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Excessive Data Collection as an Exploitative Abuse Under EU Competition Law

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ABSTRACT: The article examines excessive data collection as an exploitative abuse under EU competition law, highlighting the relationship with the existing concepts of excessive pricing and unfair trading conditions under Article 102 TFEU. Digital platforms might impose disproportionate data burdens on consumers, similar to excessive pricing. Based on existing case law and theoretical frameworks, the article suggests addressing excessive data collection within the current legal structure.

KEYWORDS: excessive data collection – exploitative abuse – Article 102 TFEU – excessive pricing – unfair trading conditions –EU competition law.

1. Introduction

In the recent digital economy, consumers pay for services through the sharing of their data rather than using monetary payment. This results in companies developing business strategies and practices to collect large quantities of data, namely excessive data collection.

When determining whether data collection is justified or excessive, excessive data collection may be considered ‘once we assume that (a) either a sufficient number of consumers do actually receive disutility from “excessive” data requirements and from having their data combined or (b) consumers are somehow being harmed without noticing it’.[1]

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[1] J Haucap, ‘Data Protection and Antitrust: New Types of Abuse Cases? An Economist’s View in Light of the German Facebook Decision’ (2019) *CPI Antitrust Chronicle* 3.

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In the context of competition law, such business practices might present problems such as entry barriers set by dominant firms, distortion of competition, and limiting choice and innovation. Therefore, excessive data collection might be considered an abuse of the dominant position.

The concept of abuse is stipulated and prohibited under Article 102 of the Treaty on the Functioning of the European Union (TFEU) as follows:

> Any abuse by one or more undertaking of a dominant position within the internal market or a substantial part of it shall be prohibited as incompatible with the internal market insofar as it may affect trade between Member States.
> Such abuse may, in particular, consist in:
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> (b) limiting production, markets or technical development to the prejudice of consumers;
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

In this regard, the abuse of a dominant position can be of two types such as exclusionary and exploitative abuses.

Exclusionary abuse occurs when competing firms are excluded from the market, whereas exploitative abuse occurs when dominant firms exploit their consumers. Specifically, in the context of the digital economy, exclusionary abuse can include refusals to provide data or discriminatory access to data, and tying of access, while exploitative abuse may include extensive data collection and restrictions on consumer choice.[2]

Although US competition law does not prohibit monopoly pricing and prohibits only exclusionary conduct that creates or maintains a monopolistic position, imposing excessive prices or other unfair conditions on consumers is a form of exploitative abuse under EU competition law, as previously stated.[3] Thus, it is aimed to protect consumers from direct harm caused by dominant firms. In practice, however, the European Commission has more often investigated exclusionary conduct cases than exploitative ones under Article 102 TFEU due to the high burden of proof and concerns over market regulation. Nevertheless, it has been noted that NCAs have also been particularly active in pursuing excessive pricing cases in the

[2] A Vadehra, 'Exploitative data harvesting as an article 102 TFEU violation' (Master's thesis, University of Oxford 2021) 39.

[3] M Gal, 'Monopoly Pricing as an Antitrust Offense in the US and the EC: Two Systems of Belief About Monopoly?' (2004) 49 *Antitrust Bulletin* 347.

energy and pharmaceuticals sector such as *Danish CD Pharma*[4] and *Italian Aspen*[5] cases. Furthermore, the Bundeskartellamt's decision regarding *Meta (formerly Facebook)*[6] plays an important role in the digital sector, relating to the sanctioning of exploitative conduct by NCAs.[7]

As 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions' should be assessed as exploitative abuse under Article 102 TFEU, excessive data collection will be analysed due to this as an analogy to excessive pricing and unfair trading conditions.

The purpose of this article is to examine exploitative abuses under EU competition law, focusing on the analogy between excessive pricing, unfair trading conditions, and the current practice of excessive data collection. It examines whether and how excessive data demands placed on consumers may constitute an abuse of dominance under Article 102 TFEU. It argues that excessive data collection can only qualify as an exploitative abuse under Article 102 TFEU when (i) the undertaking is dominant, (ii) data collection exceeds what is objectively necessary to provide the service or good, and (iii) users lack of meaningful options, such as in the *Meta v Bundeskartellamt* case.[8] In the case, excessive data collection was not examined through a price-cost analysis, but rather through imposing non-negotiable conditions and limiting meaningful user choice, which raises the question of valid consent. Therefore, the case is included in the article to show why unfair trading conditions provide a better basis for evaluating exploitative practices in data-driven markets compared to excessive pricing.

The article starts with an introduction that provides a conceptual framework for abuse under Article 102. Section 2 discusses the parallels between excessive pricing and excessive data collection, discussing whether similar legal reasoning can be applied. Following that, Section 3 examines excessive data collection in relation to unfair trading conditions and points out overlaps with existing law. Section 4 analyses the famous *Meta v Bundeskartellamt* case from the perspective of the intersection between data protection and competition law. Finally, the conclusion comments on the role of EU competition law in addressing excessive data collection.

[4] Danish Competition and Consumer Authority, 'The Maritime and Commercial Court: CD Pharma has abused its dominant position by charging an excessive and unfair price for the drug Syntocinon' (3 March 2020), at en.kfst.dk.

[5] Case A-480 *Incremento Prezzo Farmaci Aspen*, at www.agcm.it.

See also European Commission, Decision in Case AT.40394 – *Aspen* (10 February 2021), at ec.europa.eu.

[6] Bundeskartellamt, B6-22/16, 2019.

[7] M Botta and K Wiedemann, 'Exploitative Conducts in Digital Markets: Time for a Discussion after the Facebook Decision' (2019) 10 *Journal of European Competition Law & Practice* 8, 465.

[8] Bundeskartellamt, Decision B6-22/16, 6 February 2019.

2. The relationship between excessive pricing and excessive data collection

Excessive pricing is based on the existence of a monetary price, therefore, when examining the relationship between excessive pricing and data collection, a monetary value must be calculated for personal data.

Although zero-payment in the data economy does not necessarily imply that a product is free, attention and data may serve as the currency. This is acknowledged by a 2019 Directive on certain aspects concerning contracts for the supply of digital content and digital services[9] as it can be seen in Article 3 (1) that says 'the consumer provides or undertakes to provide personal data to the trader'.[10] However, while data is commonly referred to as the currency of a data-driven economy as it can be considered a negotiable asset that can be exploited economically and counter-performed as specified by the regional Administrative Court of Lazio in Italy[11], its nature differs dramatically from that of actual currency. Since data lacks scarcity and imitability, legal provisions that are based on the monetary compensation principle cannot be applied directly to data without considerable adjustment.[12] For example, unlike oil, data is not an exhaustible resource and can be used multiple times and by multiple services at the same time. As a result, even if a user pays with data for a service, their available data will not be reduced. However, while their data is not exhaustible, their privacy may be compromised and their control over their data may be lost.[13] Also, another challenge to view data as currency would be the non-monetary values associated with data such as privacy and dignity.

Despite the challenges, it is not impossible to assess the value of personal data. For example, Malgieri and Custers argue that it is possible to assess the monetary value of personal data with two objective parameters, namely a top-down approach, which estimates value from the prices companies pay for data and is often based on advertising revenue, and a bottom-up approach, which measures the value of personal data in terms of privacy loss and consumer asymmetry.[14] While these parameters do not give exact prices, they show personal data can be measurable and valued in monetary.

It would be helpful to examine the chronology of the development of the case law regarding excessive pricing in this regard of its relation to excessive data collection.

[9] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

[10] Botta and Wiedemann (n 7).

[11] OECD, Consumer Data Rights and Competition – Background Note, DAF/COMP(2020)1, 2020, 48.

[12] VHSE Robertson, 'Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data' (2020) 57 *Common Market Law Review* 10.

[13] Haucap (n 1).

[14] G Malgieri and B Custers, 'Pricing Privacy – the Right to Know the Value of Your Personal Data' (2018) 34 *Computer Law & Security Review* 2.

The European Commission's intervention regarding exploitative abuse cases is limited due to a number of reasons, including error-cost frameworks, which mean that under-enforcement is less expensive and will be resolved by the market itself, and the possibility that innovation may be stifled. As to exploitative abuse, enforcement has been focused on excessive pricing cases, and although these are not as common due to the policy mentioned, prohibiting the imposition of unfair trading conditions is less common than the imposition of excessive pricing cases.[15]

In excessive pricing, a monopolistic undertaking uses its power to '[r]eap trading benefits that it would not have reaped if there had been normal and sufficiently effective competition'.[16] In *United Brands* case, the CJEU held that 'the imposition by an undertaking in a dominant position directly or indirectly of unfair purchase or selling prices is an abuse to which exception can be taken under Article 102 TFEU'.[17] Also, it specified that '[...] charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse'.[18] Briefly, excessive pricing refers to a rate that is unreasonable in relation to the economic value of the product purchased by customers of the dominant undertaking.[19]

The CJEU established two-step test in *United Brands* which has two key criteria: (i) 'whether the difference between the costs actually incurred and the price actually charged is excessive, and (ii) whether a price has been imposed which is either unfair in itself or when compared to competing products'.[20]

2.1. *United Brands* – step 1

The first step of the two-step test is the evaluation of excessiveness. Costs and prices are compared to determine whether the price set by a dominant undertaking is unreasonably high in comparison with the product's economic value, which requires the determination of the actual costs incurred and the profit margin. However, this step has been complicated by the lack of clarity on when the profit margin is excessive and the price is unfair.[21]

Excessiveness would vary in each case, depending on a number of factors related to the nature of the market and the product. As the level of excessiveness is different in each sector, it can sometimes be difficult to determine. For instance, a firm may face very high fixed costs for R&D in the innovative sectors, but once a new product

[15] Vadehra (n 2) 52-55.
[16] Case C-27/76 *United Brands v Commission*, EU:C:1978:22, para 249.
[17] Ibid para 248.
[18] *United Brands v Commission* (n 16) para 250.
[19] Botta and Wiedemann (n 7) 467.
[20] *United Brands v Commission* (n 16) para 252.
[21] Miroslava Marinova, 'Unmasking excessive pricing: evolution of EU law on excessive pricing from United Brands to Aspen' (2024) 20 *European Competition Journal* 2, 329.

has been developed, marginal costs or production of additional units may be very low. Also, it would be difficult to determine the level of excessiveness in a sector where a company produces a variety of products and incurs costs common to all of these products.[22] Thus, even though it is complex, excessiveness should be determined case by case.

In terms of extensive data collection as an excessive pricing, the amount of data gathered which is the price payed by the user in this case and the economic value that the user receives should be taken into account, after that, it should be determined if there is a reasonable relationship between the amount of data collected and the economic value received by the user.[23]

Unlike the goods and services provided in traditional markets, when it comes to data, the step of determining the above-mentioned reasonable relationship regarding excessiveness, and the assessment of the difference between the price charged and the cost incurred, might be challenging due to a number of reasons. A quantitative assessment of the economic value of data is difficult since it is linked to non-monetary values such as privacy, autonomy and control over personal data, therefore, the value of data would differ significantly from user to user. Users may be unaware of the value of their personal data and the extent to which third parties are tracking them.

Besides, it is difficult to establish a meaningful cost benchmark. In digital platforms, where data plays an important role, marginal costs are often close to zero, whereas high fixed and sunk costs resulting from infrastructure, innovation and data analytics do not directly affect user costs.[24] Furthermore, the current revenue of the undertaking may not be a reliable indicator of the value of the data in the future.

In contrast to traditional goods, data is a non-rivalrous asset which means that once a user provides data, he or she does not lose it, thus, this situation theoretically complicates the estimation of data's value as a cost.

Based on the above reasons, the first step of the United Brands test becomes unreliable in data collection, which begs the question as to whether excessive pricing doctrine serves as an appropriate approach for determining the extent to which a dominant undertaking gathers excessive data.

2.2. *United Brands* – step 2

When a price is established to be excessive, it does not necessarily follow that it is unlawful under Article 102 (a) of the TFEU. After the first step, excessiveness, the second step comes which is the evaluation of unfairness that is to assess if the amount

[22] Ibid 330.

[23] Robertson (n 12).

[24] International Competition Network, 'Control of Data, Market Power, and Potential Competition in Merger Reviews' (2024) *Merger Working Group,* 53.

of data gathered is 'unfair in itself or when compared to competing products' as stated in *United Brands*.

The second step focuses on the evaluation of the fairness of the price charged rather than price-cost comparisons. While the charged price can be compared with those for similar services provided by other market participants, the fairness of a price cannot be determined only by comparing costs and prices, but must take into account several factors such as the nature and characteristics of the product, the market conditions and the existence of alternative products.[25]

In the judgment *AKKA/LAA*, the methodology for assessing excessive pricing was clarified where Advocate General Wahl suggested several approaches that could be used when evaluating excessive pricing.[26] He not only expressed that the *United Brands* price-cost test is only one way of calculating the benchmark price but also outlined the other methods such as 'the price charged for the product in question by the dominant undertaking and, [...] the prices charged in the same market by non-dominant undertakings (comparison across competitors) or by the same dominant undertaking at different points in time (comparison across time), or the prices charged in other geographic markets by the same dominant undertaking or by other undertakings (geographic comparison)'.[27] Moreover, he indicated that the approach should be selected based on 'objective, appropriate and verifiable criteria' and depending on 'the circumstances specific to each case'.[28]

In accordance with Advocate General Wahl's opinion, the Court recognised the United Brands test and also stated that there are other methods for determining whether a price is excessive. As a result, it set an important criteria for assessing excessive pricing benchmarks.[29] Regarding the choice of a benchmark, the Court clarified that reference Member States or markets should be selected based on objective, appropriate and verifiable criteria. The Court also rejected the notion that a comparison of prices across Member States must include a minimum number of markets to be representative, instead concluding that even limited comparisons may be sufficient if the selection criteria are appropriate.[30] Regarding excessiveness, the Court emphasised that 'there is [...] no minimum threshold above which a rate must be regarded as "appreciably higher". Thus, a difference between rates may be qualified as "appreciable" if it is both significant and persistent' that must be determined in light of the specific circumstances of each case.[31]

[25] K Ebrahimzadeh, 'Excessive Data Collection as an Exploitative Abuse Under the EU Competition Law' (Master's thesis, University of Helsinki 2023) 28.

[26] Opinion of AG Wahl in Case C-177/16 *AKKA/ LAA*, EU:C:2017:286, para 35.

[27] Ibid para 19.

[28] Ibid para 61.

[29] Case C-177/16 *AKKA/ LAA,* 14 September 2017, ECLI:EU:C:2017:689, paras 36-37.

[30] Ibid para 41.

[31] Ibid para 55.

An appropriate benchmark for assessing whether the amount of personal data requested by a dominant undertaking is excessive could be the amount or type of personal data requested by other online platforms for similar online services. It would be necessary to demonstrate a significant and persistent difference in the quality and amount of data requested by other online platforms. In practice, it may present challenges since significant and persistent terms can seem vague and leave the authority with broad discretion.[32] Therefore, applying the second step of the United Brands test to data collection practices is highly problematic.

Moreover, the undertaking may collect extensive data to enhance its advertising services as well as user experience, which makes it difficult to determine when the collection of personal data as counter-performance becomes excessive and unfair, similar to excessive pricing.[33] In this regard, Robertson suggests that excessive data collection could be considered as unfair in itself when an undertaking reduces the product's quality by lessening the user's privacy protection, and GDPR could be used as a guideline when assessing whether the undertaking's data collection activity is unfair.[34] Indeed, privacy was deemed as a non-price parameter of competition in recent cases. For instance, *Facebook/WhatsApp* case marked a key step as recognising privacy as a non-price parameter of competition.[35] Also, in *Microsoft/LinkedIn* case, it was stated that privacy was an important parameter of quality in the professional social networking market.[36]

The current nature of competition in the data market makes it difficult to estimate what the competitive level of consumer data sharing would be, since they usually have very similar terms of service regarding user data and are free.[37] Also, as most data-driven markets are dominated by a small number of platforms, it is quite difficult to establish an appropriate benchmark for measuring the amount of data collection that can be deemed normal. As described previously, although some methods can be used to determine the value of data, it will be quite complex. Due to all of these factors, the United Brand two-step test cannot be directly applied to the data market.

Several factors must be considered in order to evaluate the economic value of personal data. The value of data varies based on the user, platform, or third party. In this context, the assessment of unfairness is subjective since users' perceptions of privacy differ considerably, leading to practices that may be considered excessive by some, or may be considered acceptable by others as a reasonable compromise.

[32] Botta and Wiedemann (n 7) 467.
[33] Ibid 466.
[34] Robertson (n 12) 15.
[35] Case COMP/M.7217 *Facebook/WhatsApp*, 2014.
[36] Case COMP/M.8124 *Microsoft/LinkedIn*, 2016.
[37] Vadehra (n 2) 77.

Moreover, since data can be shared simultaneously across multiple platforms, it lacks the scarcity and imitability of traditional currency.

In addition, personal data is highly related to the non-monetary values, such as privacy and dignity, that are fundamental rights, and if personal data were only valued in terms of its monetary value, it would overlook its significance as a fundamental right. Lastly, as users pay not only with their data but with their attention as well, this must be assessed in the analysis of the value of data.[38] Therefore, the excessive pricing doctrine provides limited guidance on the analogy regarding excessive data collection and should not be the primary approach. As a result of this limited guidance, neither the Bundeskartellamt nor the CJEU attempted to show excessive data collection by Meta through a price-cost comparison in the *Meta* case. However, the focus was on the competitive harm resulting from a dominance-based structural imbalance, as Meta imposed non-negotiable data processing conditions on users who had no real other choices due to network effects. Thus, it was not a question of whether users had paid too much data, but rather that Meta's market power limited their meaningful choices about their personal data processing. Accordingly, the *Meta* decision shows why excessive data collection would be better addressed through the framework of unfair trading conditions and restrictions on consumer choice rather than through excessive pricing doctrine. In this respect, the decision will be analysed in Section 4, after discussing the relationship between unfair trading conditions and excessive data collection in Section 3.

3. The relationship between unfair trading conditions and excessive data collection

Article 102 (a) TFEU prohibits not only 'directly or indirectly imposing unfair purchase or selling prices' but also 'other unfair trading conditions', which is in fact a broader category that encompasses unfair purchase or selling prices, bringing up the issue of comparison and the relationship between unfair trading conditions and excessive data collection.

The unfairness was outlined in *SABAM* case[39] which brought the indispensability test. The case concerned the application of Article 102 TFEU to contracts between SABAM (the Belgian copyright collection society) and its members. It was contested that the contract condition obligated members to assign to SABAM all of their current and future copyrights without distinctions as to the types of rights, while the society retained exclusive control of the exploitation of those rights for a further five years following a member's withdrawal without any obligation to account for it.[40]

[38] Robertson (n 12) 10-12.
[39] Case C-127/73 *BRT v SABAM*, EU:C:1974:25.
[40] Ibid paras 3-4.

In *SABAM*, the unfairness was described as a trading condition where it 'imposes on its members obligations which are not absolutely necessary for the attainment of object and which thus encroach unfairly upon a member's freedom to exercise his copyright'.[41] Therefore, according to Article 102(a) TFEU, trading conditions can be considered unfair if they are not absolutely necessary or proportionate to achieve their purpose and unduly limit the rights of trading partners or third parties.[42]

Moreover, in *GEMA*, the German copyright collecting association ('GEMA') prohibited beneficiaries of its collective agreements from transferring their shares of revenue to others directly or indirectly under its statutes.[43] The indispensability test was interpreted in the case as requiring absolute necessity and equity without unnecessarily restricting the parties' freedom. Due to the Commission's decision that GEMA acted proportionately. The equity test in this case demonstrated the importance of not unnecessarily restricting the freedom of the parties.

Also in *Tetra Pak II*, the Commission deemed the contractual terms regarding the sale and leasing of Tetra Pak equipment and the sale of its cartons to be abusive since they had no link with the contract's purpose.[44]

In the case, the clause that required purchaser to inform Tetra Pak of any improvements or modifications to the equipment and to grant Tetra Pak ownership of any resulting intellectual property right was found limiting the purchaser's use of the goods and since it did not have connection with the purpose of the contract it was not only deemed abusive but also distorted the contract's very nature. Moreover, purchasers of Tetra Pak equipment were required to obtain Tetra Pak's approval before reselling the items or transferring their use, this was found as unfair trading condition as well.[45]

Later in *DSD* case, the Commission stated the proportionality principle as following, 'unfair commercial terms exist where an undertaking in a dominant position fails to comply with the principle of proportionality'.[46] The Commission expressed that giving only a choice between accepting the unreasonable commercial terms which means paying an unreasonable licence fee in the case or introducing separate packaging and distibution channels is imposing unfair commercial terms.[47] Therefore, in order to determine whether there is an unfair trading term or not, it is important to take into account the bargaining power of the parties and whether they are in a take it or leave it situation.

[41] *BRT v SABAM* (n 39) para 15.

[42] Autorité de la concurrence, Decision 19-D-26 of 19 December 2019, paras 345-352.

[43] Case IV/29.971 *GEMA Statutes* Commission Decision 82/204/EEC [1981] OJ L94/12.

[44] *Tetra Pak II* [1991] OJ 1992 L 72/1, para 106.

[45] A C. Witt, 'Unfair trading conditions — the revival of a dormant concept of EU competition law' (EDHEC Business School Augmented Law Institute Working Paper 2025), at ssrn.com

[46] Case COMP/34.493 *Duales System Deutschland (DSD)* Commission Decision of 20 April 2001 [2001] OJ L166/1, para 112.

[47] Ibid.

In order to assess the fairness of trading conditions, the indispensability test requires that the imposed obligations must be assessed to determine whether they are absolutely necessary for the achievement of the contractual objective.

The opaque, lengthy and difficult to understand privacy policies of most companies are leveraged to extract unfair amounts of data from users.[48] This might be a starting point to analyse it in the perspective of excessive data collection as unfair trading conditions. Similar to what explained in *SABAM*, excessive data collection can be considered an unfair trading condition if the collection is considered not absolutely necessary or proportionate to achieve a legitimate objective of the service and encroaches unfairly the rights of the user to privacy.[49] Therefore, it should be examined whether data collection is necessary for the purposes of the agreement between the platform and its users. It may be an unfair term that restricts the privacy of users if it is not absolutely necessary and proportionate.

In the same manner as *DSD*, an unfair trading condition may be established when a platform offers users the choice of creating their own social network service or agreeing to excessive data collection which exceeds their reasonable expectations when they consent to the terms of data collection.[50]

When assessing the fairness of data collection, the absolute necessity, not unnecessarily limiting the freedom of the parties and the bargaining power between the parties would play a role. As a result, unfairness in data collection may arise from third-party tracking that exceeds the users' reasonable expectations at the time they consent to such a practice, taking into account the context within which the data is collected.[51] A take it or leave it situation, in which consumers have no real choice, would constitute an unfair term in this regard.

Data protection law might serve as a useful guide in determining whether data collection is necessary for achieving legitimate objectives and whether they are disproportionate.[52] Specifically, Article 5 (1) (b) of GDPR establishes the principle of purpose limitation, which mandates that personal information be collected only for specified, explicit, and legitimate purposes. In addition, Article 5 (1) (c) outlines the principle of data minimisation, which requires adequate, relevant, and limited data to be used for the stated purposes. These standards may be violated by contractual clauses that require the disclosure of personal data beyond these boundaries.[53]

[48] Vadehra (n 2) 82.
[49] Witt (n 45) 33.
[50] Robertson (n 12) 14.
[51] Ibid.
[52] See: Witt (n 45) See also: Robertson (n 12).
[53] Vadehra (n 2) 85.

Furthermore, from the point of view of competition law, undertakings might exploit their market power in order to impose non-negotiable terms concerning privacy. Although applying unfair trading conditions to excessive data collection may be considered creating ambiguity and excessively broadening the scope of Article 102 TFEU, it is a 'necessary adaptation to the context of data-driven ecosystems'. Since personal data can be considered as a counter-performance to a contract, it would not seem unreasonable to expect that this data constitutes a fair price.[54] To determine whether a particular trading term on privacy is unfair, it is necessary to consider whether it is imposed in a fair and appropriate manner, if it is required, and if it does not encroach upon the bargaining power between the parties or harm consumer autonomy. Using the explained tests, namely indispensability, equity, and proportionality, it is possible to analyse the harm under Article 102 TFEU.

4. Excessive data collection in practice: *Meta (formerly Facebook) v Bundeskartellamt*

The imposition of non-negotiable terms regarding privacy can be seen in the *Meta* case, where the German Competition Authority ('Bundeskartellamt') found that users of the platform were forced to comply with terms that involved more excessive data collection that resulted in abuse of a dominant position.[55] This case is remarkable for the evaluation if excessive data collection can qualify as an exploitative abuse under Article 102 TFEU, as it was pointed out that Meta's terms and conditions must not be assessed on the basis of the criteria of the prohibition of abusive pricing, but rather on the basis of unfairness.[56]

Having initiated proceedings in 2016, the Bundeskartellamt decided in 2019 that Meta abused its dominant position in the market for social networks, along with strong network effects, high entry barriers and lock-in situation, through the revision of its terms and conditions which enabled the company to combine personal data gathered from Facebook and other Meta platforms.[57] The Bundeskartellamt decided that Meta's excessive data collection and combination was exploitative abuse, stating that users were forced to accept unfair data processing conditions in order to continue using the platform, thus, there was no effective consent. It was also found that users were unaware that Meta exploited their data even when they used the internet for

[54] N Zingales, 'Between a Rock and Two Hard Places: WhatsApp at the Crossroad of Competition' (2017) *Data Protection and Consumer Law* 8.

[55] Bundeskartellamt (n 6).

[56] Ibid para 524.

[57] A Tóth, 'Overview of the National Enforcement of EU Competition Law' (2018) 4 *European Competition and Regulatory Law Review* 260.

purposes other than browsing Facebook.[58] Remarkably, the Bundeskartellamt held that the terms violate the stipulations of the GDPR and constitute an abuse of dominant position in the form of exploitative business terms within the meaning of Section 19 (1) of the German Competition Act ('GWB').[59] However, it did not consider the GDPR violation as an autonomous violation of competition law. Instead, by relying on data protection laws, it established the exploitative nature of the imposed terms by demonstrating that the company's conduct was different from those expected under undistorted competition conditions.

By stating its terms and conditions did not create a casual connection between the dominant position in the market and the abusive conduct, the Düsseldorf Higher Regional Court held that Meta was not obliged to be bound by the decision of the Bundeskartellamt. The German Federal Court of Justice ('BGH') disagreed and shifted the focus from data protection to the restriction of consumer choice. The BGH stressed in its interim decision that the main competitive harm was due to the lack of meaningful choice between allowing Facebook potentially unlimited access to information regarding off-Facebook online activities, resulting in a more 'personalised experience', personalised service based only on Facebook and a less intrusive version of the platform, which resulted in a take it or leave it scenario.[60]

The approach of the BGH is in accordance with Article 102 TFEU regarding unfair trading conditions. The analysis focused on if the conditions under which data was collected were unfair and on the issue of meaningful consent, rather than if data as a price was excessive. As a result, the *Meta* case illustrates that it would be more logical to regard excessive data collection as an unfair trading condition rather than as an analogy to excessive pricing.

The CJEU's decision on *Meta Platforms and Others*[61] clarified the intersection between data protection and competition law. According to the decision, competition authorities may assess whether a dominant undertaking's conduct is in compliance with the GDPR where such an assessment is necessary for examining whether an abuse of dominance has occurred. While doing so, the competition authorities do not replace the supervisory authorities, monitor or enforce the GDPR, and their GDPR breach findings are limited to the area of competition law.[62]

In accordance with the opinion of Advocate General Rantos[63], the CJEU also described the concept of non-compliance with the GDPR as a 'vital clue' for

[58] A Tóth, 'Strengthening of EU Regulatory Intervention Against Data Exploitations By Online Platforms with a Zero-Price Business Model' (2023) 17 *Masaryk University Journal of Law and Technology* 1, 117.

[59] Bundeskartellamt (n 6) para 532.

[60] Courtesy translation of Decision KVR 69/19 rendered by the Bundesgerichtshof (Federal Court of Justice) on 23/06/2020 provided by the Bundeskartellamt, paras 58, 86, at www.bundeskartellamt.de

[61] Case C-252/21 *Meta Platforms and Others*, EU:C:2023:537.

[62] Ibid paras 48-49.

[63] Opinion of Advocate General Rantos in Case C-252/21 *Meta Platforms and Others*, para 23.

competition law analysis.[64] In this regard, a competition authority may be able to assess the degree of compliance or non-compliance with the GDPR as a vital clue for a violation of Article 102 TFEU. By considering privacy as an important parameter of competition, a competition authority would be able to carry out its investigation based on it as a substantial factor.[65] However, the Court also held that a GDPR infringement does not automatically amount to abuse of dominance.

The CJEU emphasised the principle of sincere cooperation enshrined in Article 4(3) Treaty on European Union (TEU).[66] The authorities should cooperate and consult with each other. In order to avoid contradictory assessments, competition authorities must verify whether the conduct has already been subject to a decision by a data protection authority. Moreover, if a national competition authority contacts a data protection authority for information or cooperation, the data protection authority must respond within a reasonable period of time.[67] The sincere cooperation requirement shows that the GDPR might serve as a guide in competition law assessments.

By providing an important guidance, the case confirms that access to and processing personal data is a competitive parameter and a deterioration in data protection standards, such as forcing users to accept terms without meaningful and effective consent, may result in the exploitation of consumers.[68] Accordingly, excessive data collection should be evaluated with regard to necessity, proportionality and consumer choice. However, the intersection between data protection and competition law does not mean that all data protection breaches or only violations of privacy rights themselves are subject to competition law, rather it means that the GDPR can be linked to competition law when there is a privacy-related competitive harm. Therefore, the case should be read as the limited suitability of the United Brands test for data-driven markets and confirmation of the argument that excessive data collection constitutes abuse when combined with unfair and non-negotiable conditions due to dominance.

5. Conclusion

Markets based on data present some challenges for both regulators and consumers, such as excessive data collection. To overcome these challenges it may be possible to address excessive data collection in the same manner as excessive pricing and unfair trading conditions within the scope of Article 102 TFEU.

Considering that consumers pay for online services on platforms by sharing their personal data, excessive data collection might be regarded as an excessive price,

[64] *Meta Platforms and Others* (n 61) para 47.

[65] PJ van de Waerdt, '*Meta v Bundeskartellamt*: Something Old, Something New' (2023) 8 *European Papers* 1077, 1086.

[66] *Meta Platforms and Others* (n 61) para 53.

[67] Ibid paras 56-58.

[68] Ibid para 51.

especially if it is not proportionate to the value of the service. However, due to the nature of data, the United Brand two-step test for excessive pricing cannot be directly applied to it. The primary reason for this is the difficulty of calculating a measurable price for data. Even though the value of data is widely acknowledged, its value extends well beyond monetary considerations. Moreover, excessiveness differs from case to case, especially when it comes to data, it would be difficult to determine production costs due to network effects.

From the perspective of unfair trading conditions, analysing excessive data collection would be less complicated compared to excessive pricing. When excessive data collection is considered not absolutely necessary or proportionate to achieve a legitimate objective of the service and encroaches unfairly on users' privacy rights, it could be considered an unfair trading condition. However, in this case, the question would arise when excessive data collection exceeds what is necessary or proportionate. As discussed before, in order to continue to use the platform, forcing users to choose between disclosing their personal data or quitting such as in the *Meta* case could be considered excessive data collection that exceeds what is necessary and proportional, in this respect, competition concerns on excessive data collection relate to the lack of consumer choice as well as imposing terms and conditions that violate consumer privacy. Consequently, tools regarding unfair trading conditions can be used to address the challenges posed by excessive data collection.