

EUR Research Information Portal

The German Facebook Saga: Abuse of Dominance or Abuse of Competition Law?

Published in:
World Competition

Publication status and date:
Published: 01/01/2021

Document License/Available under:
Article 25fa Dutch Copyright Act

Citation for the published version (APA):

Van den Bergh, R., & Weber, F. (2021). The German Facebook Saga: Abuse of Dominance or Abuse of Competition Law? *World Competition*, 44(1), 29-52. Article Nominated, 2022 Antitrust Writing Awards: Academic, Unilateral conduct.
<http://hdl.handle.net/1765/135284>

[Link to publication on the EUR Research Information Portal](#)

Terms and Conditions of Use

Except as permitted by the applicable copyright law, you may not reproduce or make this material available to any third party without the prior written permission from the copyright holder(s). Copyright law allows the following uses of this material without prior permission:

- you may download, save and print a copy of this material for your personal use only;
- you may share the EUR portal link to this material.

In case the material is published with an open access license (e.g. a Creative Commons (CC) license), other uses may be allowed. Please check the terms and conditions of the specific license.

Take-down policy

If you believe that this material infringes your copyright and/or any other intellectual property rights, you may request its removal by contacting us at the following email address: openaccess.library@eur.nl. Please provide us with all the relevant information, including the reasons why you believe any of your rights have been infringed. In case of a legitimate complaint, we will make the material inaccessible and/or remove it from the website.

The German Facebook Saga: Abuse of Dominance or Abuse of Competition Law?

Roger Van den BERGH^{*} & Franziska WEBER^{**}

This article provides a critical analysis of the German Facebook case and stresses the limits of competition law. Facebook's terms and conditions regarding the use of Off-Facebook data were qualified as an exploitative abuse at various stages of the German Facebook proceedings. However, it is far from certain that Facebook would have written its terms any different if it was operating on a competitive market. From an economic viewpoint the market failure at hand is a pervasive information asymmetry rather than market power. Therefore, it is doubtful that the correct response lies within competition law. If competition rules must be rewritten in order to cope with market failures in digital markets, there is a serious risk that the abuse found is not an abuse of market power but an abuse of the market power provisions in competition law. Alternative routes that can be found in consumer contract, unfair competition or data protection laws might be viable options. The latter rules can be applied without a complicated finding of causality between market dominance and the use of 'unfair' contract terms. Admittedly, also the information paradigm can be called into question but amending rules of contract law avoids Herculean interpretations of competition law that go against a broadly supported 'more economic approach'. Abusing competition law or enhancing contract law to improve the efficiency of digital markets, that is the question.

Keywords: Facebook case, goals of competition law, market failures, data law, information disclosure, consent, signing-without-reading problem, abuse of dominance, unfair contract terms, unfair commercial practices

1 INTRODUCTION

The proceedings initiated by the Federal German Cartel Office (*Bundeskartellamt*, BKartA) in the Facebook case have attracted a lot of attention, not only from German antitrust commentators but more generally from anyone taking a critical stance against the use of competition rules outside the traditional realm of antitrust policy. There is a long-standing debate about the goals of competition law, which is now manifesting another revival following paradigmatic changes in the industry

^{*} Emeritus Professor of Law and Economics, Erasmus University Rotterdam, Erasmus School of Law/Rotterdam Institute of Law and Economics. Email: r.vandenbergh@law.eur.nl.

^{**} Associate Professor of Law and Economics, Erasmus University Rotterdam, Erasmus School of Law/Rotterdam Institute of Law and Economics. Email: weber@law.eur.nl. We wish to thank Roberto Pardolesi for useful comments; all errors and omissions remain the authors' responsibility.

caused by the digital economy. Data security and privacy protection are not straightforward competition goals, but they may be related to such goals depending on differing political concepts of competition rules.¹ Recent changes of the German Act Against Restrictions of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB) have been motivated by the need to adapt the traditional competition framework to the paradigmatic changes of the digital industry.² The recent Facebook case has further complicated the current state of German competition law by intermingling competition goals with concerns of privacy protection. Obviously, if there is no clarity about the goals to pursue, there is a serious risk that competition law risks to become both incoherent and ineffective.

Every first-year student of economics learns that the welfare analysis of an industry should start with an investigation of potential market failures. The list of market deficiencies includes monopoly, information asymmetry and (positive and negative) externalities.³ For every single market failure, there is an appropriate legal response: competition law tackles the monopoly problem, consumer protection rules correct information asymmetries and different forms of economic regulation may be targeted at the welfare losses caused by the lack of internalization of externalities (for example, environmental regulation). The traditional view is that x-market failures require x-remedies; one cannot kill three birds with one bullet. This elementary economics lesson seems to be neglected by German policy makers. It is far from evident to use competition law remedies if market power is not the underlying market failure.

In digital markets, information asymmetries are adamant: consumers generally do not know the value of the information they part with, in order to become users of a social network. By contrast, the impact on competition is less certain. Anti-competitive effects may occur if alleged monopolists lower the quality of digital services or if competitors are foreclosed due to the lock-in effect of pervasive

¹ See on this generally I. Lianos, *Polycentric Competition Law*, 71 *Current Legal Probs.* 161 (2018); on the sponge-nature of law, see A. Ezrachi, *Sponge* 5(1) *J. Antitrust Enforcement* 49 (2017).

² This was one of the purposes of the Neuntes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, BGBl 2017 Teil 1 Nr. 33, 8 June 2017, pp. 1416 (9. GWB-Novelle); changes have, furthermore, just been introduced by 10. GWB-Novelle, Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer wettbewerbsrechtlicher Bestimmungen (GWB-Digitalisierungsgesetz), BGBl 2021 Teil 1 Nr. 1, 18 Jan. 2021, pp. 2. On this T. Körber, *Die Digitalisierung der Missbrauchsaufsicht durch das 'GWB-Digitalisierungsgesetz' im Spannungsfeld von moderater Anpassung und Überregulierung* (2020), available at SSRN.

³ For information asymmetry: G. A. Akerlof *The Market for 'Lemons': Quality Uncertainty and the Market Mechanism*, 84(3) *Q. J. Econ.* 488 (1970); for externalities: R. Cooter & T. Ulen, *Law & Economics* 39 (online version 6 2016); A. M. Paccès & L. T. Visscher, *Methodology of Law and Economics*, in *Law and Method: Interdisciplinary Research Into Law* 95 (B. van Klink & S. Taekema eds, Mohr Siebeck 2011); for market power: U. Schwalbe & D. Zimmer, *Kartellrecht und Ökonomie* 53 (R&W, 2 2011).

network externalities. However, the negative impact on competition may be outweighed by both static and dynamic efficiency gains.⁴ The more information about users the internet giants collect and process, the better they can satisfy the preferences of their users and, therefore, the more efficient they become. They may develop superior data processing qualities. Also, competition ‘for’ the market initiated by would-be entrants may limit the scope for persisting competition restrictions ‘in’ the market.⁵ Hence, whereas government intervention may be easily justified to correct the welfare reducing consequences of information asymmetries, the case to use competition law to protect data supplied by users is less evident.

The central argument of this article is that the prohibition of abuse of dominance is not an appropriate instrument of data protection and that other legal remedies are needed to protect the privacy of internet users. Following the basic principle that different goals require the use of different instruments, non-competition goals must be achieved by legal rules outside the scope of competition law. If privacy protection (or the enforcement of another non-competition goal) becomes the driving force behind antitrust enforcement, there is a serious risk that Herculean interpretations of the major competition law provisions will be necessary. The watering down of traditional interpretations of market power and similar exercises to reinterpret the meaning of abuses may result in misinterpretations that go against the very purposes of competition policy. The German case illustrates that this evolution generates persisting claims to continuously ‘rewrite’ the competition laws.

We argue that rules of contract law and direct regulation of contract terms are the most obvious remedies to protect the private data of internet users.⁶ The major cause of the so-called exploitative abuse by internet companies is the information asymmetry in ‘zero price’ markets, such as social media. In fact, the use of the platform is not ‘for free’ since it involves costs for consumers who transfer personal data, without being fully aware of the inherent privacy risks. Businesses, furthermore, turn the data they obtain into revenue. Users will be confronted with

⁴ See for those arguments by Facebook, E. Garcés in CRESSE 7 July 2020 event *Antitrust and Regulation in the Digital Economy*, <https://www.competitionpolicyinternational.com/schedule-cresse-july-7-2020/> (accessed 29 Jan. 2021), finding harm to consumers in a stylized scenario, see D. Condorelli & J. Padillo, *Data-driven Envelopment with Privacy Policy Tying* (working paper 2020); J. Haucap, *Data Protection and Antitrust: New Types of Abuse Cases? An Economist's View in Light of the German Facebook Decision*, CPI Antitrust Chronicle February (2019).

⁵ Data portability may play a role. Then again, there are also successful entrants that had zero data to start with.

⁶ In a recent interview by the WuW (Podszun) on 17 September 2020, the president of the cartel senate at the BGH, Prof. Meier-Beck, mentioned the underdeveloped state of social media contract law indeed among the reasonings why competition law stepped in; BGH, decision of 23 June 2020, para. 124.

personalized advertising to induce them to consume. Competition law is institutionally ill-equipped to cope with these information problems, since it imposes a potentially insurmountable hurdle to the enforcement authorities: the proof of a causal link between market power and the exploitative conduct.

The structure of this article is as follows. After this introduction, section 2 gives an overview of the specific provisions of German competition law that deal with abuse of dominance in the digital economy. It also provides a summary of the proceedings in the Facebook case from its start with the decision of the BKartA until the recent judgment of the Federal Supreme Court (*Bundesgerichtshof*, BGH). Section 3 discusses why zero price markets fail in providing an optimal level of privacy protection. Section 4 elaborates on the difficulties faced in competition law to prevent the use of contract terms that harm the privacy of the users of social media platforms. It stresses the adverse effects of an overly activist use of the prohibition of abuse if the requirement of causation is not taken seriously. Section 5 argues how regulation of contract terms can prevent a suboptimal transfer of personal data. The problems faced by the application of competition rules do not materialize if contract regulation remedies are used to combat quality deterioration in the digital economy (in particular, social media). Section 6 concludes.

2 ABUSE OF DOMINANCE IN DIGITAL MARKETS UNDER THE RULES OF THE GWB

2.1 REVISIONS OF THE GWB

To provide for a competition law that is apt for digitalized markets, major efforts have been undertaken to revise the GWB with the 9. GWB-Novelle and the 10. GWB-Novelle.⁷ The 9. GWB-Novelle introduced a new section 18 (2a), according to which it is without prejudice for the assumption of a market that a service is free of charge. Section 18 (3a) GWB mentions specific factors to be taken into account in the assessment of a company's market position in multi-sided markets, namely (1) direct and indirect network effects, (2) the parallel use of several services and the switching effort for users, (3) economies of scale related to network effects, (4) access to data relevant to competition and (5) innovation-driven competitive pressure. It is, furthermore, noteworthy that section 18 (4) GWB contains a presumption that a company is dominant if it has a market share of at least 40%.⁸

⁷ Input for the reforms stemmed from H. Schweitzer et al., *Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen* (Endbericht Projekt im Auftrag des Bundesministeriums für Wirtschaft und Energie [BMWi] Projekt Nr. 66/17, 2018).

⁸ In the following special thresholds are set out for market power by two or more companies.

The GWB contains a general clause regarding the prohibition of abuse of a dominant position in section 19 (1). Among the standard examples of the second paragraph of section 19 GWB, there are exclusionary abuses vis-à-vis competitors (section 19 [2] No 1 GWB) and exploitative abuses vis-à-vis trading partners (section 19 [2] No 2 GWB). As a particularity, German competition law qualifies the so-called *Konditionenmissbrauch* as a form of exploitative abuse (section 19 [2] No 2 GWB).⁹ In essence, an exploitative abuse does not only refer to prices but can also be constituted by the use of *Geschäftsbedingungen* (trading conditions). The interpretation of the latter provision is the major concern in the Facebook proceedings and, hence, also in this article.

A short look at the 10. GWB-Novelle confirms the ongoing efforts to bring German competition law in line with the digital age.¹⁰ New sections include, among others, an abuse provision for companies of paramount cross-market importance acting predominantly on section 18 (3a) GWB-type markets (section 19a). When determining if a company is of such a nature, special importance is given to the access to data relevant for competition (No 4).

2.2 THE FACEBOOK CASE

The Facebook saga started with the decision taken by the BKartA on 9 February 2019, after approximately three years of investigation.¹¹ The German competition watchdog used the abuse of dominance provision to ban the contract terms that Facebook enforces upon its users. Facebook functions as a free network and multi-sided market and thus falls under the definition of the intermediary product within the meaning of section 18 (3a) GWB.¹² The social network is free of charge, which according to section 18 (2a) GWB does not preclude the assumption of a market.¹³ Facebook gathers data on users not only from its own websites (such as WhatsApp and Instagram) but also from third party websites, by using pixels and social plug-ins (such as Like!) without the users' consent. In effect, its contract terms allow Facebook to build 'super profiles' of users by combining data from all sorts of sources on the internet (Off-Facebook data). The proceeding is not

⁹ In s. 19 (3) GWB the term 'Geschäftsbedingung' comes back.

¹⁰ GWB-Digitalisierungsgesetz.

¹¹ Annotations to this decision, K. Schreiber, *Facebook kombiniert Nutzerdaten missbräuchlich, da DSGVO-widrig*, *GRUR-Prax* 266 (2019); I. Kartheuser, *Unangemessene Datenverarbeitung durch Facebook*, *ITRB* 112 (2019); G. Colangelo & M. Maggiolino, *Antitrust Über Alles. Whither Competition After Facebook?*, *42(2) World Competition* 355 (2019).

¹² BKartA, paras 213, 422.

¹³ BKartA, para. 238.

concerned with On-Facebook data.¹⁴ Facebook's privacy policy conditions, which make this possible, were seen as an infringement of privacy law (in particular the General Data Protection Regulation – GDPR) and, for this reason, the contract terms were qualified as an abuse of dominance. The BKartA assessed GDPR rules, as a normative parameter of the legality of how a company collects and processes data. The decision is primarily concerned with the exploitative abuse vis-à-vis the users and only to a minor extent with the exclusionary abuse vis-à-vis competitors.¹⁵ The abuse found, namely *Konditionenmissbrauch* is based directly upon the general abusiveness clause of section 19 (1) GWB.¹⁶ In the end the BKartA prohibited the data processing and imposed corrective measures. Importantly, for the analysis to hold the causality requirements were lowered.¹⁷

Facebook challenged the Decision of the BKartA before the competent Higher Regional Court, the *Oberlandesgericht Düsseldorf* (OLG).¹⁸ In summary proceedings involving the order of suspensive effect, the OLG decided to withhold the enforcement of the BKartA's decision, because of apparent weaknesses in the BKartA's motivation concerning the required proof of damage to competition and lack of causality. The OLG approved of the delimitation of the relevant market as done by the BKartA and went on to finding that there is no *Konditionenmissbrauch* according to section 19 (2) No 2 GWB, as the BKartA did not investigate the but-for market scenario.¹⁹ Neither was section 19 (1) GWB regarded as applicable since the presumed infringement of the GDPR did not cause anti-competitive effects.²⁰ The OLG heavily criticized the lowering of the causality requirement for the purposes of finding an exploitative abuse.²¹ As regards the data dimension, the court argued more generally that the data can be duplicated and used vis-à-vis several services.²² It held that consent is given and making the participation in Facebook dependent upon data sharing is not regarded as sufficient to constitute

¹⁴ It leaves it open how the behaviour regarding the data generated while using Facebook should be assessed, see BKartA, para. 522.

¹⁵ See only briefly in BKartA, para. 885: the BKartA also found the latter based on a generally accepted lower causality threshold; doubtful according to T. Körber: *Die Facebook-Entscheidung des Bundeskartellamtes – Machtmissbrauch durch Verletzung des Datenschutzrechts?*, NZKart 187, at 192 (2019).

¹⁶ BKartA, para. 523. Hence, rather than using the specific provision for 'Konditionenmissbrauch' in s. 19 (2) No 2 GWB it applied the concept of 'Konditionenmissbrauch' via the general clause. The OLG, at 8 later argued that it would not determine in the proceedings at hand when 'Konditionenmissbrauch' exceptionally could fall under the general clause rather than s. 19 (2) No 2 GWB.

¹⁷ See s. 4.1.1. for details.

¹⁸ VI-Kart 1/19 (V); M. Bergmann and J. Modest, *Vom Umschreiben der Geschichtsbücher – Anmerkungen zu OLG Düsseldorf in Sachen Facebook*, NZKart 531 (2019).

¹⁹ OLG, at 7.

²⁰ OLG, at 14.

²¹ OLG, at 19: the strict standard of "Verhaltenskausalität" – the strict causality standard – needs to be fulfilled in the context of exploitative abuses.

²² OLG, at 9; along these lines also Haucap, *supra* n. 4.

abuse or a loss of control. However, the OLG did not ultimately judge about the possibility of a data protection infringement.²³ It did also not see any ground for an exclusionary abuse.²⁴

Still in interim proceedings, the BKartA appealed the judgment of the OLG before the German Federal Supreme Court (*Bundesgerichtshof*, BGH).²⁵ In its judgment of 23 June 2020, the BGH gave a ‘preliminary ruling’ related to the OLG’s judgment. The highest federal court argued that Facebook’s terms of use may constitute an abuse of a dominant position (according to section 19 [1] GWB), irrespective of their conformity with data protection laws. According to the BGH, the lack of choice, i.e. not giving consumers different options to choose between when using Facebook, constitutes an exploitative abuse. Therefore, the suspensive effect of the OLG’s judgment has been annulled. Interestingly, the BGH also referred to the GDPR but to a lesser extent than the BKartA. The highest federal court strongly emphasizes the personal autonomy of Facebook users and their right to informational self-determination.²⁶ It did find that there is a lack of choice for those users that want to use Facebook but do not wish to excessively share their data.²⁷ Not using the network is, in contrast to the OLG’s view, not seen as an acceptable option. The BGH even argued that Facebook is a necessity for many users to participate in societal life.²⁸ The competition problem at hand is the forced expansion of service (*aufgedrängte Leistungserweiterung*) by way of forcefully coupling participation in the network with sharing Off-Facebook data. These data are economically highly valuable and a crucial competition parameter for the network, which collects these data in exchange for additional Facebook functionalities.²⁹ As a consequence, the BKartA’s view was reinforced and Facebook can be obliged to explicitly seek consent for data processing from both users of the company’s own services and users tracked via third party websites. The BGH found both an exploitative and exclusionary abuse and pointed at how both types of abuse interact.³⁰ It must be noted that the judgment of the BGH is not the end of the Facebook saga, since the OLG has not yet decided on the merits of the case. It cannot be ruled out that the OLG will take a decision in the main

²³ OLG, at 12.

²⁴ OLG, at 32.

²⁵ F. C. Haus & C. D. Cesarano, *Ausbeutungs- und Behinderungsmissbrauch in zweiseitigen Märkten – zugleich Anmerkung zum Beschluss des BGH in Sachen Facebook*, NZKart 521 (2020); J. Mohr, *Konditionenmissbrauch durch soziale Netzwerke: Facebook*, WuW 506 (2020).

²⁶ BGH, decision of 23 June 2020, para. 103.

²⁷ *Ibid.*, para. 58.

²⁸ *Ibid.*, para. 102 with reference to a judgment by the German Constitutional Court on the ‘right to forget’.

²⁹ BGH, decision of 23 June 2020, paras 59, 97.

³⁰ *Ibid.*, para. 64; see s. 4.1.1.

proceeding before Facebook has started to fully implement the prohibition of building ‘super profiles’ of all its users.

3 WHY ‘ZERO PRICE’ MARKETS FAIL

Several antitrust commentators have argued that the supply of ‘free goods’ (such as search engines and social media platforms) bring important benefits to consumers.³¹ Therefore, one should be extremely cautious to prevent type I errors (false prohibitions) by enforcing antitrust prohibitions against high-tech companies (such as Google or Facebook). Obviously, both in reality and in the virtual world of the internet nothing is for free (as illustrated by the famous saying of Milton Friedman ‘There is no such thing as a free lunch’³²). ‘Zero price goods’ are not really offered for free since their provision involves costs to the users. The use of social media platforms, mobile applications, travel booking websites and many others cause attention costs spent on watching advertisements that consumers may not be interested in. Also, understanding the terms of use causes information costs that the consumers may not wish to incur and the adaptation of ‘herd behaviour’ that may cause unpleasant surprises. From a consumer welfare perspective, zero price markets are efficient if consumers receive the highest quality services at the lowest level of attention and information costs. If the resulting attention and information costs increase above economically optimal levels, consumer welfare will be reduced.

Information asymmetry may very well explain the use of ‘unfair’ contract terms in digital markets. What consumer activists consider unfair may simply be the consequence of what economists regard as a market failure. Most users of Facebook or other digital platforms are not informed about the contract terms that govern the use of the digital services.³³ The requirement to consent to these terms is usually satisfied by a simple click on the webpage, but very few consumers – if any – take the trouble to read these terms in advance. Consumers simply ‘sign without reading’, since reading the terms would take a lot of time that they do not wish to spend and maybe require legal advice to understand the precise content that they do not want to pay for.³⁴ As a large Law and Economics literature has demonstrated, signing without reading creates scope for the imposition of

³¹ M. S. Gal & D. L. Rubinfeld, *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*, 80(3) *Antitrust L. J.* 521 (2016); M. E. Stucke & A. Ezrachi, *When Competition Fails to Optimize Quality: A Look at Search Engines*, 18 *Yale J. L. & Tech.* 70 (2016); on the other hand: J. M. Newman, *The Myth of Free*, 86(2) *Geo. Wash. L. Rev.* 513 (2018).

³² M. Friedman, *There’s No Such Thing as a Free Lunch* (Open Court, LaSalle Ill 1975).

³³ Along those lines see also Haucap, *supra* n. 4.

³⁴ J. A. Obar & A. Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*, 23(1) *Info., Comm’n. & Soc’y* 128 (2020).

contractual conditions that informed consumers would not have accepted.³⁵ In the short run, the existing information asymmetry allows the service provider to act opportunistically by putting personal gain above the offer of better conditions that may not be honoured by increasing trust on the side of the uninformed consumers.³⁶ In the long run, as it has been demonstrated in the seminal article by Nobel Prize laureate *George Akerlof*, it creates a ‘market for lemons’ in which only poor quality contract terms can survive.³⁷

The quality deterioration is the consequence of the unwillingness of consumers to pay for better contract terms, since they are unable to differentiate between good and bad quality. In this way, a process of adverse selection occurs implying that good quality terms are ousted by bad quality contracts (‘lemon contracts’, if one wishes to use this terminology). Adverse selection may very well be the cause of the insufficient privacy protection for users of social media. No service provider has an incentive to offer better privacy conditions since they are not recognized and not rewarded by the users of the relevant services. Moreover, it is unclear if and how users compensate the internet firms for better quality, i.e. more privacy friendly contract terms, if this is not signalled by the willingness to pay a higher price. Consequently, the degree of privacy protection in digital markets is sub-optimal and lower than required by the consumer protection goal set by politicians. To correct the information asymmetry regulatory intervention will be necessary; the process of adverse selection could be stopped by imposing information remedies (duties to inform the consumers) or direct regulation of quality (prohibition of particular contract terms). Information remedies should be salient and convey a clear message so that the consumer is made aware of the privacy risks of transmitting personal data. If such remedies remain ineffective, further regulatory steps can be taken that ban terms of use that would not be accepted by informed consumers.³⁸

Besides the adverse selection process, ‘zero price’ markets may also cause a sub-optimally large transfer of private data because of systematic irrational behaviour on

³⁵ G. De Geest, *The Signing-Without-Reading Problem: An Analysis of the European Directive on Unfair Contract Terms*, in *Konsequenzen wirtschaftsrechtlicher Normen: Ökonomische Analyse des Rechts* 214 (H. B. Schäfer & H. J. Lwowski eds, Deutscher Universitätsverlag 2002); I. Ayres & A. Schwartz, *The No-reading Problem in Consumer Contract Law*, 66(3) *Stan. L. Rev.* 545, 549–550 (2014); O. Ben-Shahar, *The Myth of the ‘Opportunity to Read in Contract Law*, 5(1) *Eur. Rev. Cont. L.* 1 (2009); Y. Bakos, F. Marotta-Wurgler & D. R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-form Contracts*, 43(1) *J. Legal Stud.* 1 (2014).

³⁶ Geest, *supra* n. 35.

³⁷ Akerlof, *supra* n. 3, at 488–500.

³⁸ Judicial control might be another option, see P. Leyens & H. B. Schäfer, *Inhaltskontrolle allgemeiner Geschäftsbedingungen. Rechtsökonomische Überlegungen zu einer einheitlichen Konzeption von BGB und DCFR*, 210(6) *AcP* 771 (2010).

the part of internet users.³⁹ Systematic irrational behaviour of consumers will further strengthen the case for regulatory intervention. The experience with social media has shown that users often act against their personal interest and start to care only afterwards when potentially damaging private information has leaked. This may be due to a behavioural bias faced by irrational consumers, who overvalue the present gain and underestimate the future loss (hyperbolic discounting).⁴⁰ Whatever the cause be may (information deficiencies or behavioural biases), one observes a ‘privacy paradox’,⁴¹ since the complaints about lack of privacy protection are at odds with the actual behaviour of the users of social media. Given this privacy paradox, information remedies (duties to inform) are likely to be insufficient and direct regulation of contract terms (prohibition of clauses harming the users’ privacy) may be needed.

The above analysis explains why non-German antitrust observers will raise their eyebrows when reading the decision of the BKartA and the judgment of the BGH. Using the antitrust laws to ban contract terms seems awkward since it is not the most obvious remedy to protect consumers. The damage to competition caused by Facebook’s contract terms is far from obvious since the building of super-profiles may better allow to satisfy consumers’ purchasing desires. Only those consumers who would have not agreed to an overly broad data collection will be harmed. This is not necessarily a consequence of monopoly power.⁴² Large scale data collection also takes place by non-monopolists outside the digital economy (for example, utilities and insurance companies). It must always be investigated which market failure, either monopoly or information asymmetry, has enabled the use of the contract terms. Only after this question is answered will it be possible to design the most effective regulatory remedy (through contract law, regulation or competition law).

³⁹ On behavioural insights, see R. Korobkin, *Bounded Rationality, Standard form Contracts, and Unconscionability*, 70(4) U. Chicago L. Rev. 1203 (2003); S. I. Becher, *Behavioral Science and Consumer Standard form Contracts*, 68(1) La. L. Rev. 117 (2007); H. A. Luth, *Behavioural Economics in Consumer Policy: The Economic Analysis of Standard Terms in Consumer Contracts Revisited* (Doctoral dissertation, Erasmus School of Law 2010); M. G. Faure & H. A. Luth, *Behavioural Economics in Unfair Contract Terms*, 34(3) J. Consumer Pol’y 337 (2011).

⁴⁰ D. Laibson, *Essays in Hyperbolic Discounting* (Ph.D. dissertation, MIT, 1994).

⁴¹ S. Barth & M. D. T. de Jong, *The Privacy Paradox – Investigating Discrepancies Between Expressed Privacy Concerns and Actual Online Behavior – A Systematic Literature Review*, 34(7) Telematics & Informatics 1038–1058 (2017).

⁴² Along these lines, J.-U. Franck, *Eine Frage des Zusammenhangs: Marktbeherrschungsmisbrauch durch rechtswidrige Konditionen*, ZWeR 137, at 151 (2016); S. Thomas, *Wettbewerb in der digital economy: Verbraucherschutz durch AGB-Kontrolle im Kartellrecht?*, NZKart 92, 94 (2017). This is rather a data law problem: Körber, *supra* n. 15, 187, at 192; W. Kerber & K. Zolna, *The German Facebook Case: The Law and Economics of the Relationship Between Competition and Data Protection Law* (working paper 2020) argue in favour of a joint approach of competition and data law in the light of two market failures.

4 THE LIMITS OF COMPETITION LAW

For several reasons, the abuse prohibition in competition law is not the most appropriate legal instrument to guarantee the collection and transmission of private data and protect the privacy of consumers making use of social media. Even if market power can be established,⁴³ there must be a causal link between the dominance and the challenged abuse. If privacy protection is also lacking in competitive markets, the requirement of causation will be difficult to meet. A watering down of the causation requirement in order to establish an abuse raises the legitimate concern that competition law is subverted: a violation of privacy rights should not be dressed up as a violation of competition law.

The ‘big bang’ of the BKartA’s Facebook decision is the qualification of the violation of data protection laws as an abuse of dominant position. The focus of the German competition watchdog was not so much on the competitive harm (which is difficult to prove) but rather on the GDPR violation by Facebook. Put concisely, the BKartA held that a violation of data protection law is also a violation of the prohibition of abuse, if the infringing company enjoys a dominant position. This was enabled by a far-reaching interpretation of the preceding BGH jurisprudence on *Konditionenmissbrauch*. In the light of the BGH judgments *VBL Gegenwert I* (2013)⁴⁴ and *II* (2017)⁴⁵ and *Pechstein* (2016),⁴⁶ according to the BKartA, the abuse also applies to Facebook’s data guidelines.⁴⁷ The judgments *VBL Gegenwert I* and *II* deal with a standard contract clause, more specifically a termination clause. The *Pechstein* verdict concerns an arbitration clause. These rather recent BGH rulings have awoken the *Konditionenmissbrauch* from a deep slumber. By an extensive interpretation of the BGH’s judgments, the BKartA managed to dress up data protection laws with the clothes of antitrust law. Furthermore, the BKartA laid the foundation to assess fundamental rights when balancing the respective interests.⁴⁸ This approach has raised two fundamental questions: Is it legally possible to

⁴³ The market definition proposed by the BKartA (private use of social media in Germany) seems awkward. It disregards the multi-sided market characteristics and downplays the importance of internationally operating companies. Within the limits of this article, the market definition problem cannot be further commented upon. See for a critique among others: Körber, *supra* n. 15, at 187, 190; A. Pomana & M. Schneider, *Wettbewerbsrecht und Datenschutz: Facebook im Visier des Bundeskartellamts*, BB 965, 968 (2018).

⁴⁴ BGH, 06 Nov. 2013 – KZR 61/11 – VBL-Gegenwert I. The BGH uses the vague formulation ‘Ausfluss von Marktmacht’ (flow of market power) in para. 65 rather than abuse of dominance. It also speaks of power superiority (‘Machtüberlegenheit’); BGH, 07 June 2016 – KZR 6/15 – Pechstein, para. 55: ‘Fremdbestimmung’ (heteronomy).

⁴⁵ BGH, 24 Jan. 2017 – KZR 47/14 – VBL-Gegenwert II; annotation S. Thomas Anmerkungen LMK 2017, 392671: no automatism that an infringement of s. 307 and following BGB is at the same time an infringement of competition law.

⁴⁶ BGH, 07 June 2016 – KZR 6/15 – Pechstein.

⁴⁷ BKartA, para. 524.

⁴⁸ BKartA, para. 527.

substantially weaken the causality criterion, in order to enlarge the scope of the abuse prohibition in markets dominated by internet giants? Is abandoning a stricter causality criterion a desirable way forward for competition law?

4.1 OVERTURNING CAUSALITY

The BKartA argued that a *Konditionenmissbrauch* cannot only be established via the specific clause in section 19 (2) No 2 GWB. This clause requires conduct causality (*Verhaltenskausalität*), i.e. an assessment of a counterfactual but-for market with competition.⁴⁹ According to the strict interpretation, it must be shown that the challenged practice (such as high prices or inappropriate contract terms) would not have occurred in a competitive market. In contrast, the BKartA used the general abuse clause of section 19 (1) GWB and attenuated the causality requirement.⁵⁰ It is noteworthy that exclusionary abuses, rather than exploitative abuses, have long been based upon a lower causality threshold.⁵¹ For the former category of abuses, it suffices that the result is anti-competitive, a so-called *Ergebniskausalität* (normative causality). Exploitative abuses do typically not affect the market structure. Extending the lower causation threshold to an exploitative abuse like *Konditionenmissbrauch* is novel.⁵²

In the Facebook case, the BKartA uses the weak causality criterion (normative causality).⁵³ According to this criterion it is sufficient to show that the consequences of the practice are anti-competitive since the contract terms have been used by a dominant firm. Because of its dominance, the consequences are more severe than on competitive markets: contract terms that would not be objected if used by competitive companies become problematic because they are used by a dominant firm. The BKartA thereby substantially watered down the causation requirement, to ultimately enable the qualification of a breach of the GDPR Regulation as an abuse of dominance. The interpretation of the causality criterion by the Federal German Competition Authority met a lot of criticisms in the

⁴⁹ *Ibid.*

⁵⁰ The BGH according to the BKartA had left it open in the *Pechstein* judgment which route to follow, see BKartA, para. 527 with reference to BGH, 07 June 2016 – KZR 6/15 – Pechstein, para. 48.

⁵¹ Franck, *supra* n. 42, 137, at 151; A. Engert, *Digitale Plattformen*, 2018 AcP, 304, 374 (2018); OLG, at 20, 23.

⁵² Some foundation is found in the preceding case-law on ‘Konditionenmissbrauch’. However, the BGH had in that case-law not abolished ‘Verhaltenskausalität’ – according to T. Körber, *Ist Wissen Marktmacht?*“ Überlegungen zum Verhältnis von Datenschutz, „Datenmacht“ und Kartellrecht – Teil 2, NZKart 348, 355 (2016) with further references (on the contrary!) or H. Schweitzer et al., *Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen* (Endbericht Projekt im Auftrag des Bundesministeriums für Wirtschaft und Energie [BMWi] Projekt Nr. 66/17, 2018), at 109 (it was left open); in the course of the procedure also OLG, at 12, 22.

⁵³ BKartA, para. 873 with further references, 875.

German literature.⁵⁴ It may indeed be questioned whether the BKartA gave a correct interpretation of the relevant case-law of the BGH. The requirement of causality in German competition law is heavily debated.⁵⁵ The majority opinion in the German literature insists on a *Verhaltenskausalität* for any exploitative abuse.⁵⁶

Next, the OLG Düsseldorf stepped in and upheld the strict causality criterion. It regarded the wide interpretation of the *VBL Gegenwert* etc. jurisprudence as unfounded.⁵⁷ It interpreted the preceding case-law by the BGH in such a way that not the use of any void standard contract term constitutes abuse.⁵⁸ Such conditions are unlawful without necessarily having an anti-competitive effect. The OLG argued strongly against the finding of normative, result-driven causality.⁵⁹ *Verhaltenskausalität* is strictly required: a mere look at the market result does not generate robust proof of competitive harm vis-à-vis consumers. It does not matter for the consumer if the disadvantageous conditions were imposed by a dominant or non-dominant firm.⁶⁰ In the case at hand the causality test has to be orientated at the GWB and not data protection law.⁶¹ The relevant question is whether the consent required from consumers when joining the network is externally determined, so that the declaration of consent can no longer be viewed as based on an autonomous decision of the users. Such a dependence is not confirmed by OLG Düsseldorf. Furthermore, there is no data loss. There is no evidence that users prefer a paid service.⁶² The BKartA suspected that even the strict causality criterion

⁵⁴ Engert, *supra* n. 51, 304, at 373; Körber, *supra* n. 52, at 348, 351; Körber, *supra* n. 15, 187, at 190; Thomas, *supra* n. 42, 187, at 192; Bergmann & Modest, *supra* n. 18, at 531, 533.

⁵⁵ “‘Verhaltenskausalität’ also called ‘instrumentelle Kausalität’ v. lower thresholds, see Franck, *supra* n. 42, at 137; H. Schweitzer et al., *Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen* (Endbericht Projekt im Auftrag des Bundesministeriums für Wirtschaft und Energie (BMWi) Projekt Nr. 66/17, 2018), at 108; Engert, *supra* n. 51, at 304, 373; in favour of lowering the threshold: Nothdurft, in Langen/Bunte, § 19 GWB, para. 206 and following as quoted by BKartA; T. Lettl, *Missbräuchliche Ausnutzung einer marktbeherrschenden Stellung nach Art. 102 AEUV, § 19 GWB und Rechtsbruch*, 66 WuW 214 (2016); J. Mohr, *Kartellrechtlicher Konditionenmissbrauch durch datenschutzwidrige Allgemeine Geschäftsbedingungen Die Facebook-Entscheidung des Bundeskartellamts v. 6.2.2019*, EuZW 265, 273 (2019); Fuchs in Immenga/Mestmäcker, *Wettbewerbsrecht*, 6. Aufl., 2020, § 19 GWB, para. 234a; Pomana & Schneider, *supra* n. 43, 965, at 975: in favour of more data protection law at BKartA.

⁵⁶ Franck, *supra* n. 42, 137, at 151; Körber, *supra* n. 52, at 348, 355; D. Wiedmann & T. Jäger, *Marktmachtmissbrauch durch unangemessene Datennutzung*, K&R 217, 220 (2016); Thomas, *supra* n. 42, 92, at 95; H. Schweitzer et al., *Modernisierung der Missbrauchsaufsicht für marktmächtige Unternehmen* 108 (Endbericht Projekt im Auftrag des Bundesministeriums für Wirtschaft und Energie (BMWi) Projekt Nr. 66/17 2018); M. Nuys, ‘Big Data’ – Die Bedeutung von Daten im Kartellrecht, WuW 512, 519 (2016).

⁵⁷ OLG, at 12, 22.

⁵⁸ OLG, at 13.

⁵⁹ OLG, at 17.

⁶⁰ OLG, at 20.

⁶¹ OLG, at 26.

⁶² OLG, at 29.

could have been fulfilled since a company on a competitive market could not have acted this way.⁶³ The OLG Düsseldorf positioned itself against this conclusion.⁶⁴

The German Federal Court's reasoning is again more in line with the BKartA's approach: it changes the perspective of the analysis but supports the final outcome. Not the violation of privacy laws but the restriction of consumer choice has been put forward as the hard core of the abuse of dominance committed by Facebook.⁶⁵ This change of direction will be welcomed by those who have criticized the simple equation that a breach of a law outside the competition sphere is also a violation of competition law, if practiced by a dominant firm. The weak causality criterion was reconfirmed and has become even more crucial to apply the prohibition of dominance.⁶⁶ The BGH regards *Ergebniskausalität* not as a necessary but as a sufficient condition to satisfy section 19 (1) GWB.⁶⁷ It suffices that the behaviour of a dominant company leads to results that could not be expected – hence requiring a 'mere expectation' – in a competitive market.⁶⁸ The BGH stresses that it is necessary to analyse the competitive effects on both affected groups: the users of the social network and Facebook's potential competitors.⁶⁹ It, therefore, adds to the finding that the alleged infringement not only constitutes exploitation but is at the same time 'objectively apt'⁷⁰ to restrict competition from potential rivals. With a view to Facebook's terms, hard proof of a causal connection between market power and abuse is not required. If a behaviour qualifies as an exclusionary abuse, a strict causality requirement may not hinder the finding of exploitative abuse towards the user.⁷¹ This is particularly so in the case of two-sided markets. Next to the rejection of an effects-based analysis of causation, the BGH refers to the specificities of two-sided markets to qualify Facebook's terms of use as an abuse of dominance.⁷² It sees incentives for Facebook to use the room for manoeuvre in the user market to the benefit of its position in the advertising market.⁷³

Overall, so it is argued by the BGH, it must be sufficient to show that consumers would prefer different terms of use if there was a possibility of choice. Such a chance may not exist because of the competitive restrictions in the latter

⁶³ BKartA, para. 880.

⁶⁴ OLG, at 27.

⁶⁵ BGH, decision of 23 June 2020.

⁶⁶ Meier-Beck regards their approach as cautious, see interview Meier-Beck by the WuW (Podszun) on 17 September 2020.

⁶⁷ BGH, decision of 23 June 2020, para. 72.

⁶⁸ *Ibid.*, head n. (a).

⁶⁹ *Ibid.*, para. 72.

⁷⁰ *Ibid.*, para. 77.

⁷¹ *Ibid.*, para. 79.

⁷² *Ibid.*, head n. b).

⁷³ *Ibid.*, para. 43.

relationship. Since social networks must rely on a very large number of subscribers to fully profit from the (direct and indirect) network effects, consumers of Facebook will be locked in.⁷⁴ This prohibits newcomers to engage in competition with Facebook (as it is supposedly proven by the rise and fall of Google + as a competitor) and allow to qualify the terms of use also as an exclusionary abuse. In such a situation the monopolist has to provide for the alternative option that the market would otherwise have provided itself.⁷⁵ In essence, the judges at the BGH follow the OLG in that the BKartA's interpretation of the preceding case-law on *Konditionenmissbrauch* and bringing it together with the GDPR was overstrained. However, they agree with the result the BKartA achieved. The BGH simply exchanged the reasoning given by the BKartA to uphold its result. The decision thus puts certain restraints on an excessive use of the *Pechstein et al* BGH judgments.

4.2 ABANDONING THE ECONOMIC APPROACH

To understand the preference for a weak causality criterion, it is helpful to link the debate on the interpretation of the abuse clause to the perennial discussion about the goals of competition law. The view of the BGH fits in the tradition which sees the protection of the competitive process as the main goal of competition law. In a market structure where this competitive process is restricted by the presence of a dominant firm, the latter has a 'special responsibility' to safeguard competition. *Quod licet bovi non licet Iovi*. Consequently, an infringement decision requires proof of market dominance but not necessarily hard evidence of the causal link between the possession of market dominance and the existence of an abuse. Clearly, if the BGH had taken a 'more economic approach', a stronger causality criterion would have emerged. A competition law that rests upon economic foundations is effects based: to establish abuse of dominance, it must be proven that the abusive behaviour is made possible by the dominant position. Moreover, in a full efficiency-oriented analysis, the showing of anti-competitive effects must be balanced against the creation of efficiency benefits, such as lower prices, better quality and innovation. By focusing the analysis on the efficiency consequences, it also becomes possible to supplement the qualitative legal reasoning by empirical evidence, which measures the impact on consumer welfare in quantitative terms.

Hard evidence is not a concern of the BGH. The personal conviction of the BGH that consumers would make a choice between different terms of use if the market was not dominated by Facebook appears sufficient. For the mere expectation that behaviour on a competitive market would have been different, the BGH

⁷⁴ *Ibid.*, paras 44.

⁷⁵ *Ibid.*, para. 122.

holds that ‘actual leads’ (*tatsächliche Anhaltspunkte*) about how market participants would reasonably react to user preferences suffice.⁷⁶ In the absence of market dominance they would not sell their personal data by simply adapting the business model of the internet giants.⁷⁷ If competition works, users of social media would have a choice between unrestricted access to their data and a highly personalized profile (super profile) and limited access to personal data and a less personalized profile (regular profile). An effects-based approach would require evidence that offering such a choice will improve the functioning of competition in the market. As we have argued in the previous section, even in a competitive market sub-optimal terms of use may survive because of information asymmetries or irrational consumer behaviour. A similar argument was made by Facebook: the allegedly abusive contract terms are commonly used by other internet firms, such as YouTube or LinkedIn. Acceptance of contract terms by a mere click is common also in industries with lively competition. The BGH’s argument that the but-for test is not feasible in markets where there is little or no prospect of competition is beyond the point.⁷⁸ This would disqualify the criterion in many markets.

The BGH supports its reasoning by referring to data supplied in the decision of the BKartA. Reference is made to surveys showing that 46% of Facebook users would switch to another social medium if the competitor accepted a reduced transfer of data.⁷⁹ In addition, 38.5 % of surveyed consumers would be willing to pay for the use of Facebook as a compensation for not providing data. Surveys are not a reliable basis to show violations of competition law. Several problems need to be overcome: the survey must have been done with a sufficiently large and heterogeneous group of consumers who were chosen at random. Also, the use of leading questions must have been avoided. If users are given an explicit choice, they may indeed opt for a competing social network. Without such a choice, they may routinely accept the terms of use by a simple click on their computer. The BGH also points at the high number of consumers (80%) that accept the terms of use without having read them.⁸⁰ Nevertheless, the BGH claims that if there was competition, at least data sensitive users would use the possibility of choice. There is no evidence offered to support this view. Will the problem of information asymmetry simply disappear in a competitive market? Will the same happen with behavioural biases?

⁷⁶ *Ibid.*, para. 81.

⁷⁷ See N. Economides & I. Lianos, *Restrictions on Privacy and Exploitation in the Digital Economy: A Competition Law Perspective*, October 2019, [www.ssrn.com. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3474099](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3474099) (accessed 29 Jan. 2021)

⁷⁸ BGH, decision of 23 June 2020, para. 82.

⁷⁹ *Ibid.*, paras 44, 85.

⁸⁰ *Ibid.*, para. 91.

The BGH's fundamental mistake is the judges' belief that the lack of choice is the consequence of Facebook's market dominance. This view recalls an almost eighty years old argument, put forward by Friedrich Kessler, that the use of 'unfair' contract terms is the consequence of monopoly power.⁸¹ However, in the past decades we have learned that linking unfair terms and monopoly power is far from evident. Unfair contract terms may be used by firms not enjoying market power, whereas monopolists may increase their sales and profit by offering better quality terms.⁸² Particularly in innovation markets, dynamic competition may ultimately improve market performance. If better terms are not offered by newcomers, this is the consequence of another market failure: asymmetric information. By targeting a different market failure (monopoly), the real cause of quality deterioration will not disappear. Any newcomer could 'misbehave' until it would reach a level of market power. The abuse of dominance prohibition is at best an indirect way to force Facebook to alter its terms. A more effective response is a direct regulation of contract terms: information remedies that respect the demands of salience and simplification and direct regulation of contract terms if market outcomes are not corrected by a sufficiently large group of marginal users.⁸³

For non-German observers, the choice of a weak causality criterion by the German competition authority may be remarkable, if not revolutionary. It will be not surprising for German competition scholars who see the BGH's decision as a return to old ideas and principles of the Ordoliberal School. Ordoliberals have always stressed freedom of choice. Competition works if undertakings are free to choose their trading partners (*Wettbewerb im Austauschprozess*) and free to decide how they wish to compete (*Wettbewerb im Parallellprozess*). The only new aspect of the BGH's judgment is that the freedom of choice is extended to end consumers (users of social media).⁸⁴ This will be welcomed by everyone who rejects productive, allocative and dynamic efficiency as benchmarks of competition law and prefers to resort to vague criteria of consumer choice and personal autonomy. It is also an implicit rejection of empirical approaches that may quantify losses of efficiency but cannot put any numbers on losses of personal autonomy. If one adds to the credo of freedom the other ordoliberal credo that dominant firms have a special responsibility to protect the competitive process, which is already limited by their mere presence on the market, the BGH's decision becomes comprehensible. This ordoliberal view is completely extraneous to US antitrust law and it explains why American firms (such as Facebook) will have a hard time in understanding the

⁸¹ F. Kessler, *Contracts of Adhesion – Some Thoughts About Freedom of Contract*, 43(5) Colum. L. Rev. 629.

⁸² Leyens & Schäfer, *supra* n. 38.

⁸³ For further analysis, see next section.

⁸⁴ P. Nihoul, *Freedom of Choice – The Emergence of a Powerful Concept in European Competition Law* (5 June 2012, unpublished manuscript), <http://ssrn.com/abstract=2077694> (accessed 29 Jan. 2021).

abuse prohibition in German competition law. From their perspective, the BGH's judgment is not forward-looking but backward-looking, by revamping old principles that many had thought to be abandoned by the more economic approach in competition law.

Next to the rejection of a strict causality criterion, another economic weakness of the BGH's decision is its reliance on the existence of an exclusionary abuse to facilitate the finding of an exploitative abuse. Due to the existence of large (direct and indirect) network effects, so the argument goes, the transaction costs to change the platform are too high and users of Facebook are locked in. Even if a competitor is offering more friendly privacy terms, competitors cannot easily start-up competition with Facebook because of its size and access to funds. The disappearance of Google+ is put forward as evidence of such an exclusionary effect. This reasoning is not convincing. Access to data is less difficult than the BGH assumes. To start with, data have characteristics of public goods: they are non-rivalrous and non-exclusive.⁸⁵ Since every competitor has access to data, there can be no market power on data. Even though there may be economies of scale and scope in collecting data, building big data also has a diminishing marginal return and mere size is never the full story. Moreover, data may be short-lived, so that their utility decreases over time. The real value of data is not their mere amount, but the quality of data analysis.

Better privacy terms may not compensate poor data analytics. An exclusionary abuse can be proven only by showing that competitors would not be able to finance the investments in data technology to start up competition with Facebook. In innovation driven industries, such as social media, well-informed consumers may switch to a different platform not so much because it offers more privacy friendly terms of use but above all because it offers a better data personalization thanks to better data analytics. The qualification of Facebook's contract terms as an exploitative abuse does not address the real cause of this potential quality deterioration in the digital services markets. The allegedly abusive terms of use refer to the mere amount of data, not to their analysis. Only if Facebook hinders the development of superior analytic tools, an innovation-driven competition may be impeded. Google+ may have left the market for different reasons: because there was not a sufficiently large number of subscribers or because Facebook was offering a superior product. In the first scenario, information remedies may help in convincing an increasing number of consumers with strong privacy concerns to switch platforms. In the second scenario, a strategy to impede dynamic competition may be qualified as an antitrust infringement. In both scenarios, the qualification of the terms of use that allow the building of super profiles as an exploitative or

⁸⁵ Here we do agree to some extent with the OLG's analysis on at 9.

exclusionary abuse reflects a misunderstanding of the real causes of the potential market failure.

5 IMPROVING THE FUNCTIONING OF SOCIAL MEDIA THROUGH REGULATION OF CONTRACT TERMS

Given the difficulties posed by the application of competition rules, particularly the causation requirement, the question must be asked why the Facebook case was not analysed in a different way. In essence, the problem at hand is the use of ‘unfair’ contract terms. The German legal system deals in different ways with such terms. Besides the general rules of the Civil Code (*Bürgerliches Gesetzbuch*, BGB) including the provisions on standard contract terms, users of social networks are also protected by the German implementation of the GDPR. The latter got particular attention in the decision of the BKartA, which carried out a comprehensive review coming to the conclusion that Facebook’s data processing conditions violate the GDPR,⁸⁶ a result that is also suggested by the analysis of the BGH by confirming the final outcome of the BKartA with a different reasoning. To justify the collection and procession of data, Article 6 [1] lit. b GDPR requires that data is needed simply for the contract conclusion and performance. In the case of Facebook, it seems *prima facie* doubtful that this applies to Off-Facebook data. Article 6 (1) lit. f GDPR includes a rather vague norm according to which data can be collected without consent because of a legitimate interest. Rightly, the BKartA denies this for Facebook’s business model.⁸⁷ The legitimate interests-exception requires that business and user interests are weighted. Whereas having Off-Facebook data on top of On-Facebook data may further both of Facebook’s purposes even more, it comes presumably with a too heavy intrusion in the users’ lives.⁸⁸

Within the scope of this contribution is not possible to ultimately judge whether the GDPR has been complied with. The answer to this question is most likely to be found in the analysis of the requirements for valid consent. When it comes to the classical and in the case at hand most disputed route to agree to data sharing, namely consent, it stands out that each purpose needs to be specified (Article 6 [1] lit. a GDPR).⁸⁹ There are further requirements to obtain valid consent (Article 7 GDPR). There is a clear necessity that the data subjects understand what they are doing. Consent has to be explicit, given deliberately and

⁸⁶ BKartA, para. 573; The BKartA also finds a violation of Art. 9 (2) GDPR as particularly sensitive data is used, *see* BKartA, para. 584.

⁸⁷ BKartA, para. 727.

⁸⁸ In line with BGH that in general accepts this justification but not in the case at hand, *see* BGH, decision of 23 June 2020, para. 117.

⁸⁹ Consent needs to be linked to the purpose (recital 32 GDPR). F. Hofmann & F. Freiling, *Personalisierte Preise und das Datenschutzrecht*, ZD 331, 335 (2020).

in awareness of the consequences.⁹⁰ To the end of obtaining valid consent there are transparency (Article 5 [1][a] GDPR) and information requirements (predominantly Article 12 and 13 GDPR). A guiding principle of the GDPR that can, furthermore, be of help when interpreting the regulation is data minimisation (Article 5[1][c] GDPR). Whether the transparency requirement is met is at least doubtful, as there seems to be some leeway with a view to the required degree of specificity. Overall, a very general and vague remark that data will be collected is not sufficient. Importantly, according to Article 7 (4) GDPR the contract conclusion may not be made dependent on consent to data sharing beyond the necessary – *Kopplungsverbot*.⁹¹ There is no voluntary consent if the use of the network is made dependent upon it.⁹² The *ex post* opt-out possibility is not sufficient. The BKartA finds such a violation.⁹³ In contrast, the OLG found consent.⁹⁴ It did not see any infringement of the *Kopplungsverbot* as there are also many non-Facebook users. This view is doubtful as the *Kopplungsverbot* seems to concern rather the fact that the same service should be available for those inclined to share their data and those not inclined. The BGH regards it as the crucial parameter if the contract can be performed without the data in question.⁹⁵ Given that it was ruled out that the Off-Facebook data is necessary for the contract performance, this view can be doubted. A follow-up challenge concerns finding an equivalent alternative for giving consent to providing personal data.⁹⁶ In sum, the legality of Facebook's user terms under the GDPR remains unclear.⁹⁷

Aside data protection law, contract law and unfair commercial practices law provide additional requirements and remedies regarding online transactions. A first

⁹⁰ T. J. Tillmann & V. Vogt, *Personalisierte Preise im Big-Data-Zeitalter*, VuR 447, 450 (2018).

⁹¹ *Ibid.*, at 447, 450; on this also H. Zander-Hayat, L. Reisch & C. Steffen, *Personalisierte Preise – Eine verbraucherpolitische Einordnung*, VuR 403, 407 (2016); A. Golland, *Datenschutzrechtliche Fragen personalisierter Preise*, CR 186, 188 (2020).

⁹² N. Krohm & P. Müller-Peltzer, *Auswirkungen des Kopplungsverbots auf die Praxistauglichkeit der Einwilligung*, ZD 551, 552 (2017) had generally predicted a decrease of the take-it-or-leave-it attitude.

⁹³ BKartA, para. 629; Pomana & Schneider, *supra* n. 43, 965, at 972: no free consent.

⁹⁴ OLG, at 9, 25 where Körper, *supra* n. 15, at 187, 191 is quoted who regards the assumption of a forced situation as quite far-fetched. It should be added though that he related his statement to the *Pechstein* judgment which dealt with a situation in which consenting to the arbitration clause was necessary to be able to do one's job. This he differentiated from the situation which concerned the participation in a social network.

⁹⁵ BGH, decision of 23 June 2020, para. 107.

⁹⁶ Krohm & Müller-Peltzer, *supra* n. 92, at 551, 554.

⁹⁷ Literature discussing the controversial question of whether the prohibition on tying data law actually prohibits all forms of provision of a fee-free service in return for the disclosure of user data (Art. 7 [4] GDPR), see Bergmann & Modest, *supra* n. 18, at 531, 535 with further references. As one extreme it is argued that Facebook's data protection information could fall under mandatory information of Arts 13 and 14 GDPR which lack the requirement of consent altogether, see T. Hören, *Kartell – oder Datenschutzrecht: BKartA untersagt Facebook die Zusammenführung von Nutzerdaten*, MMR 137 (2019). The literature concerning the conditions of the *Kopplungsverbot* of s. 28 (3b) BDSG (Bundesdatenschutzgesetz – Federal Data Protection Act) might further enlighten the discussion.

set of information requirements flows from unfair commercial practices law, which is widely harmonized throughout the EU. European rules require that the average consumer must be enabled to make informed transactional decisions.⁹⁸ To this end, (s)he needs to obtain all the information that is material. Not providing it or not providing it in the adequate form may constitute a misleading omission.⁹⁹ The omission of material information leads the consumer to taking a commercial decision that (s)he would otherwise not have taken. The same outcome may result if the information is hidden or kept vague. It has traditionally been complicated, though, to link violations of unfair practices law to concrete contractual consequences.¹⁰⁰

Much speaks in favour of qualifying Facebook's data guidelines as standard contract terms. Such terms are subject to a more protective regime than regular contract terms. The validity of standard contract terms consists of two components: a procedural and a content related one. First, there are strong procedural requirements to enable a valid acceptance of standard contract terms (see section 305 [2] BGB). Important elements are the indication of their existence and the possibility to obtain notice. If the standard contract term has never become part of the contract, an assessment of the fairness of its content is obsolete. Otherwise, the content of the clause is controlled upon the basis of a general fairness clause (section 307 [1] BGB) and a grey and black list (sections 308, 309 BGB).¹⁰¹ Content-wise it may be doubted whether Facebook's conditions satisfy the transparency requirements of section 307 (1) 2nd sentence BGB.¹⁰² If a term has not become part of the contract or is considered unfair, the legal consequences are regulated by section 306 BGB, – in essence the contract remains valid without it. As a default regime the general BGB rules kick in (see paragraph 2). Under certain conditions, however, the whole contract is void (see paragraph 3). In terms of interrelations with data law it is argued that if no effective inclusion of

⁹⁸ W. Van Boom et al., *Consumers Beware: Online Personalized Pricing in Action! How the Framing of a Mandated Discriminatory Pricing Disclosure Influences Intention to Purchase*, 33(3) Soc. Just. Res. 331, 332 (2020).

⁹⁹ See s. 5a UWG – *Gesetz gegen den unlauteren Wettbewerb* [Law against unfair competition]. An omission seems to be more likely than an actual misleading commercial practice (s. 5 UWG). However, there might be some scope, too, when it comes to suggesting a service is for free which is in fact not the case.

¹⁰⁰ Regarding representative actions for injunctions via s. 8 UWG (but also violations for unfair terms or data law via the UKlaG – *Unterlassungsklagengesetz* [Law of Injunctions]), R. Podszun & M. de Toma, *Die Durchsetzung des Datenschutzes durch Verbraucherrecht, Lauterkeitsrecht und Kartellrecht*, NJW 2987, 2988 (2016). Individual consumers cannot pursue these routes, whereas competitors can. The UWG does include a rarely used provision for competitors to obtain damages (in s. 9 UWG). Another route to act against data breaches by way of the UWG might be its s. 3 – 'Rechtsbruch' (breach of law).

¹⁰¹ As to possible violations F. Graf von Westphalen, *Nutzungsbedingungen von Facebook – Kollision mit europäischem und deutschem AGB-Recht*, VuR 323, at 326 (2017).

¹⁰² Pomana & Schneider, *supra* n. 43, 965, at 972.

Facebook's data policy terms into the contract could happen, also consent regarding the personal data dimension would still be pending.¹⁰³ Also the question whether the terms at hand actually are standard contract terms or regular contract terms has been raised.¹⁰⁴ In the latter case a less protective regime applies. Section 138 BGB on usury seems applicable to determine the validity of a contract term at hand.¹⁰⁵ It poses a rather high threshold. As a consequence, the contract could be void. General contract law, furthermore, provides information requirements (for e-commerce in particular section 312j BGB and section 246c EBGB¹⁰⁶).

The discussion in this section has shown that several rules outside the scope of competition law provide for fairness and information requirements, which could be a viable alternative to protect the privacy of internet users. Traditionally a lot of faith was put in informing consumers. More recent research within behavioural law and economics is rather critical as to whether information disclosure rules can truly inform consumers and enable them to make informed decisions.¹⁰⁷ The ineffectiveness of information remedies is exacerbated by the complexity of Facebook's business model. Not even Facebook itself can accurately determine the value of different data points and sets. Along these lines one must be careful to overly promote information duties for the complicated matters at hand. Hence, innovative ideas are needed to reform contract regulation. The *Kopplungsverbot* shows a lot of potential to achieve the outcome that also the BKartA and the BGH are striving for. Facebook should provide an alternative for those users who prefer not to share their data. Clearly, there are still many open questions if alternative routes to competition law are chosen. However, we advocate to correct these imperfect routes rather than to dress up competition law as privacy protection law. Interpretations of competition law, such as the watering down of the causation requirement, that sacrifice the economic approach on the altar of the ordoliberal dogmas does not seem the right way forward for improving the efficient functioning of digital markets. The suggested alternative route has the comparative advantage that complicated assessments of the relevant market,

¹⁰³ Westphalen, *supra* n. 101, 323, at 331.

¹⁰⁴ KG Berlin, judgment of 27 December 2018, 23 U 196/13 regards the data clauses of apple's online store as standard contract terms; F. Graf von Westphalen *supra* Fn. 101 classifies them as such; related to this: if it was not a standard contract term, then the *Pechstein* et al BGH jurisprudence would not be applicable, *see* interview Meier-Beck by the WuW (Podszun) on 17 September 2020.

¹⁰⁵ This provision is also mentioned by the OLG, at 15.

¹⁰⁶ *Einführungsgesetz BGB* – Introductory Act BGB.

¹⁰⁷ O. Ben-Shahar & C. E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press 2016); other research remains more optimistic to find viable means, *see e. g.*, O. Seizov, A. J. Wulf AJ & J. Luzak, *The Transparent Trap: a Multidisciplinary Perspective on the Design of Transparent Online Disclosures in the EU*, 42(1) J. Consumer Pol'y 149 (2019).

dominance and anti-competitive effects can be avoided. The starting point for reform seems to be a clarification and improvement of the interrelations between data, contract and unfair commercial practices law.¹⁰⁸ The European Better Enforcement Directive,¹⁰⁹ that is yet to be implemented into German law, makes a step in the right direction by linking the disapproval of certain commercial practices more concretely with contractual remedies like termination (see its Article 11a).

6 CONCLUSIONS

The German Federal Antitrust Authority claimed to have taken a pioneering decision in the Facebook case, which was supposed to set an important precedent for a better enforcement of the competition rules in the digital economy. According to the supporters of the approach by the BKartA, the abuse of market power provision has been turned into an effective instrument for controlling abuses of dominance in digital markets, where up until now antitrust experience has remained limited. The US company was found to have abused its dominant position on the German market for social media platforms by making an unrestricted collection of private data a precondition of using Facebook's services (exploitative abuse). A violation of data protection laws was equated with a violation of the prohibition of abuse, if the infringing company enjoys a dominant position. In interim proceedings the OLG Düsseldorf suspended the decision of the BKartA, but the latter was again made enforceable by the judgment of the BGH. The German Federal Court confirmed the existence of an exploitative abuse in a different way. Not the violation of data protection laws (GDPR) but the lack of choice on the part of consumers, that is to say the impossibility to disagree with the building of super profiles, was qualified as an infringement of German competition law.

The major problem with the views of both the BKartA and the BGH is that neither decision convincingly shows the damage to competition caused by privacy violating contract terms. As a matter of fact, large data sets are also collected without the consent of consumers in relatively well-functioning markets. The

¹⁰⁸ M. Engeler, *Das überschätzte Kopplungsverbot*, ZD 55, 60 (2018): e.g., shows how the principles of the GDPR can inform the assessment of standard contract terms; see about the interrelations also Westphalen, *supra* n. 101.

¹⁰⁹ Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (Text with EEA relevance) PE/83/2019/REV/1, OJ L 328, 18 December 2019, at 7–28; on this T. de Graaf, *Consequences of Nullifying an Agreement on Account of Personalised Pricing*, EuCML 184 (2019).

real cause of quality deterioration is not lack of competition but information asymmetry on the part of the users of digital services, such as social media platforms. Users do not know the value of the information that they transmit to enable the building of super profiles.

A regulatory intervention directed at a correction of the relevant information asymmetry does not pose the difficulties encountered by competition authorities who must turn to the prohibition of abuse. Under the competition law regime, market power must be established on a well-defined relevant market and the requirement of causation must be taken seriously. Regulation of contract terms does neither require a finding of dominance, nor a causal link between market power and an exploitative abuse. Information remedies, if well-designed, cope with information asymmetries and improve consumer choice. Direct regulation of contract terms bans irrational clauses that a well-informed consumer would never have accepted. At best, competition law is an indirect way to achieve similar results. At worst, a watering down of the requirements of market power and causation will subvert competition rules into an atypical data protection regulation. If the regulatory intervention takes place through the antitrust door, there is a risk that the competition authority (if committed to strict enforcement) itself abuses competition law rather establishing an abuse of dominant position by an internet giant. As an alternative route, this article has suggested to enhance the substantive provisions of contract regulation (in particular concerning privacy rights) and to improve enforcement by linking these rules with unfair commercial practices law.