Widening The Frontiers of Competition Law: The Impact of Digital Market On (our) Privacy

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Abstract

In the digital world, we exchange our privacy and personal data to access social and professional platforms, search engines etc. It is known as "take it or leave it" principle by which access to various platforms is provided in exchange for personal data. These platforms generate, gather and analyze on daily basis a huge amount of personal data. Personal data and privacy issues have fundamental and economic value and are closely related to consumers.

This paper discusses the developments in the digital market and their impact on privacy and personal data in Competition Law. In particular, it analyzes how the frontiers of Competition Law can be amplified in order to address privacy and personal data rights. EU Institutions and Member States at national level have been addressing Privacy and Data Protection in the digital market based on the Primary and Secondary legislation.

Moreover, there is a major development in this area of law with the shift from the Data Protection Directive to the General Data Protection Regulation (GDPR) which requires further critical review. These developments on digital and traditional markets and personal data may impact other countries and regions, including the Gulf Cooperation Council (GCC) countries.

Key words: European Union (EU), Competition Law, GDPR, Data Protection, Privacy, GCC.

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"We reject the excuse that getting the most out of technology means trading away your right to privacy" Tim Cook, Apple CEO, 14.05.2018

1. Introduction

When Google was launched two decades ago, it covered only 1% of users worldwide.(2) This was the time when the first Data Protection Directive was adopted within the European Union (EU).(3) Nowadays, the digital market holds personal data of more than 3 billion people, almost half of the world.(4) The digital market collects large amounts of personal data assisted by companies specialized in processing and selling data.(5) A study by Carnegie Mellon University showed that certain Android apps collect location information on individual users every three minutes, or 6,200 times over a two-week period. Authors argue that even when inidivduals don't have anything to hide, privacy must stand important.(6) While it may be too late to discuss whether personal data had to be given away, it is not too late to reconsider the legal relationship between the companies in the digital market and users.(7) The questions to be addressed are, what is left to be done and would an institutional protection suffice if damage is caused to users?(8)

It seems that within the EU, a force of magnetism, for the very first time, is pulling together groups such as the competition law and consumer protection communities, as well as privacy and personal protection advocates.(9) In 60 years now, effective competition law was kept alive across all sectors of the EU economy.(10) However, the new business models which arised and

(2) Jacso, P. (2005). As we may search—comparison of major features of the Web of Science, Scopus, and Google Scholar citation-based and citation-enhanced databases. Current science, 89(9), 1537-1547.

(3) Council Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. L 281/32.

(4) Fiegerman, S. (2017). Facebook tops 1.9 billion monthly users. CNN Tech.

(5) J. Morris and E. Lavandera, "Why big companies buy, sell your data", 23 August 2003, available at http://edition.cnn.com/2012/08/23/tech/web/big-data-acxiom/index.html.

(6) Solove, D. J. (2007). I've got nothing to hide and other misunderstandings of privacy. San Diego L. Rev., 44, 745.

(7) Hutchinson, E. E. (2015). Keeping Your Personal Information Personal: Trouble for the Modern Consumer. Hofstra Law Review, 43(4), 7.

(8) Cate, F. H., Dempsey, J. X., & Rubinstein, I. S. (2012). Systematic government access to private-sector data.

(9) Kerber, W. (2016). Digital markets, data, and privacy: competition law, consumer law and data protection. Journal of Intellectual Property Law & Practice, 11(11), 856-866.; Ohlhausen, M., & Okuliar, A. (2015). Competition, Consumer Protection, and the Right (Approach) to Privacy.; See also Whish, R., & Bailey, D. (2015). Competition law. Oxford University Press, USA.

(10) World, Economic Forum, 6 things the EU has achieved, 60 years on from its founding treaty, 23 March 2017, available at https://www.weforum.org/agenda.

operate in online[11] markets are yet to be regulated by EU competition law. The transformation process caused by digitalization is comparable to a new industrial revolution known as the 'Fourth Revolution'.[12] New online business models have developed operating mainly in two or multisided markets.[13] Digital markets are proven to be extremely dynamic and are characterized by high levels of innovation.[14] However, it is a fact that these companies are either big players dominating the whole market or truly highly concentrated.[15] Therefore, a key task of competition authorities in the digital economy is to keep markets open in order to ensure that innovative newcomers and smaller competitors have a chance to succeed.[16]

Some of these companies increasingly control the infrastructure of online commerce or other essentials of our economy and society. In practice, the question for competition authorities whether or not to intervene in the dynamic digital markets is not an insignificant one. Although the GDPR[17] enters in force in May of 2018, the criticism that it is ineffective and weak takes over.[18] In particular strong criticism exist in the area of consumer (user's) protection. Especially since services where no monetary consideration is overtaken can

(11) The words "Online" and "Digital" are interchangeably used in this paper.

(12) The First Industrial Revolution used water and steam power to mechanize production; The Second used electric power to create mass production; The Third used electronics and information technology to automate production. Now the Fourth Industrial Revolution is characterized as a digital revolution that has been occurring since the middle of the last century. It is a fusion of technologies blurring the lines between the physical, digital, and biological spheres. See more: Klaus Schwab, Founder and Executive Chairman, World Economic Forum Geneva, World Economic Forum, 14 January, 2016, available at: https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond.

(13) Two sided or multi sided markets, see more at: Rochet, J. C., & Tirole, J. (2004). Two-sided markets: an overview (Vol. 258). IDEI working paper.; Rochet, J. C., & Tirole, J. (2006). Two-sided markets: a progress report. The RAND journal of economics, 37(3), 645-667.; Rysman, M. (2009). The Economics of two-sided markets. Journal of Economic Perspectives, 23(3), 125-43.

(14) Bergek, A., Jacobsson, S., Carlsson, B., Lindmark, S., & Rickne, A. (2008). Analyzing the functional dynamics of technological innovation systems: A scheme of analysis. Research policy, 37(3), 407-429.

(15) Castells, M. (2014). Technopoles of the world: The making of 21st century industrial complexes. Routledge.; see also Treacy, M., & Wiersema, F. (2007). The discipline of market leaders: Choose your customers, narrow your focus, dominate your market. Basic Books.

(16) Tidd, J., Bessant, J., & Pavitt, K. (2005). Managing innovation integrating technological, market and organizational change. John Wiley and Sons Ltd.book,.; Audretsch, D. B., Baumol, W. J., & Burke, A. E. (2001). Competition policy in dynamic markets. International journal of industrial organization, 19(5), 613-634.

(17) Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

(18) Koops, B. J. (2014). The trouble with European data protection law. International Data Privacy Law, 4(4), 250-261. Koops compares European Data Protection Law with Harry, from Alfred Hitchcock's 1955 movie, when he is dead, and everyone seems to have a different idea of what needs to be done with his body.

also constitute a market and fall within the scope of competition law.(19)

Competition law seeks to avoid economic harm so far only on the parameters such as price, quality, choice and innovation, which affect efficiency or consumer welfare.(20) While there is an increasing body of economic analysis that sheds light on how personal data processing benefits and harms consumers, such economic analysis alone is considered unable to determine when competition intervention is neccessary.(21)

The European Commission (COM) must expand its interpretation of the notion of consumer welfare in order to incorporate the objectives of public policy.(22) This has nevertheless always been resisted on the grounds that the consumer welfare standard is guided by economic principles and that competition authorities lack the legal competence to incorporate non-economic concerns.(23) Competition law experts have thus invoked these arguments again in protest against an interpretation of the consumer welfare standard incorporating data protection.(24)

This paper is structured in six parts. Introductory remarks are provided in part one. Part two provides an insight into personal data rights and privacy under EU Law covering both, primary and secondary rules. The primary legislation, TFEU Article 16, provides explicit legal basis for protection of data, whereas Article 8 of the Charter of Fundamental Rights (Charter) provides for data protection rights. Article 51(1) of the same Charter provides the right to intervene in regulating privacy and data protection.

In the secondary legislation, based on article 288 TFEU and article 114 TFEU as a legal basis, a step forwad is made by replacing the directive (with minimum harmonisation) with a general and directly applicable Regulation (GDPR).(25) The third part contributes to the discussion on privacy and

(19) Calo, R. (2013). Digital market manipulation. Geo. Wash. L. Rev., 82, 995.

(20) The notions of "Competition Law" and "Antitrust" are interchangeably used in this paper. See also, Posner, R. A. (2014). Economic analysis of law. Wolters Kluwer Law & Business.

(21) O›Brien, D., & Smith, D. (2014). Privacy in online markets: A welfare analysis of demand rotations.; Gal, M. S., & Rubinfeld, D. L. (2016). The Hidden Costs of Free Goods: Implications for Antitrust Enforcement. Antitrust Law Journal, 80(3), 521.

(22) Guidance on the COM's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, O.J. 2009, C 45/7, point 5., See also Cseres, K. J. (2005). Competition law and consumer protection (Vol. 49). Kluwer Law International.

(23) Motta, M. (2004). Competition Policy: theory and practice. Cambridge University Press, Chicago.

(24) Ohlhausen, M., & Okuliar, A. (2015). Competition, Consumer Protection, and the Right (Approach) to Privacy.

(25) See GDPR, fn. 17, see also De Hert, P., & Papakonstantinou, V. (2012). The proposed data protection Regulation replacing Directive 95/46/EC: A sound system for the protection of individuals. Computer

personal data from Competition Law perspective. The powers of the COM dealing with mergers in particular will be discussed. The forth part provides case studies from two EU Member States related to private enforcement in social networks within the digital market. The fifth part provides the reader with comparative insights of personal data rights and privacy within GCC, emphasisng in particular the avaliable laws enacted. Finally, the Conclusion specifies some recommendations and concluding remarks.

2. Personal Data Rights and Privacy

After a decade of discussion, the even constant between personal data and currency has been achieved and raised as a notorious fact.(26) Yet, beyond this economic value, personal data and privacy are intrinsically linked to human dignity of individuals.(27) This dual nature of personal data is acknowledged in EU law.(28) Data protection law and privacy within the EU is governed by particular rules both at the EU and at the national levels.(29) At the EU level, the body charged with the protection of personal data is the European Data Protection Supervisor (EDPS)(30), established by the Regulation on the protection of individuals, (in detail considered below). EDPS calls for a new concept of consumer harm for competition enforcement in digital market.(31) It confirms that the notion of consumer welfare has never been clearly defined in EU, which generates complexities when privacy and personal rights are an issue.(32)

In its 2014 report, EDPS strongly advocated the use of competition remedies that would address the harm caused to privacy. Among others, the EDPS

Law & Security Review, 28(2), 130-142.

(26) Colangelo, G., & Maggiolino, M. (2017). Data Protection in Attention Markets: Protecting Privacy through Competition?. Journal of European Competition Law & Practice, 8(6), 363-369.; Newman, J. M. (2015). Antitrust in zero-price markets: foundations. U. Pa. L. Rev., 164, 149.

(27) Manne, G. A., & Sperry, B. (2015). The Problems and Perils of Bootstrapping Privacy and Data into an Antitrust Framework.

(28) Lynskey, O. (2015). The foundations of EU data protection law. Oxford University Press; Fuster, G. G. (2014). The emergence of personal data protection as a fundamental right of the EU (Vol. 16). Springer Science & Business.

(29) At national level, each State has appointed a data protection officer in charge of the internal application within its territory of the EU data protection provisions, which will be discused later in the fourth part in more details.

(30) EDPS Preliminary Opinion, "Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy", Mar. 2014, 29–32; EDPS Opinion 8/2016, "On the coherent enforcement of fundamental rights in the age of big data", 23 Sept. 2016.

(31) De Hert, P., & Papakonstantinou, V. (2012). The proposed data protection Regulation replacing 95/46/EC: A sound system for the protection of individuals. Computer Law & Security Review, 28(2), 130-142.

(32) EDPS opinion 2014, see supra note, fn. 29.

suggested the imposition of data portability remedies such as giving users the right to withdraw personal information and transfer to another service provider.(33) This report stronlgy suggests that the control of huge personal datasets could be considered an essential facility, and that the appropriate remedy would be therefore to grant competitors access to personal information.(34) Finally, the EDPS has encouraged competition law enforcers to consider the data protection rights of consumers and intervene in order to control market power in the digital economy.

EU data protection law incorporates both: Primary and Secondary law. The TFEU, in Article 16 offers an explicit legal basis for EU data protection legislation. In the charter of Fundamental rights, Article 8 sets out a right to data protection. In addition, in the secondary legislation the 1995 Data Protection Directive (DPD)(35) regulates personal data processing. However, the DPD will be replaced by the GDPR soon.(36) The GDPR seeks to clarify existing rights and obligations while introducing changes to improve compliance and enforcement. This secondary law must be interpreted in light of the Charter rights to privacy and data protection.(37) Article 114 of the TFEU provides the legal basis for adoption of the data protection Directive in 1995 in order to achieve the harmonization of internal market process.(38)

Intrinsically enough, it is expected that the GDPR's impact will, most likely, be profound and overwhelming. For the time being, it is considered to be the most comprehensive and forward looking piece of legislation regarding data protection in the digital market. GDPR enters into force at a crucial time for the digital market and has a broad scope of application, as it applies to personal data processing conducted by natural and legal persons and public and private bodies, with limited exemptions. Personal data processing is permissible provided it has a legal basis and also complies with certain safeguards.(39) Processing is legitimate only if, for instance, it is necessary

(33) Preliminary opinion of the EDPS, paras 72 and 83.
(34) Preliminary opinion of the EDPS paras. 66-67. See also: Concurrences N°3-2016 I Article I Charlotte Breuvart, Étienne Chassaing, Anne-Sophie Perraut I Big data and competition law.
(35) See supra note 3.
(36) See supra note 17. GDPR Art.68(1).
(37) See more: Case C-362/14, Schrems,EU:C:2015:650.
(38) Former article Article 100a EEC, see Lynskey, The Foundations of EU Data Protection Law(OUP,2015),pp.46–89.; see also Bartl, M. (2015). Internal market rationality, private law and the direction of the Union: resuscitating the market as the object of the political. European Law Journal, 21(5), 572-598.
(39) GDPR, Supra note 29, Arts.5 and 6.

for compliance with a legal obligation or for the performance of a contract.(40) Authors consider that it will do so while stalling innovation in Europe and limiting utility to European citizens, and without necessarily providing greater privacy protection.(41) The GDPR, in general, is premised on deep philosophical convictions regarding the extent to which the specific rights of both individuals and groups must be protected in the digital age.(42) As part of the GDPR's drafting process, firms engaged in collection and processing personal data voiced their concerns regarding the impact of various GDPR provisions to the relevant decision-makers.(43)

The GDPR is espected to regulate how tech companies will collect, store, and use personal data from users across EU and beyonds.(44) GDPR applies to personal data of EU residents, and also it applies extraterritorially to those companies that process the personal data of any EU resident so the practical effect of the law will be to force platforms and companies within the digital market around the globe to comply with GDPR requirements everywhere.(45) The alternative would be for companies to create two separate systems and infrastructure to separate EU data, which is not considered wise in an interconnected world we leave. That will become a tool for users of the digital platforms to see the increased transparency about what data have been collected, how it is used, to whom it is disclosed, and have the ability to limit all of the above.

We are still waiting to see how the GDPR will be implemented in each country so users should look at this as a process that will take time. But because the fines are up to 4% of global revenue, companies have had to anticipate compliance in many areas.(46) Almost every online transaction requires the disclosure of personal data, which can then be aggregated, analysed, and traded for further use.(47) Personal data is so valuable that many companies are willing to forego

(40) GDPR, supranote 17, Art.6.
(41) See Zarsky, T. Z. (2015). The Privacy-Innovation Conundrum. Lewis & Clark L. Rev., 19, 115.
(42) Bennett, C. J., & Bayley, R. M. (2016). 8 privacy protection in the era of 'big data': regulatory challenges and social assessments. Exploring the Boundaries of Big Data, 205.
(43) Jennifer Baker, EU Data Protection Proposals Taken Word for Word from US Lobbyists, TECHWORLD (Feb. 12, 2013), available at: http://www.techworld.com/news/security/eu-data-protection-proposals-taken-word-for-word-from-us-lobbyists.
(44) Goodman, B., & Flaxman, S. (2016). European Union regulations on algorithmic decision-making and a» right to explanation».
(45) Svantesson, D. J. B. (2015). Extraterritoriality and targeting in EU data privacy law: the weak spot undermining the regulation. International Data Privacy Law, 5(4), 226.
(46) GDPR Supra note. 17, Art. 83.
(47) D'Acquisto, G., Domingo-Ferrer, J., Kikiras, P., V., de Montjoye, Y.A., & Bourka, A. (2015). Provacy by design in big data: an overview of privacy enhancing technologies in the era of big data analytics.

monetary payment for their digital services in order to gain access to such data.(48) The rules set in the GDPR must be reevaluated as they will be taken far more seriously than those set out in DPD.(49) Whether GDPR goes too far or not in protecting privacy depends on who is answering the question.(50) All companies within the digital market, have had to invest in changing systems to meet requirements. For example, Google and Facebook have appointed hundreds of people to review requests for erasure, known as the right to be forgotten.(51)

The framework provides individual data subjects with rights over their personal data, for instance, the right to information regarding the processing of their personal data,(52) the right to delete personal data in certain circumstances,(53) and the right to access personal data(54). Through this framework, data protection determines the boundary between permissible and impermissible personal data processing and, in so doing, reconciles individual rights with other societal interests. There is no doubt that GDPR increases the protections for individual privacy, although informational only, but at what cost remains to be seen. Lastly, this Regulation creates momentum throughout the rest of the world for increased privacy regulation because cross-border data flows will be affected if the receiving country lacks adequate privacy protections.

The analysis of the Regulation is of greater importance, as it will impact far more economic entities on an international level.(55) Even though the GDPR's text is final, a critical discussion of its content is far from futile, even on the practical and policy level. There will be plenty of opportunities to engage in changes, as over the next few years, courts, national legislators and regulators

(48) Art.3(1)of the proposed Directive on digital contracts applies when "a price is to be paid or the consumer actively provides counter-performance other than money in the form of personal data or any other data": Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts on the supply of the digital content, COM(2015)634 Final. See also Hoofnagle and Whittington, "Free accounting for the costs of the internet's most popular price", 61 UCLA Law Review (2014), 606.

(49) DPD, see supra note 3.

(50) Facebook issued out a new consent form for targeted advertising and more. It was introduced globally, rather than just in Europe.

(51) Cook, H. L. (2017). Flagging the Middle Ground of the Right to Be Forgotten: Combatting Old News with Search Engine Flags. Vand. J. Ent. & Tech. L., 20, 1.

(52) GDPR, Arts.13 and 14.

(53) GDPR, Art.17.

(54) GDPR, Art.15.

(55) GDPR, art. 3. See also Christopher Kuner, The Internet and the Global Reach of EU Law, in The Collected Courses of the Academy of European Law 25 (forthcoming 2017), https://ssrn.com/abstract=2890930.

will respond to, interpret and enforce the new regulation.

Among the challenges data protection law faces in the digital market, the emergence of privacy is considered the greatest.(56) Privacy so far is seen as a fundamental issue during the processing of personal data.(57) Although privacy was perceived as an element of the digital economy, this category has a long history, since the time when the market was (only) traditional.(58) The European COM had the opportunity to address privacy, not only based on Competition Law,(59) but also based on the Charter of Fundamental Rights and data Directive. However, for the COM the issues of privacy were clearly not part of competition law, as seen from the case law discussed below. (60) Accepting that privacy concerns are a parameter of competition law,this would potentially lead to a finding that if a merger degrades privacy than specific remedies must guarantee the protection of privacy.(61)

As just mentioned, the second instrument provided for in the primary legislation to be discussed in this paper is the Charter of fundamental Rights.(62) The EU data protection policy seeks to ensure the free flow of personal data while respecting fundamental rights, in particular the right to privacy and data protection. The COM has an obligation to respect and promote the Charter based on Article 51(1) which explicitly states that "the provisions of this Charter are addressed to the institutions and bodies of the Union with due regard to the principle of subsidiarity and to the Member States only when they are implementing Union law.

They shall therefore respect the rights, observe the principles and promote the

(56) Kuner, C., Cate, F. H., Millard, C., & Svantesson, D. J. B. (2013). PRISM and privacy: will this change everything?.

(57) Nissenbaum, H., Barth, A., Datta, A., & Mitchell, J. C. (2006). Privacy and Contextual Integrity: Framework and Application. In Proceedings of the IEEE Symposium on Security and Privacy, May. http://www.nyu. edu/projects/nissenbaum.

(58) The world's first national data network was constructed in France during the 1790s, see more at The Economist, 1843, October 5th 2017, The crooked timber of humanity Nearly two centuries ago, France was hit by the world's first cyber-attack. Tom Standage argues that it holds lessons for us today.

(59) Nissenbaum, H. (2004). Privacy as contextual integrity. Wash. L. Rev., 79, 119.

(60) In the same time, the U.S. Federal Trade Commission was on the same line with the European Commission regarding antitrust analysis, although former FTC Commissioner Pamela Jones Harbour regretted, in her dissenting opinion, that privacy issues were not part of the FTC's analysis of competitive effects.

(61) Ohlhausen, M., & Okuliar, A. (2015). Competition, Consumer Protection, and the Right (Approach) to Privacy.; Costa-Cabral, F., & Lynskey, O. (2017). Family ties: the intersection between data protection and competition in EU Law. Common Market Law Review, 54(1), 11-50.; Sokol, D. D., & Comerford, R. (2015). Antitrust and Regulating Big Data. Geo. Mason L. Rev., 23, 1129.

(62) The Charter of Fundamental Rights, available at http://www.europarl.europa.eu/charter/default_en.htm.

application thereof in accordance with their respective powers." This provision sets out a cler duty for EU institutions and Member States to comply with the Charter while implementing EU Law.(63) Failure to respect the Charter rights when enacting legally binding acts can be challenged in the EU,(64) or before national courts under the preliminary reference mechanism,(65) that may result in a declaration that the act is unlawful.(66) Most evidently, the COM must also comply with this substantive obligation when adopting legally binding competition law decisions.(67)

For instance, the COM could not give binding force to commitments offered by a company to remedy an alleged breach of competition law if these commitments entailed an interference with the right to data protection.(68) However, the COM enjoyes a wide margin of discretion when accepting competition law commitments.(69) While the COM's obligation not to infringe the EU Charter right to data protection is clear, the extent of its obligation to respect and promote the EU Charter is not. The institutional and substantive changes brought about by the Lisbon Treaty point to an obligation on the COM's burden, beyond its stated obligation not to breach the EU Charter, to take affirmative action to ensure that all areas of EU policy-making are compliant with the EU Charter.(70)

3. **Widening The Boundaries of Competition Law**

Competition Law provisions apply to undertakings, that is, entities engaged in economic activity.(71) Based on EU Competition Law, undertakings are

(63) Douglas-Scott, S. (2011). The European Union and human rights after the Treaty of Lisbon. Human rights law review, 11(4), 645-682.

(64) Art. 263 TFEU.

(65) Art. 267 TFEU.

(66) COM Staff Working Document SEC(2011)567 Final, "Operational guidance on taking account of fundamental rights in COM Impact Assessments", This document states: "Respect for fundamental rights is a legal requirement, subject to scrutiny of the European Court of Justice. Respect for fundamental rights is a condition of the lawfulness of EU acts.", see also De Burca, G. (2013). After the EU Charter of Fundamental Rights: The Court of Justice as a human rights adjudicator?. Maastricht Journal of European and Comparative Law, 20(2), 168-184.

(67) Morano-Foadi, S., & Andreadakis, S. (2011). Reflections on the architecture of the EU after the Treaty of Lisbon: the European judicial approach to fundamental rights. European Law Journal, 17(5), 595-610. See also Lenaerts, K. (2012). Exploring the limits of the EU charter of fundamental rights. European Constitutional Law Review, 8(3), 375-403.

(68) Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance). Article 9(1).

(69) Case C-441/07 P, COM v.Alrosa Company Ltd., EU:C:2010:377, paras. 60–61.

(70) See for example Case T-512/12, Front Polisario, EU:T:2015:953.

(71) Joined Cases C-180-184/98, Pavlov, EU: C:2000:428, para. 74. Certain provisions of the GDPR also apply to "undertakings", such as "binding corporate rules" see Art. 47 and "general conditions for

prohibited from colluding to restrict competition[72], abusing a dominant position[73] and/or from engaging in a concentration that significantly influences the effective competition according to the EU Merger Regulation (EUMR).[74] With the multisided markets created by the raise of the digital market, Competition Law principles become inapplicable or need revision and adaptation.[75] Multisided markets do not allow competition authorities to continue functioning comfortably in their regular ways.[76] This is evident in the observed flood of antitrust scrutiny in digital markets.[77] In a great number of digital markets, the service providers are multisided platform businesses, such as in the cases of Facebook, Google, LinkedIn analyzed below.[78]

The first step in defining the relevant product market in multisided markets is challenging.[79] As one side of the market is usually subsidized, the antitrust authorities may be inclined to define the relevant product market solely based on the paying side.[80] The literature on multisided markets suggests that in defining the relevant product market, all sides should be analyzed together.[81] Leaving out one group could result in errors of judgment. As such, a one-sided SSNIP test [82] in multisided markets can ignore the consequences of indirect

imposing administrative fines" see Art. 83).

(72) Article 101 TFEU.

(73) Article 102 TFEU.

(74) EUMR, Regulation 139/2004 on the control of concentrations between undertakings, O.J. 2004, L 24/1.

(75) Multi-sided ot Two-sided markets, used interchangebly in this paper are defined as markets in which one or more platforms enable interactions between end users and try to get on board together, see more Rochet, J. C., & Tirole, J. (2006). Two-sided markets: a progress report. The RAND journal of economics, 37(3), 645-667.; Gürkaynak, G., İnanılır, Ö., Diniz, S., & Yaşar, A. G. (2017). Multisided markets and the challenge of incorporating multisided considerations into competition law analysis. Journal of Antitrust Enforcement, 5(1), 100-129.; Evans, D. S. (2003). The antitrust economics of multi-sided platform markets. Yale J. on Reg., 20, 325.

(76) Shelanski, H. A. (2013). Information, innovation, and competition policy for the Internet. University of Pennsylvania Law Review, 1663-1705.

(77) Pollock, R. (2010). Is Google the next Microsoft: competition, welfare and regulation in online search. Review of Network Economics, 9(4).

(78) Devine, K. L. (2008). Preserving competition in multi-sided innovative markets: how do you solve a problem like Google. NCJL & Tech., 10, 59.

(79) Filistrucchi, L., Geradin, D., Van Damme, E., & Affeldt, P. (2014). Market definition in two-sided markets: Theory and practice. Journal of Competition Law & Economics, 10(2), 293-339.

(80) Filistrucchi, L., Geradin, D., Van Damme, E., & Affeldt, P. (2014). Market definition in two-sided markets: Theory and practice. Journal of Competition Law & Economics, 10(2), page 300.

(81) Gürkaynak, G., İnanılır, Ö., Diniz, S., & Yaşar, A. G. (2017). Multisided markets and the challenge of incorporating multisided considerations into competition law analysis. Journal of Antitrust Enforcement, 5(1), 100-129.

(82) The "SSNIP" test which is an abbreviation from "Small but Significant and Non-transitory Increase in Price test" is a widely-used example in these discussions. This test 'defines the smallest set of products, including some focal product of interest that can jointly profit from a non-marginal, typically 5 percent, increase in price(s)'. See more: Daljord, Ø., Sørgard, L., & Thomassen, Ø. (2007), The SSNIP test and market definition with the aggregate diversion ratio: A reply to Katz and Shapiro. Journal of

network effects and the inter-dependence between the sides. Therefore, it is not established yet, however, since there is no consensus on how to apply a multisided SSNIP test, the view that the SSNIP test could be applied separately to all sides should be supported.(83) Similar to the traditional markets, the second step is measuring the market power.(84) In measuring the market power in multisided markets, an important consideration as well is whether competition authorities can use conventional market power measurement methods.(85) Although market shares are common tool in measuring market power, it is not always clear how to analyze market shares in multisided markets. On the other side, it must be emphasized that market shares are not always accurate indicators of market power in multisided markets.(86) Despite the supposed "first players" in multisided markets, some players once believed to be strong or dominant have lost significant market shares over the years. Microsoft is a good example, as it was once found to abuse its dominant position in the market for PC operating systems and this situation changed with the interference of Competition Authorities.(87)

Today, this company is far from dominant on new mobile platforms. There are other multisided platform businesses that were among the first of their kind but then failed to hang onto their market position such as MySpace.(88) Failing to catch up with eager and innovative newcomers, or not managing to fulfill ever-changing customer needs, can quickly spell the end for first-comer platform businesses. This has been the case with digital markets. This feature of multisided platforms warrants particular attention in antitrust enforcement. Therefore, in the case of market power in multisided markets, appearances can look illusory.-

Competition Law and Economics, 4(2), 263-270.

(83) Renata B Hesse and Joshua H Soven, 'Defining Relevant ProductMarkets in Electronic Payment Network Antitrust Cases' (2006) 73 Antitrust LJ 709, 727–28. Armstrong, M. (2006). Competition in two-sided markets. The RAND Journal of Economics, 37(3), 668-691.; Hagiu, A. (2009). Multi-sided platforms: From micro foundations to design and expansion strategies.

(84) Market power is defined as the possibility to act independently of consumers and thus to worsen competitive parameters, see also Chakravorti, S., & Roson, R. (2006). Platform competition in two-sided markets: The case of payment networks. Review of Network Economics, 5(1).

(85) Argentesi, E., & Filistrucchi, L. (2007). Estimating market power in a two-sided market: The case of newspapers. Journal of Applied Econometrics, 22(7), 1247-1266.

(86) Körber, T. (2015). Common errors regarding search engine regulation—and how to avoid them. Euro. Competition L. Rev., 36, 239-240.

(87) Richard Blumenthal and Tim Wu, **"**What the Microsoft Antitrust Case Taught Us**",** May 18, 2018, The New York Times, available at https://www.nytimes.com/2018/05/18/opinion/microsoft-antitrust-case.html.

(88) Gebicka, A., & Heinemann, A. (2014). Social media & competition law. World Competition, 37(2), 149-172.; Baran, K. S., Fietkiewicz, K. J., & Stock, W. G. (2015, May). Monopolies on Social Network Services (SNS) Markets and Competition Law. In ISI (pp. 424-436).

3.1 Mergers

Competition Law is based on three pillars: Anti-competitive Agreements, Abuse of Dominant Position and Mergers.(89) This paper begins with the third pillar, for the simple reason that the (Competition intitution in charge, so far) the European COM had the possibility to tackle the categories of personal data rights and privacy under this pillar. Under the EUMR, a concentration might be prohibited if, among others, it leads to the creation or strengthening of a dominant position. Merger control's objectives were developed "with an explicit and exclusive focus on competition."(90) Based on the Guidelines on horizontal mergers, the COM exercises these powers in relation to mergers that are likely to increase market power and negatively affect competitive parameters.(91)

It analyses these prospective mergers by investigating whether the concentration leads to the removal of competitive constraints or to a higher level of transparency and coordination in the market.(92) Certainly this Guidelines does not mention privacy among merger control's objectives or the benefits of competition.(93) Based on the EUMR, the protection of consumer interests is only one of the factors that the COM should take into account.(94)Furthermore, EUMR mentions the "effective control of all concentrations from the point of view of their effect on competition within the Community."(95) Unsurprisingly, the COM has thus far faithfully applied the Court's stance throughout its merger control practice, and therefore has consistently declined to include privacy in its competition analysis. Instead, the COM has thus far taken what some critics call a "pure economic approach," in cases such as Google/

(89) Jones, A., & Sufrin, B. (2016). EU competition law: text, cases, and materials. Oxford university Press.; Whish, R., & Bailey, D. (2015). Competition law. Oxford University Press, USA.; Craig, P., & De Búrca, G. (2011). EU law: text, cases, and materials. Oxford University Press.

(90) Pepper, R., & Gilbert, P. (2015). Privacy Considerations in European Merger Control: A Square Peg for a Round Hole. Antitrust Chronicle, 5.

(91) Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal C 031, 05/02/2004 P. 0005 – 0018.

(92) Ibid.,points 17–19.

(93) Ibid. para. 8 "effective competition brings benets to consumers, such as low prices, high quality products, a wide selection of goods and services, and innovation. Through its control of mergers, the COM prevents mergers that would be likely to deprive customers of these benets". To keep the balance between inovation and harm caused to users is not an easy job, see also Kennedy, J. (2017). The Myth of Data Monopoly: Why Antitrust Concerns About Data Are Overblown. Information Technology and Innovation Foundation. See also David, C. (1980). The social control of technology. London: Frances Pinter.; Akerlof, G. A., & Shiller, R. J. (2015). Privacy in context: Technology, policy, and the integrity of social life.

(94) EUMR, cited supranote 75, Art.2(1).

(95) Ibid, EUMR, recital 24.

DoubleClick and Facebook/WhatsApp and Microsoft/LinkedIn. These cases are separately discussed in more detail below.(96)

3.1.1 Google/DoubleClick

In the merger decisions on Google/Doubleclick of 2008(97), the COM refused to take into consideration the potential data protection implications brought about by the merging of the parties regards datasets. The COM stated that its decision referred exclusively to the appraisal of this operation with Community rules on competition.(98) In this way, not only the COM, but also the Court excluded personal data protection considerations from the application of competition law. As mentioned above, personal data is the currency that pays for free services in two-sided or multi-sided markets.(99) However, this data is mostly seen as a vehicle for targeted advertising, leading competition analysis to focus solely on the advertising market.(100)

The viability of the undertaking depends on such advertising, and the revenue from this advertising is assumed, in turn, to subsidize the free services offered.(101) In this case, the COM did not analyse the impact of the concentration on competition for free services, ignoring in this way the role of data protection on the side of the free service.(102) The COM excluded the idea that DoubleClick's and Google's datasets would together confer the merged entity with a bottleneck – that is, an asset that could have not been replicated by competitors. In other words, according to the COM, the post-merger entity was unable to squeeze out competitors and ultimately charge higher prices for its intermediation services.(103) Therefore, the COM clearly stated this decision refers exclusively to the appraisal of the operation with Community rules on competition, namely whether this merger hinders effective competition in the common market. Regardless of the approval of the merger, the new

(96) Preliminary Opinion of the EDPS, supra note 29. point 4.2.3.
(97) Case No.COMP/M.4731, Google/DoubleClick,of 11 March 2008.
(98) Ibid. point 368.
(99) EDPS Opinion 8/2016, cited supra note 29.
(100) Ibid. Providers of free services may thus escape being considered in a dominant position, as the market for advertising may be larger than that of the free service: Gebicka and Heinemann, "Social media & competition law", (2014) World Competition, 155–156. See also: Clarke, R. (2011). An evaluation of privacy impact assessment guidance documents. International Data Privacy Law, 1(2), 111. See also Waehrer, K. (2016). Online services and the analysis of competitive merger effects in protections and other quality dimensions.
(101) Newman, "Antitrust in zero-priced markets: Foundations", University of Memphis Research Paper Series, Research Paper No. 151 (2014), 49.
(102) EDPS Preliminary Opinion, cited supranote 29.
(103) Google/DoubleClick supra note 98, paras. 359–366.

entity is obliged in its day to day business to respect the fundamental rights recognised by all relevant instruments to its users, but not limited to privacy and data protection'.(104) In other words, by attributing their management to data protection rules, the COM disclaimed its responsibility regarding repercussions on privacy caused by combining the big data of Google and DoubleClick.

3.1.2 Facebook/WhatsApp

After the decision on Facebook/WhatsApp (FB/WA),(105) the COM acknowledged that "competition on privacy" exists. However, it stated that apps compete for customers by attempting to offer the best communication experience, including privacy. The importance of privacy varies from user to user but it is becoming increasingly valued; as shown by the introduction of consumer communications apps specifically addressing privacy. The COM observed that following the announcement of Facebook-WhatsApp acquisition, many users switched services due to privacy concerns.((106)) Despite these empirical findings that competition on data protection did exist for these free services,(107) the COM did not consider the effects of the merger on such competition. While the COM held that the parties were not actual competitors and their activities did not overlap on the relevant markets,((108)) it did investigate the effects of the merger only on advertising and the possible introduction of online advertising to WhatsApp, and whether Facebook could improve its advertising based on WhatsApp data.

The COM was thus concerned with whether Facebook could improve its competitive position in the advertising market.(109) The COM even noted that the extension of online advertising to WhatsApp would be seriously limited by dissatisfaction among the increasing number of users who significantly value privacy.(110) Yet, despite this recognition of the importance of data protection for consumers, the COM did not consider the effects of combined activities for the competition on data protection–whether Facebook could alter WhatsApp's data protection conditions to the detriment of the consumer and remove an innovative constraint on its own data protection conditions. The

(104) Ibid para 368.
(105) Case No.COMP/M.7217, Facebook/WhatsApp, point 87.
(106) Ibid., points 79 and 174.
(107) Ibid., points 107, 158, and 165.
(108) Ibid., points 107, 158, and 165.
(109) Ibid.,point 187.
(110) Ibid.,point 174.

COM confirmed its position in Facebook/WhatsApp, as it considered that 'any privacy-related concerns owing from the increased concentration of data within the control of Facebook as a result of the transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules'.(111) Although privacy breaches, as such, are not a matter for competition law, privacy concerns may nevertheless act as a non-price parameter of competition. For example, in Facebook/WhatsApp, the COM noted that privacy is increasingly valued and constitute one of the drivers of the competitive inter- action between consumer communications apps.(112) For instance, in Facebook/Whatsappthe COM stated that "apps compete for customers by attempting to offer the best communication experience", including "privacy the importance of which varies from user to user but which are becoming increasingly valued, specifically addressing privacy".(113) Facebook paid WhatsApp USD 19 billion for its service, despite the COM's finding that the acquisition would not influence the advertising market. The COM now recognizes: "The issue seems to be that it's not always turnover that makes a company an attractive merger partner. Sometime, what matters are its assets.(114) That could be a customer base or even a set of data."((115)) Personal data can be acquired by a merger, or even traded as a commodity in dedicated markets.(116)

3.1.3 Microsoft/LinkedIn

Alike to FB decision, the COM took a similar approach in reviewing

(111) Facebook/WhatsApp, para. 164, see also in the same line how Federal Trade Commission (FTC) adopted an approach quite similar to the Euroepan COM's, as its Bureau of Competition did not object to the transaction on antitrust grounds. However, another branch of the FTC, namely the Bureau for Consumer Protection, sent a letter asking the parties to honour the promises that WhatsApp had made before the FTC, in terms of privacy. Letter from Jessica Rich, Director, Bureau of Consumer Protection, Federal Trade COM, to Eric Egan, Chief Privacy Of cer, Facebook, Inc., and Anne Hoge, General Counsel, WhatsApp Inc. (April 20, 2014), available at: http://www.ftc. gov/system/ les/documents/public_statements/297701/ 140410 facebookwhatapp ltr.pdf., see also Kimmel, L., & Kestenbaum, J. (2014). What›s up with WhatsApp: A Transatlantic View on Privacy and Merger Enforcement in Digital Markets. Antitrust, 29, 48.

(112) Facebook/WhatsApp, supra note 106, point 87.

(113) Ibid. point. 87.

(114) Data, B. (2012, January). Big Impact: New possibilities for international development. In World Economic Forum, Davos, Switzerland. http://www3. weforum. org/docs/WEF_TC_MFS_ BigDataBigImpact_Briefing_2012. pdf.

(115) Commisioner Vestager, "Refining EU merger control system",10 Mar. 2016,<www. ec.europa.eu/COM/2014-2019/vestager/announcements/refining-eu-merger-control-system_en>. The COM and NCAs are thus considering revising their notification thresholds to capture such mergers even if the entities involved generate low turnovers at the time.

(116) EDPS Opinion 8/2016, cited supra note 29.

the Microsoft Corp.-LinkedIn merger.(117) It considered whether the post-merger combination of data may increase Microsoft's market power or increase barriers to entry. The COM approved the transaction, observing that there would continue to be a significant amount of data available in the market outside of Microsoft's control. The COM found that no foreclosure effect was possible, mainly because the data available to the entities resulting from Microsoft/ LinkedIn mergers were also available to their rivals. However, in developing these analyses of possession of data, the COM did not take into consideration any privacy concerns.(118)

In this decision, the COM plainly entrusted privacy rules with the task of protecting users' personal data. It affirmed that data combination could only be implemented by the merged entity to the extent it is allowed by applicable data protection rules.(119) Moreover, the COM proceeded by discussing the antitrust issues raised by the transaction, assuming that such data combination is allowed under the applicable data protection legislation.(120) The COM chose to refer to the privacy rules for the protection of individuals' personal data and digital identities. The novelty in this decision is citing the GDPR by stating that the 'future' Regulation may further limit Microsoft's ability to have access and process its users personal data, since the new rule will strengthen the existing one.(121)

3.2 Abuse

It is also becoming clear that, for companies with a dominant market position, personal data may pose an enforcement risk in EU. Germany's Federal Cartel Office (BKA) last year (still ongoing) undertook an investigation of whether Facebook abused its market power by requiring users to agree to its terms and conditions, which allow the company to collect valuable personal data.(122) In the meantime, such companies should be aware that their collection of data may be viewed as an exercise, and potentially abuse, of their market power.(123)

(117) Case No.COMP/M.8124 Microsoft/LinkedIn.
(118) Ibid., paras. 179–180.
(119) Ibid., para. 177.
(120) Ibid., para. 179.
(121) Ibid., para. 178.
(122) Justus Haucap, A German Approach to Antitrust for Digital Platforms, April 2, 2018, University of Chicago Booth School of Business.
(123) On the whole, US antitrust agencies have demonstrated less concern over big data than their European counterparts. The FTC recently approved a number of mergers with significant big data components, despite commentators expressing concerns over potential issues with post-merger combinations of

In what appears to be the first amongst competition authorities in Europe, in March 2016, the German BKA took the bold step of examining whether a breach of privacy and personal data rights could also run afoul of competition law. In initiating its antitrust investigation against Facebook, the BKA's press release made some important statements. It stated that there are 'indications' of Facebook's dominant position in the market for social networks;(124) that the procedure whereby new users agree to allow Facebook to collect and use their personal data may run contrary to German data protection law and if there is a connection between an infringement of privacy laws and market dominance, the possibility exist that an abuse of a dominant position might arise.

However, it is unclear on which market the abuse would be assessed. While previous European COM decisions had analyzed the impact of data collection on companies' market position on advertising markets, the BKA case is the first to link the collection of data from users and potential abuse of market position. Facebook's dominant position on a market for social networks cannot be ruled out.(125) The BKA could focus its analysis on the market for social networks, assessing whether imposing "unfair" trading conditions degrades the quality of the service. Such analysis could not have theoretical support in the view that privacy is a non-price parameter of competition.(126)

Alternatively, the BKA may investigate effects on markets for online advertising, where Facebook uses its customers' data to provide ad targeting services. It could consider that an abuse on the "social network" side of the market brings anticompetitive consequences on the "advertising" side of the market. In any event, the German antitrust investigation of Facebook is likely to fuel debates in the coming months.(127) Article 102 of the TFEU prohibits

data.

(124) Baran, K. S., Fietkiewicz, K. J., & Stock, W. G. (2015, May). Monopolies on Social Network Services (SNS) Markets and Competition Law. In ISI (pp. 424-436).

(125) In Facebook/WhatsApp decision, the COM needs to establsih a potential market for "social networking services" but did not assess Facebook's market share on such market, (see paras. 51–62).

(126) E. Orcello, A. Subocs and C. Sjödin, note that "Privacy could be regarded as a non-price parameter of competition which may be degraded by the merged entity post-merger," although they acknowledge that the COM did not apply such theory of harm in the Facebook/Whats App case.; Stucke, M. E., & Ezrachi, A. (2016). When competition fails to optimize quality: A look at search engines. Yale JL & Tech., 18, 70. See also Fidelis, A. L. (2017). Data-driven mergers: a call for further integration of dynamics effects into competition analysis. Revista de Defesa da Concorrência, 5(2), 189-218.

(127) See the preliminary analysis published on the Chillin' Competition blog on March 2nd, 2016: https://chillingcompetition.com/2016/03/02/facebook-privacy-and-article-102-a-first-comment-on-the-bundeskartella- mts-investigation. See also: McLeod, R. (2016). Novel But a Long Time Coming: The Bundeskartellamt Takes on Facebook.; E. Morgan de Rivery and C. Michaud, Facebook, 2016, "More Data, More Problems" –L'Observateur de Bruxelles.

"exploitative" abuses, whereby dominant undertakings charge consumers excessive prices or otherwise exploit them. The Court has equated excessive prices to deviations from the "economic value" of a certain good or service.(128)

3.3 Conclusion

The companies will be able to use the same algorithm and in this way to fix the price or divide the markets. Fixing prices or dividing the market can be achieved easily in the digital market compared to the traditional market by the use of pricing algorithms or impact collusive behavior.(129) Both sides of the market (users and advertisers) have the ability to compare prices faster and in an effective way.(130) Agreements between undertakings to set prices or divide markets, and thereby stop competing, are prohibited as restrictions under Article 101 TFEU.(131)

Undertakings(132) decide not to compete by fixing prices, dividing the market or restricting the output if they collude by aligning their data protection conditions so as to effectively end competition between them. Article 101 explicitly prohibits such conduct in the traditional market as well. Such alignment would, like exchanges of information and other restrictive forms of coordination, remove the degree of uncertainty as to the operation of the market.(133) Article 101 could therefore apply to industry efforts to self-regulate competition on data protection, such as agreements on personal data collection and sharing. Competition law could capture the alignment of data protection conditions in this way without any apparent input from data protection law: the reduction of uncertainty such alignment of data protection conditions would entail would be sanctioned in the same way as the alignment of any other competitive parameters.

Data protection law can be deployed in an analogous manner, as it is this

(128) Case C-27/76, United Brands, EU:C:1978:22, para 250 and Gal, "Abuse of dominance – Exploitative abuses" in Lianos and Geradin (Eds.), Handbook on European Competition Law (Edward Elgar, 2013), p. 13. Excessive prices could apply to disclosing personal data not commensurate with the service provided.

(129) Vezzoso, S. (2017). Competition by Design. ee also OECD, Algorithms and collusions, available at:http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2017)2&docLanguage=n

(130) Hair Jr, J. F., Wolfinbarger, M., Money, A. H., Samouel, P., & Page, M. J. (2015). Essentials of business research methods. Routledge.

(131) Case C-67/13 P Groupement des cartes bancaires (CB) v European Commission, para. 51.

(132) TFEU, article 101 uses the concept of undertakings for firms and companies. In this paper the term undertakings, companies and firms are interchangeably used.

(133) Case C-8/08, T-Mobile, EU: C:2009:343, para.35.

law that specifies the chosen level of data protection. Agreements between undertakings that infringe data protection law would come under particular scrutiny,(134) since it is clear that they fall below that level.(135) Nevertheless, as set out above, it would always be necessary that the infringement hinders competition on data protection – as it does in relation to the alignment of data protection conditions. This defuses potential objections that Article 101 will enforce compliance with data protection rules as decided by the Court in Asnef-Equifax. Although it is not their main purpose, data protection rules provide the normative framework for the processing of personal data for competitive purposes. Data protection infringements can therefore fall outside usual competition. In Asnef the Court considered whether banks restricted competition by exchanging information about the solvency of potential borrowers.(136) Any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, the Court without doubt stated in this case.

4. Case Studies in EU Member States: Private Enforcement

4.1 France

In 2010, a private enforcement procedure between a French Bishop and Facebook (FB) took place in the Court of First Instance, Paris.(137) The Bishop claimed that by sharing an insulting picture of him, FB has provoked hate and violence against the Catholic church and Catholics and, thus, violated the French hate speech codes.(138) The second claim was related to the use of photos without permission. The Paris court ruled in the bishop's favor on both grounds. The court ordered FB to remove the page; pay €2,000 in damages, and a penalty of €500 for every day the page remained online.

In addition, FB was ordered to identify the person who posted the page. Apparently, the fines were insignificant and FB didn't even bother to appear before the court.(139)

(134) Agreements that lead to a lower level of data protection without constituting an infringement of data protection law could also fall under Art. 101 TFEU such as restrictions by effect.

(135) Like horizontal price-fixing cartels, it can be said that such infringements are so likely to have negative effects on the parameters of data protection competition that it is redundant to prove those effects: Case C-67/13, CB, supra note 132. para. 51.

(136) Case C-238/05, Asnef-Equifax, EU:C:2006:734.

(137) Hervé G. v. Facebook France, TGI Paris, April 13, 2010.

(138) Rick Mitchell, French Court Fines Facebook for Page with Photo of Bishop, 'Insulting' Caption, 15 Electronic Com. & L. Rep. (BNA) 662 (Apr. 28, 2010), available at 2010 WL 1667686.

(139) Facebook's French entity seems to have insisted that the complaint should be lodged with the Facebook parent entity, rather than "Facebook France".

However, in 2016, Whatsapp (WA) released a new version of its Terms of Service and Privacy Policy explaininig that from now on, its users' data are transferred to FB primarily for targeted advertising and improvement of services. Following this, the Chair of the National Data Protection Commission in France (CNIL) requested explanations from WA on the data transfer and asked the company to stop the transfer for targeted advertising purpose. CNIL also decided to verify the compliance of the processing implemented by WA with the Act, to carry out online inspections and a hearing if necessary.

CNIL was informed by the company that the data of its 10 Million French users have actually never been processed for targeted advertising purposes. However, the investigations found violations of the French Data Protection Act. It was observed that WA actually transfers data concerning its users to FB for "business intelligence" and security purposes. Therefore, information about users such as their phone numbers or their use habits on the application were shared. While the security purpose seems to be essential to the efficient functioning of the application, it is not the case for the "business intelligence" purpose, which aims at improving performances and optimizing the use of the application through the analysis of its users' behavior. CNIL concluded that the data transfer from WA to FB for this "business intelligence" purpose is not within the legal basis required by French Data Protection Act. In particular, neither the users' consent nor the legitimate interest of WA can be used as arguments in this case. On the other hand WA cannot claim a legitimate interest to massively transfer data to FB insofar as this move does not provide adequate guarantees allowing to preserve the interest or the fundamental freedoms of users since there is no mechanism whereby they can refuse to do so while continuing to use the application.

What is considered specifically significant is that the CNIL report mentions that they have constantly asked WA to provide a sample of the French users' data transferred to FB. The company explained that it could not perform this duty since FB main Corporation is located in the United States and therefore it considers that is subject to the legislation of that country. Consequently, CNIL, which is competent the moment an operator processes data in France, was therefore unable to examine the full extent of the compliance of the processing implemented by the company with the Data Protection Act because of the violation of its obligation to cooperate with the Commission under Article 21 of the Act. A new development occurred in the late December 2017 also in France.

The French Data Protection Authority ordered WA to stop sharing user data from the parent company FB. Messaging app WA could be fined if it does not comply with an order from the French Data Protection Regulator to bring its sharing of user data with parent company FB in line with French privacy.(140) France's privacy watchdog issued formal notice to WA, asking the popular mobile messaging app to stop sharing user data with the parent company FB within a month. CNIL issued formal notice(141) to WA to legally transfer its users' data to FB by obtaining their consent.(142)

The French Competition Authority (FCA) published a Joint Report on Competition Law and Data together with the German Federal Cartel Office.(143) The report identifies the main issues antitrust authorities should take into consideration when assessing the interaction between Competition Law and data. It explicitly stated that the collection, processing and commercial use of data is often not perceived as a competition law issue but rather as an issue which concerns data protection of consumers. However, competition authorities may look at possible competition issues arising from their possession and use.

4.2 Ireland

Another EU Member State under scrutiny in this paper is Ireland in particular because the national authority attempted to regulate personal data and privacy beyond its borders, although unsuccessfully. The rule "one fits all" was not achieved in this case. In 2011, the Data Protection Commission declared both its findings on the basis of an inspection and its resolution of the claims. The Commission made suggestions regarding changes to FB's privacy policies. The report indicated that its recommendations "do not carry an implication that current practices are not in compliance with Irish data protection law was

(140) The French data protection authority - CNIL - stated on Monday it had issued an order to WhatsApp to comply within one month, failing which it could move to sanction the company. The CNIL stated that WhatsApp did not have the legal basis to share user data. Read more at: //economictimes.indiatimes.com/articleshow/62125954.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst, 18.12.2017.

(141) CNIL explains that formal notices are not sanctions and no further action will be taken if the company complies with the Act within the specified timescale, in which case the notice proceedings will be closed and this decision will also be made public. Should WA fail to comply with the formal notice within the specified timescale, the Chair may appoint an internal investigator, who may draw up a report proposing that the CNIL's restricted committee responsible for examining breaches of the Data Protection Act issue a sanction against the company.

(142) https://www.cnil.fr/en/data-transfer-whatsapp-facebook-cnil-publicly-serves-formal-notice-lack-legal-basis.

(143) On May 10, 2016, the French Competition Authority and German Federal Cartel Office published "Competition Law and Data and its implications for competition law Joint Report, The full report can be found here: http://www.autoritedelaconcurrence.fr/ doc/reportcompetitionlawanddatafinal.pdf.

reviewed."[144]

FB agreed to modify its policies in a number of ways, such as: to increase transparency and control for the use of personal data for advertising purposes, give an additional notification for users in relation to facial recognition such as "tag suggest", an enhanced ability for users to control tagging and posting on other user profiles, an enhanced ability for users to control their addition to Groups by friends etc.[145] One may reflect that this should be available for all users of the platform such as FB. Yet, FB declared that only FB Ireland was the subject of this control, which was considered under obligation to make necessary changes.

This proves to be difficult, since Ireland is not a separate island using FB only between Irish citizens (considering the connections Irish citizens have with their families and friends in Europe and beyond). The momentum was right for the platform to make new (and global) changes in data protection rules. Still, the FB made it clear to the Irish Commissioner that the territoriality principle must be respected until GDPR enters into force, therefore the narrow scope toook place.

5. GCC Countries

The GDPR, as mentioned above will have extraterritorial effect including the GCC as well.[146] The rise of digital market has proven to be the major transformation of worldwide economies.[147] After the birth of digital market, the remained market was renamed traditional. In the traditional market, however, is worth mentioning that privacy issues and personal data rights did not rise with the digital market, they have always been a constitutional category. Example, the Kuwaiti Constitution states that freedom of communication by post, telegraph and telephone and the secrecy therefore is guaranteed.[148]

On the other hand, platforms operating in the digital market, such as social

(144) Office of data prot. Comm'r of IR., FB Ireland LTD.: Report of audit 4 (Dec. 21, 2011), available at http://dataprotection.ie/documents/FB20report/final20report/report.pdf.

(145) Ritter, C., 2016.Bibliography of Materials Relevant to the Interaction of Competition Policy, Big Data and Personal Data.

(146) GDPR article 3, See also, Voss, W. G. (2017). European union data privacy law reform: General data protection regulation, privacy shield, and the right to delisting.; see also de Hert, P., & Czerniawski, M. (2016). Expanding the European data protection scope beyond territory: Article 3 of the General Data Protection Regulation in its wider context. International Data Privacy Law, 6(3), 230-243.

(147) Ezrachi, A., & Stucke, M. E. (2016). Virtual competition.prophesize the 'end of competition as we know it so far'

(148) Kuwaiti Constitution, No.1-1962, Article 39.

and professional networks, search engines and so on, being 'fuelled' by data, have no territorial boundaries. For the time being, Internet (with the State permission certainly) remains their foundation. Users in the GCC countries being conscious that specific data protection laws do not protect data and personal rights have become self-carers. Research shows that three quarters of Middle East Internet users do not trust websites related to their privacy.(149) Therefore a significant part of the information is false.(150) GCC countries have general rights of privacy enshrined across various laws rather than specific data Protection laws, except for Qatar and its financial centre.(151) In the UAE, there is no general data protection law, however there are segments regulated in different areas such as in the Dubai International Financial Centre (DIFC) and in the Dubai Healthcare City (DHC).(152) Data Protection Law of UAE prescribes the term related to information where personal data has been (or not) obtained from the data subject.(153)

This law covers both, the collection and the process of data. The other GCC countries have general rights of privacy enshrined across various laws rather than specific data protection laws.(154) Most GCC countries also have specific privacy regulations relating to certain sectors such as telecoms and healthcare.(155) Big data have been the focus of competition law enforcer in particular in EU and USA, however, Canada, Australia and India are between the followers. The Middle East and in particular GCC Countries strive to be more inclusive regarding privacy and personal rights within their legal framework. The first step in this directions have been the laws related to cyber security.(156)

(149) Excerpts taken from "Google's New Privacy Policy may violate EU Rules," Associated Press, February 28, 2012.

(150) Ibid.

(151) See Catherine Beckett, www.dentons.com/en/insights/alerts/2015.

(152) UAE Constitution, Civil Code, E-Commerce Law, Labour Law, Penal Code, Cyber Crimes Law etc, available at https://www.difc.ae and http://www.dhcc.ae.

(153) Data Protection Law, DIFC law no.1 2007, Data Protection Law Amendment Law DIFC Law No. 5 of 2012.

(154) Qatar E-Commerce and Transactions Law (No. 16 of 2010), Oman Electronic Transactions Law (Royal Decree 69 of 2008).

(155) Such as the UAE TRA's Consumer Protection Regulations 30.01.2014, the Oman TRA's Regulations on Protection of the Confidentiality and Privacy of Beneficiary Data, Resolution No. 113/2009) and Qatar's Telecommunications Law No. 34 of 2006.

(156) Cyber security is another issue present in particular in GCC countries, however, not within the framework of this paper. With the recent enactment of laws in Qatar and Bahrain, all of the GCC countries apart from Kuwait now have specific cyber crimes law in place as follows: Oman: Cyber Crime Law (Royal Decree No. 12/2011); KSA: Arab Cybercrime Agreement (No. 126 of 2012); Qatar: Cyber Crime Law (No. 14 of 2014) plus Qatar Computer Emergency Response Team (Q-CERT); Bahrain: Cyber Crimes Law (No. 60 of 2014), and Kuwait Law No.63 for the year 2015 regarding Anti-Information Technology Crime. The current cyber crime laws across the

6. Conclusion

Privacy and personal data rights are challenges that are gaining significant attention lately. Therefore, companies utilizing personal data within the digital market must also be aware of antitrust risks. The extent of that risk depends on the characteristics and nature of these data, the ways in which companies treat them and the territories in which they operate. The European Commission, when dealing with competition law, must extend its frontiers in order to tackle these important categories for many reasons.

To conclude, only few will be named: first, EDPS, in regards to Google/ DoubleClick decision, stated that the COM should have considered how the merger could affect users whose data would be further processed by merging the two companies' datasets in view of providing services.(157) The EDPS, furthermore considered, that the notion of consumer welfare should not be reduced to price only, but could also include "quality of privacy protection" as an important parameter regarding consumers. Third, although the COM had some justification based on the argument that is in process of learning regarding the implications of personal data and privacy,(158) certain issues changed with the Lisbon Treaty.

This is in particular explained above with article 51(1) of the charter. The fourth incentive to be taken into account is the ongoing investigation of the BKA on Facebook, which may break new grounds in respect to personal data rights and privacy. It remains uncertain however, that other NCAs or the COM would follow this approach. This down-top method, from BKA to EU COM can be used as an enriching principle of fundamental rights related to privacy and personal data, accomplishing the idea of harmonization of EU single market.

The last reason, the intensity of calls for antitrust intervention to resolve privacy-related issues, which may vary depending on how National Data Protection Authorities tackle new issues, and build on the revamped EU legal

GCC, combined with active enforcement by the courts and administrative bodies should therefore be sufficient to handle Big Data. Companies in the GCC can embrace Big Data with the confidence that adequate cyber crime laws are already in place. In the absence of generic data protection laws GCC companies should, however, consider playing an active role in dealing with privacy concerns to facilitate the full potential of Big Data.

(157) Preliminary opinion of the EDPS, para 64.

(158) Yet, is significant to be emphsized that this parameter is constantly changing and the Com's interest and knowledge in the sector is growing, see in particular: COM Staff Working Document in Online Platform, SWD(2016) 172, published on the COM's website on 25 May 2016.

framework with GDPR coming into stage. The GDPR seeks to clarify existing rights and obligations while introducing changes to improve compliance and enforcement. This Regulation must be interpreted in light of the Charter rights to privacy and data protection.(159) This seems even a more pressing matter in light of the events discussed by the US Senate concerning the social media giant - Facebook, related to Cambridge Analytica scandal.(160) This scandal seems to have finally and for the first time really, woken up the users to face the risks social media poses not just to individual privacy, as a new form of fundamental protection but also to the monetary price personal data can enjoy.

However, this paper does not stand only on the belief that privacy must be protected, but also briefly indicates the concern that users within EU and beyond, do not value on the same manner the issue of privacy of their personal data. This detail is emphasized regularly by businesses, since by estimating how much consumers value the protection of their personal data and privacy, managers try to predict which privacy-enhancing initiatives may become sources of competitive advantage. Companies argue the point that, since users are not reacting in the same way, and some time not respond at all, it means that their content is clear.(161)

This is based on the principle that in certain circumstances silence means consent, when the sound of silence is too loud.(162) To respond to the above, it is necessary to clarify the rationale of the notice and consent standard, looking back to its origins and assessing its effectiveness in a world of predictive analytics. Yet, this dimension of privacy is out of scope in this paper.(163)Therefore, it is important to researchers, who are interested in measuring the value that individuals assign to privacy, so as to better understand

(159) Case C-362/14, Schrems, EU:C:2015:650. See also: GDPR, Art.4(1).

(160) Facebook-Cambridge Analytica data scandal, available at http://www.bbc.com/news/topics/c81zyn0888lt/facebook-cambridge-analytica-data-scandal.

(161) The end of privacy "The data brokers: Selling your personal information" available at http://www.cbsnews.com/news/the-data 9 March, 2014, By Steve Kroft.

(162) Mantelero, A. (2014). The future of consumer data protection in the EU Re-thinking the "notice and consent" paradigm in the new era of predictive analytics. Computer Law & Security Review, 30(6), 643-660.

Romanosky, S., Acquisti, A., Hong, J., Cranor, L. F., & Friedman, B. (2006, October). Privacy patterns for online interactions. In Proceedings of the 2006 conference on Pattern languages of programs (p. 12). ACM. See also Cranor, L. F., Romanowsky, S., Hong, J., Acquisti, A., & Friedman, B. (2006). Privacy Patterns for Online Interactions.

(163) Consent is different topic to be researched in another paper, see more: Barnett, R. E. (1992). The sound of silence: default rules and contractual consent. Virginia Law Review, 821-911.

the drivers of information disclosure and protection.(164) However, one must admit that the costs of violations of privacy are often amorphous and not easy do define it accurately in this moment.(165) Based on the GDPR, personal data must be build based on the princple known as "privacy by desgin" which means each person's privacy must be taken inot account at every stage of the proccess and then provide for explicit consent.(166) Since markets involving personal data are flourishing and users so far are treated as "the weaker party", this debate will not end soon.

(164) Acquisti, Alessandro, Leslie John, and George Loewenstein (2009), "What is Privacy Worth?" in Twenty First Workshop on Information Systems and Economics (WISE), December 14-15, 2009, Arizona Biltmore Resort & Spa, Phoenix, AZ., see also Kyung, E. (2013). Behind the. ACR North American Advances.

(165) Vermeulen, G., & Lievens, E. (Eds.). (2017). Data Protection and Privacy Under Pressure: Transatlantic tensions, EU surveillance, and big data. Maklu. Book,

(166) Gürses, S., Troncoso, C., & Diaz, C. (2011). Engineering privacy by design.; see also Spiekermann, S. (2012). The challenges of privacy by design. Communications of the ACM, 55(7), 38-40.

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- Case C-67/13 P Groupement des cartes bancaires (CB) v European Commission.
- Case C-8/08,T-Mobile,EU:C:2009:343.
- Case COMP/M.4731 Google/DoubleClick.

- Case COMP/M.7217, Facebook/ WhatsApp.
- Case COMP/M.8124 Microsoft/LinkedIn.
- Case T-512/12, Front Polisario, EU:T:2015:953.
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