* at 66.

[289] *Id.* at 3; *see also* Chirita (2018) at 173.

[290] *HRC, supra* note 20 at 27.

[291] *Id.* at 16.

[292] *Id.* at 23.

One other factual disagreement about an infringement of Section 138 of the German Civil Code is unclear. The *HRC* could have referred to the principle of good faith in transactions, contrary to public policy. Instead, it advanced that there must be an "excessive or disproportionate" price, which had exploited "a structural inferiority of the business partner,"[293]' by which the *HRC* means an unequal bargaining position.

Section 138 (2) automatically makes an abusive exploitation of another party's "inexperience, lack of sound judgment or considerable weakness of consent," where there is a contractual promise or an offer of disproportionate pecuniary advantages. However, when there is an intersection of contract law with unfair competition, an unfair business practice does not automatically invalidate the contractual relationship. Unfairness and public morals under Section 138 are opposites of business law and ethics.[294] Likewise, Regulation (EU) 2019/1150 considers that other means through which intermediation platforms offer less favorable terms, and conditions fall under competition and unfair commercial practices.[295] The transparency obligation imposed on intermediation platforms to justify economic, commercial, or legal considerations does not affect the above areas.

It is therefore astonishing for the *HRC* to suggest that excessive or disproportionate fees imposed by a dominant undertaking are *not* a competition issue unless such fees meet the hypothetical as-if-competition scenario. The critical aspect of this legal interpretation is that Section 138 captures the general principle of abusive exploitation, from which Section 19 (2), no 2 and its equivalent Article 102 (2) (a) are derived as special prohibitions of abusive exploitation. The major difference here is that the special prohibitions capture exploitation by a dominant business, while the general prohibition lowers the bar for intervention. As the general prohibition applies irrespective of whether there is a monetary consideration; for example, performance in return for a promise, one can imply that the same would be true for the special prohibition. Therefore, this article advances the latter interpretation by analogy. It argues that Facebook promised privacy in return for acceptance of its terms and conditions, which were onerously intrusive due to the loss of an economic right to privacy. Having shared its users' preferences and choices, and their location with third-party analytics and advertisers, Facebook harms competition.

Facebook also made unfair disclosures of economic privacy to predict its users' reservation price in contractual transactions.[296] In a hypothetical scenario, users will have perfect information about Facebook's transactions with third-party advertisers. However, will Facebook compensate its users for sharing their data with advertisers? In 2017 alone, Facebook made $39 billion in profits from targeted advertising,[297] which is disproportionate to users paying nothing, although users pay Facebook with their joint data.

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[293] *Id.* at 15.

[294] Kohler, *supra* note 117, at 105; *see* Srinivasan, *supra* note 143, at 90 (for claims of unfair competition against Facebook through deceptive and unethical conduct).

[295] Recital 36 in conjunction with Arts. 1 (4) & (5) and Art. 10 Reg 2019/1150 is *without prejudice* to unilateral conduct, unfair commercial practices, and competition law; it will not affect national civil law, especially contracts.

[296] *BKartA, supra* note 14 at 496; *cf. HRC, supra* note 20 at 35.

[297] Matthew Johnston, *How Facebook Makes Money,* Investopedia, https://www.investopedia.com/ask/answers/120114/how-does-facebook-fb-make-money.asp (last visited Oct. 2019).

In contrast, the *HRC* argued that there is no reliable evidence that the consolidation of platform data has significantly increased Facebook's advertising revenues.[298] Nonetheless, this is not a valid reason to dismiss *BKartA*'s competence to evaluate Facebook's unfair terms and conditions. Following *Asnef Equifax*, one could have clarified how sensitive data issues may not fall under the remit of competition law.[299] In contrast, the *SC* ruled that the fact that data protection must be observed for the application of competition law does not rule out *BKartA*'s competence.[300]

It was, therefore, wrong for the *HRC* to deny a fundamental right to privacy under the EU Charter of Fundamental Rights (Article 8), contrary to *the Pechstein* ruling concerning the freedom to exercise a profession under the German Constitution. The same holds for the *absolute* necessity of a behavioral causality whereby, in addition to the exploitation of users, Facebook must also strengthen its dominant position by weakening its competitors through exclusionary conduct.[301] Ultimately, the *SC* emphatically recognized that the constitutional right to autonomous self-determination applies to the interpretation of general civil clauses, as in Section 19.[302] In this respect, the *SC* afforded private individuals the same level of protection as under public law.

Following *Hoffmann-LaRoche*'s formula, namely, independently of its competitors, customers, *and* consumers, the *HRC* reached a conclusion that irrespective of whether a dominant undertaking such as Facebook imposes unfair or inappropriate conditions on consumers, its conduct must also lead to a strengthening of Facebook's position or a weakening of the competitive market structure. Such an outcome is obvious, as Facebook strengthened its dominant position through multiple combinations of its users' data. While it is unclear why the *HRC* reached so many fundamentally flawed conclusions, one may find some support in the claim advanced by Chopra and Khan that generalist judges "struggle" to identify anticompetitive behavior.[303]

In fairness, any justifications brought by either Google or Facebook about sharing data for legal reasons of national security and defense are unacceptable before the EU courts. Otherwise, EU citizens become tools of transnational corporations' mass-surveillance—whether for advertising or not.

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Overall, the above analysis of recent cases is less about criticizing the competition authorities for acting in the presence of anticompetitive conduct. Instead, it is about not conspiring in favor of the most powerful corporations. Therefore, the EU courts should think carefully about tipping the balance in favor of corporations with no soul as they record huge profits on the merits of the user data they do not own. Adopting the interpretation by analogy, as advanced above, will allow the courts to fill in the legislative gap.

A Final Word About the Remedy

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[298] *See cf. HRC, supra* note 20 at 35.
[299] *Asnef Equifax*, at 63; De Vita & Ocello, *supra* note 113, at 2 (others have argued that this should not prevent the EC considering the relevance of data in digital markets, especially any "commercially sensitive information").
[300] *SC*, *supra* note 13 at 126; Körber, *supra* note 25, at 187, 194.
[301] *HRC, supra* note 20 at 19.
[302] *SC*, *supra* note 13 at 105.
[303] Rohit Chopra & Lina Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. C. L. REV. (2020), 359.

As the choice of the remedy may decide the fate of an undertaking, it is always best to choose the least intrusive measure that preserves its business's operational integrity. In *Google Shopping*, the *EC* asked for an equal treatment remedy.[304] One may feel vindicated as, although the decision remains obscure for some commentators regarding the novelty of the abuse relied upon, the choice of the remedy says it all. It is nothing that we have not seen before as part of a wider understanding of economic discrimination and unequal treatment with the usual human rights connotations. This brings us back to the stone age of competition law. Although in the digital age one might have expected a novel type of abuse, the reality is that we do not need to change competition rules if we abide by well-established principles. In *Facebook*, a divestiture of data will be a welcome development in the right direction.[305] Thus, it is impossible to break up transnational monopolies such as Google or Facebook extraterritorially. It is the responsibility of the *FTC*'s taskforce that they wish to break up Silicon Valley giants. European competition authorities have done a brilliant job to deter such corporate giants from anticompetitive conduct with harsher fines than anywhere else in the world. In Germany, the *SC* has, meanwhile, annulled Facebook's appeal before the *HRC* Düsseldorf and ordered Facebook to pay €30 million as court proceedings costs.[306] It is too early to talk about a remedy for the *Amazon* case; thus, it is worth recognizing that some commentators argue that divestiture has "ambiguous" effects[307] on consumer welfare, which is in sharp contrast to the US antitrust history of divestiture since *Standard Oil*, *American Tobacco*, *Alcoa*, *Paramount*, *United Shoe Machinery*, and *AT&T*.[308] Thus, one may agree that a marketplace is not an essential facility when compared to similar other e-commerce platforms, such as Walmart, Wayfair, Etsy, and others. Again, this leaves us with the conventional choice of behavioral remedy.

Conclusion

The critical analysis of cross-jurisdictional enforcement reveals the global leadership of the *EC* and its influence worldwide, especially in India, *where the CCI* transplanted the special responsibility following the principles of nondiscrimination and equal treatment. However, it also reveals how the *FTC* continues to remain a source of inspiration for the *EC*. The latter is bolder than the former with its interpretation of objective justifications and the theory of leveraging.

The *BKartA* deserves special praise for daring to propose an Einsteinian speculative theory of consumer harm stemming from the combination of data across platforms. Although met with harsh criticism from the *HRC*, one could also criticize this court for lacking substance, ignoring the gaps of the tripartite enforcement system, and overlooking privacy as a fundamental

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[304] *EC*, *supra* note 7 at 671.

[305] *see* Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. (2019), 540 ("Less power for Facebook and less pollution for everyone"); cf. Herbert Hovenkamp (Apr. 17, 2020) (statement to the House Judiciary Inquiry into Competition in Digital Markets); *see* Alison Jones & William Kovacic, *Antitrust's Implementation Blind Side: Challenges to Major Expansion of U.S. Competition Policy*, 65 ANTITRUST BULLETIN (2020), 243 (on difficulties in constructing and overseeing a structural remedy); *cf see* Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, CORNELL L. REV. (2020), 39, 42 (opposing predictions that structural remedies will destroy shareholder value, consumer welfare or the economy and in favor of breakups as "market-oriented" remedies).

[306] *SC*, *supra* note 13 at 2.

[307] *See* Hagiu et. al., *supra* note 72, at 5, 27.

[308] *See* Thomas W. Hazlett, US Antitrust Policy in the Age of Amazon, Google, Microsoft, Apple, Netflix and Facebook, Invited Paper for the US House of Representatives, Judiciary Committee, Bipartisan Investigation into Competition in Digital Markets (Apr. 17, 2020).

economic right of users. However, the *SC*'s interpretation has superbly adjusted to the digital age's needs while emphatically protecting consumers as autonomous users.

This article has argued that the self-preferencing categorization of abuse in *Google Shopping* is unfortunate, as it does not capture the exclusionary demotion of alternative offerings that can only lead to consumer harm. It has also forcefully exposed the flaws in the HRC's interpretation of abuse of an excessive disclosure of data combinations by *Facebook*, especially regarding the requisite legal standard and the causal link. However, if one were to sum up the above cases in concise—and not merely catchy words—recognition must be for the constitutional dimension of competition law. The latter enforces the principles of nondiscrimination with equal treatment and autonomous self-determination in *Google Shopping* and *Facebook*, respectively, asking for dominant undertakings to compete fairly, treat remaining competitors equally, and respect consumers' freedom of choice when offering, rather than imposing, allegedly free product enhancements. Unfortunately, combinations of personal data have been the price that users have paid for such enhancements.

Furthermore, one can go further beyond to advance the argument that these two cases effectively consolidate the horizontal human rights dimension of competition law, as has been embedded in quasi-constitutional EU freedoms of free and fair competition for businesses as well as free choice for consumers.

Higher national and EU courts should protect EU citizens' wellbeing as consumers of global search, social media, and marketplaces where transnational corporate giantism effectively captures consumers for behavioral discrimination. Therefore, millions of EU users should not be trapped in a vicious circle of blame-taking by unfair consumer contracts and data processing, where the real problem is a transnational monopoly over their collective data. One cannot accept an extraterritorial application of national security and defense mechanisms of mass-surveillance by transnational corporations for sharing the aggregated data of EU consumers.

While one may accept that these cases are a test for competition law boundaries, it is important to note that they are not breaking new ground when applying nondiscrimination, equal, and fair treatment principles. Following the recent helpful guidance of Regulation 2019/1150, we have reasons to remain optimistic that the EU courts will elegantly address the challenges of behavioral discrimination exposed in this article.