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Privacy and Antitrust: Searching for the (Hopefully Not Yet Lost) Soul of Competition Law in the EU after the German *Facebook* Decision

By Renato Nazzini (King's College London)¹

Edited by Thibault Schrepel, Sam Sadden & Jan Roth (CPI)



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Introduction

On February 6, 2019, the *Bundeskartellamt* (“BKA”) decided that certain companies belonging to the Facebook group (“Facebook”) had abused their dominant position.² The abuse consisted in making the use of Facebook’s social network (“Facebook.com”) by private users residing in Germany conditional upon their consent to Facebook obtaining private users’ data generated on the other Facebook’s services WhatsApp, Oculus, Masquerade, and Instagram, and on third-party websites and mobile apps that use Facebook’s programming interfaces (“Facebook Business Tools”) for the purpose of combining them with data generated on Facebook.com and using them for advertising and profiling.³

Facebook was found to be dominant on the German social network market for private users.⁴ The abusive conduct consisted in a breach of the European General Data Protection Regulation (“GDPR”)⁵ in that Facebook did not have a legal basis for processing the data in question.⁶ The BKA further determined that, while it was not necessary that the conduct was possible only because of market power, it was a “*manifestation*” of market power.⁷ This appears to be the crux of the theory of harm in the case and will be discussed later in this article. No fine was imposed but Facebook was ordered to bring the abusive conduct to an end.⁸

The BKA’s decision was highly anticipated as the first major abuse of dominance case addressing the interface between data protection and competition law. As it is adopted purely under German law, this article will focus on the wider EU law and competition policy implications of the approach adopted by the BKA.⁹ In doing so, it will tackle the fundamental question as to whether privacy standards are relevant to the competitive assessment of unilateral conduct under Article 102 TFEU, discussing, first, exploitative theories of harm, and, then, exclusionary theories of harm. Finally, conclusions will be drawn.

Exploitative Theories of Harm

The BKA states that “Using and actually implementing Facebook’s data policy, which allows Facebook to collect user and device-related data from sources outside of Facebook and to merge it with data collected on Facebook, constitutes an abuse of a dominant position on the [German] social network market in the form of exploitative business terms.”¹⁰ The very title of the Case Summary published by the BKA is “*Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing.*” It seems, therefore, that the abuse in question has been categorized as exploitative. The exploitation would consist in applying terms and conditions that are a “manifestation of market power or superior power” or are inappropriate given the constitutional rights involved, which include the “fundamental right to informational self-determination.”¹¹

It is often said that Article 102 TFEU explicitly prohibits exploitative abuses and that, therefore, this is the law in the European Union.¹² This is, of course, not the case. The text of Article 102 allows for an interpretation of the prohibition of abuse of dominance that includes exploitative abuses but does not so require. The case law has interpreted the prohibition of “unfair” prices or trading conditions as including exploitative abuses¹³ but, equally, the case law considers predatory pricing as a form of “unfair” prices.¹⁴ A price or a trading term may be “unfair” because of its effect on competitors rather than unfair because of its effect on customers. In any event, the case law is now clear that so-called excessive prices or excessively onerous trading conditions can be an abuse of dominance purely because

of their effect on customers.¹⁵ The category of exploitative abuses has thus been created in EU law.

An exploitative abuse can consist not only in the charging of excessive high prices¹⁶ but also in the application of abusive terms and conditions.¹⁷ The case law on exploitative trading conditions is scarce and fairly old. In *BRT v. SABAM*, the Court of Justice was asked to rule on whether the Belgian collecting society SABAM was abusing its dominant position by requiring authors to assign to it all categories of copyright in respect of current and future works and to give to it the power to exercise the assigned rights for five years after the withdrawal of a member.¹⁸ The Court said that, in assessing the “fairness” of the clause, all relevant interests had to be taken into account “for the purpose of ensuring a balance between the requirement of maximum freedom for authors, composers, and publishers to dispose of their works and that of the effective management of their rights” by the collecting society.¹⁹ The test resembled closely a proportionality assessment whereby the Court considered, first, the objective of the clause,²⁰ and then whether there were any less restrictive alternatives to achieving the objective pursued.²¹

In *Tetra Pak II*, the Commission considered a number of clauses in the sale and leasing of Tetra Pak’s machines and cartons abusive.²² The overall purpose of the clauses in question was exclusionary²³ and, therefore, the infringement cannot be analyzed as a purely exploitative abuse. However, the case is an interesting illustration of the types of clause that have been found to be exploitative in application of the proportionality test. Such clauses included, for instance, clauses in sale contracts prohibiting any additions or modifications to Tetra Pak’s machines and prohibiting the customer from even moving the machines, which were held to be “additional obligations which have no connection with the purpose of the contract and which deprive the purchaser of certain aspects of his property rights.”²⁴ In *DSD*, the dominant undertaking made available facilities for the collection of sales packaging and managed the recovery process. It held a trademark, *der Grüne Punkt* (literally, the green dot), which, when affixed on packaging, signaled to consumers that they could dispose of the waste through DSD’s systems. Distributors using the DSD’s system were required to pay a fee, which depended on the packaging on which the distributor affixed the trademark. The distributor was under an obligation to affix the trademark to all registered packaging for domestic consumption. Therefore, the fee was payable also in respect of packaging that was collected either by the customer directly under a self-management solution or by a competitor of DSD.²⁵ The Commission held that DSD was imposing unfair trading terms on its customers because it failed to comply with the principle of proportionality,²⁶ which was interpreted as requiring the balancing of all the relevant interests.²⁷ The Commission held that DSD did not have “any reasonable interest in linking the fee payable by its contractual partners not to the... service actually used but to the extent to which the mark is used.”²⁸

This case law and Commission practice are capable, in theory, of supporting a finding of abuse by a dominant social network if its privacy policy is “unfair” under Article 102(a) because it is disproportionate or has no connection with the purpose of the contract with the end user. Superficially, there is a parallel between cases like *BRT v. SABAM*, *Tetra Pak II*, and *DSD*, on the one hand, and *Facebook*, on the other. In *Facebook*, the BKA has also concluded that Facebook’s privacy policy was “neither required for offering the social network as such nor for monetizing the network through personalized advertising, as a personalized network could also be based to a large extent on the user data processed in the context of operating the social network.”²⁹ It also applied a broad proportionality test, balancing all relevant interests, including constitutional rights.³⁰ The question is, however,

not one of superficial similarity of the tests, as clearly “unfairness” or “proportionality” are principles applied across very many legal fields, for purposes as different as assessing self-defense at a murder trial or implying a price into a contract for the sale of soya beans. The issue is not, therefore, one of the forms of the tests but whether the harm addressed under whatever test for exploitative abuses is applied is a harm that competition law aims at protecting. Article 102 cannot be used to pursue objectives other than the protection of competition. If an EU institution were to use Article 102 to pursue extraneous objectives, this would be a misuse of power under Article 263 TFEU.

This is true of exclusionary abuses as it is true of exploitative abuses. An exploitative abuse does not, technically, involve a restriction of the process of competition but is still the result of the exercise of market power unconstrained by effective competition. While there is no restriction of competition as such, the harm addressed is still competitive harm in the form of prices significantly and persistently above the competitive level or, more rarely, trading conditions significantly and persistently more onerous than those that would prevail under conditions of effective competition.³¹ Whereas as regards exclusionary conduct it may be argued that the behavior of the dominant undertaking can be behavior that a non-dominant undertaking can also engage in, the same cannot be said as regards exploitative abuses.

For example, pricing below cost to harm a rival is conduct that may be carried out by a non-dominant firm. This does not mean that predation cannot be an abuse of dominance when carried out by a dominant undertaking. On the other hand, an exploitative abuse can, by definition, only be carried out by a dominant undertaking because the exploitation that Article 102, as interpreted by the case law, prohibits is not any exploitation of customers by a business but only the exploitation consisting in a particularly severe form of exercise of market power. Therefore, exploitative conduct caught by Article 102 is only exploitation caused, or made possible, by the fact that the undertaking engaging in such conduct is dominant.³² A non-dominant undertaking must be, therefore, unable to carry out that very same conduct - or at least unable to carry it out profitably. If a price for a given product can be profitably charged by a non-dominant undertaking, that price cannot be exploitative within the meaning of Article 102. By the same token, a mere breach of the GDPR, however serious and however extensive, that can be profitably committed by any firm, can never be an exploitative abuse.

This does not mean that a breach of the GDPR or, more broadly, substandard levels of data protection, can never be an exploitative abuse. For example, in the *Facebook case*, it can be argued that, when the basis for the processing of data is the data subject’s consent, a dominant undertaking is capable of extracting consent of such a scope that a non-dominant undertaking would not be able to obtain. This is, of course, a matter of evidence in each individual case. However, it is significant that Article 7(4) of the GDPR provides that, “when assessing whether consent is freely given, utmost account shall be taken of whether, *inter alia*, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.” This suggests that the fact that the performance of a contract is conditional on unnecessary consent is considered problematic regardless of the dominant position of the data controller. Whether or not the data controller is dominant, making the performance of a contract conditional on unnecessary consent is an indication that consent is not freely given.

It is also a type of harm that the GDPR considers as constituting a defect in the giving of consent that invalidates the legal basis for the processing of data under Article 6(1)(a) of the GDPR. This strongly suggests that this is not, in itself, competitive harm. For this type of defect in the giving of consent to be turned into competitive harm it would have to be established that: (a) only a dominant firm would be capable of extracting the consent in question and no other firm could profitably do so; and (b) the consent extracted by the dominant firm is significantly and persistently more onerous than that which would prevail under conditions of effective competition. The Case Summary published by the BKA does not allow for a full analysis of the decision, but the reasons set out therein do not appear to support the conclusion that Facebook's conduct: (a) was only made possible by dominance and (b) consisted in the application of a privacy policy significantly and persistently more onerous than that which would have prevailed under competitive conditions. The only reason the BKA offers to support an exploitative theory of harm from a causation perspective refers to a doctrine of "normative causality" in that "data protection law considers corporate circumstances like market dominance, the concrete purpose and the amount of data processed in its justifications, i.e. Facebook's market position is significant when assessing the violation."³³ It is not easy to understand the precise meaning of this reasoning but it appears that it falls short of the test highlighted above.

In conclusion, an exploitative abuse theory such as that apparently applied in the *Facebook* case would not have a solid basis under EU competition law. While, at first sight, it might appear that the case law and the Commission have applied a broad proportionality test to the assessment of trading conditions under Article 102, what is always necessary under EU law is that the harm caused by such trading conditions is competitive harm in the form of a particularly severe form of exercise of market power. In light of the published material, it does not appear that the BKA has met this test.

Exclusionary Theory of Harm

In the section titled "Manifestation of market power" of the Case Summary, the BKA points out that:

Facebook's conduct ... impedes competitors because Facebook gains access to a large number of further sources by its inappropriate processing of data and their combination with Facebook accounts. It has thus gained a competitive edge over its competitors in an unlawful way and increased market entry barriers, which in turn secures Facebook's market power towards end customers.³⁴

It is not clear whether this exclusionary theory of harm does translate, in the decision, in a finding of exclusionary abuse. In light of the published Case Summary, FAQ, and Press Release, probably not. If it did, however, this would be a solid basis for intervention under EU competition law.

First, at the most general level, Facebook's conduct would fall within the definition of exclusionary abuse in *Post Danmark I* as:

conduct of a dominant undertaking that, through recourse to methods different from those governing normal competition on the basis of the performance of commercial operators, has the effect, to the detriment of consumers, of

hindering the maintenance of the degree of competition existing in the market or the growth of that competition.³⁵

Obtaining data in breach of the GDPR cannot be described as normal competition or competition on the merits. And if the effect of such unlawful conduct is to foreclose actual and potential competitors from the relevant social network or online advertising markets to the detriment of consumers, then the conduct under review can, in principle, be abusive.

Second, unlawful conduct that strengthens or protects a dominant position is, again in principle, likely to cause consumer harm. Consumer harm is not only direct harm to consumers but also harm that results from a restriction of an effective competitive process.³⁶ The foreclosure of competitors on the relevant social network or online advertising markets, thereby protecting or strengthening Facebook's market power on either or both markets, is likely to cause consumer harm. Such consumer harm is distinct from the harm caused by a possible breach of the GDPR. The harm caused by a breach of the GDPR is the processing of data without the required legal basis and, in particular, without a freely given consent. The harm caused by foreclosure, on the other hand, would consist in the higher prices, lower quality, and reduced innovation resulting from Facebook's dominance. An element of such competitive harm may well be substandard levels of privacy protection. But then this harm would still be different for a mere breach of the GDPR because it would have been caused by foreclosure rather than simply by Facebook's breach of the GDPR. A parallel with the analysis of prices may be instructive. Unless they are a means to exclusion, like in a constructive refusal to supply scenario, high prices under Article 102 could be one of three things: (a) purely manifestation of dominance, which is not prohibited; (b) in exceptional circumstances, an exploitative abuse if they are significantly and persistently above the competitive level; (c) consumer harm resulting from an exclusionary abuse. Under an exploitative theory of harm, substandard levels of privacy protection would fall under (b). Under an exclusionary theory of harm, they would fall under (c).

Third, conduct that is unlawful under other legal rules may well constitute abusive exclusionary conduct. In *AstraZeneca*, the dominant undertaking had made misleading representations to patent offices in Belgium, Denmark, Germany, the Netherlands, the United Kingdom, and Norway, and before national courts in Germany and Norway.³⁷ These representations led, in certain circumstances, to the granting of exclusive rights to which the dominant undertaking was not entitled (at all or for the period for which they were granted).³⁸ It was clear that, by its conduct, the dominant undertaking had obtained the grant of exclusive rights to which it was not entitled and which could be annulled.³⁹ This means that conduct that brings about an unlawful consequence⁴⁰ for which there is an alternative remedy under EU (or national law), can still be an abuse of dominance. *A fortiori* this applies to conduct that misleads or forces data subjects into providing too much data to a dominant undertaking. Such conduct not only brings about an unlawful consequence (personal data is acquired in breach of the GDPR) but the conduct itself (not obtaining valid consent as a legal basis for the processing of the data) is unlawful. Indeed, it is surprising that it is sometimes disputed that conduct unlawful under other rules can also amount to an abuse of dominance. Of course, conduct unlawful under other rules cannot automatically, as a general principle, be also an abuse of dominance. All the ingredients of the abuse must be present, including not only dominance but also the anti-competitive effect (for example, foreclosure of as efficient competitors). But it seems obvious that if the behavior of the dominant undertaking also breaches other rules, such as the GDPR, this is a strong indication, or perhaps even conclusive evidence, that such behavior is not competition on the merits.

Fourth, it is conceivable - although this is a matter of proof in each individual case - that unlawfully obtaining data that actual or potential competitors are unable to obtain, by reason of their smaller scale, their more limited or no “vertical” or “lateral” integration, and, last but not least, their compliance with the law, could make entry more difficult or impossible. This does not depend on whether data are an “essential facility” - a concept that is quite difficult to apply to data, save perhaps in very exceptional circumstances. It is sufficient, in light of the general foreclosure test, that the “data asymmetry” that the unlawful conduct creates hinders “the maintenance of the degree of competition existing in the market or the growth of that competition,” that is, that the “data asymmetry” has a likely foreclosure effect.

Fifth, this exclusionary theory of harm has the advantage that it does not encroach upon the powers of data protection regulators and does not “merge” competition law into data protection law, thus keeping the two legal tools, and enforcement mechanisms, distinct and complementary, as they should be as a matter of policy and as they have been envisaged by the EU Legislature. While the conduct reviewed under Article 102 and under the GDPR would still be partially the same, the overlap is limited to an element of the anti-competitive behavior, that is, the failure to obtain a valid consent from end users. However, Article 102 TFEU would require, in addition, not only proof of dominance but also proof of foreclosure detrimental to consumers. And the consumer harm addressed would be - as explained earlier - clearly distinct from the harm that the GDPR aims at addressing.

Conclusion

The *Facebook* decision of the BKA could have brought some clarity to the role that privacy standards play in competition analysis. Instead, at least on the basis of the limited material published so far, it does precisely the opposite. It blurs the boundaries between competition enforcement, data protection and consumer law, depriving competition policy of its distinct identity. Some commentators will say that data protection and privacy standards should be a competition concern and that competition policy should evolve to be able to deal with the challenges posed by the digital economy. Put in this way, the argument is convincing.

This article shows that privacy standards can indeed be relevant to the competitive assessment of unilateral conduct, both under an exploitative theory of harm (in those jurisdictions that adopt this approach) and under an exclusionary theory of harm. However, the “harm” that competition law can address is only harm to “competition.” A mere breach of the GDPR by a dominant undertaking is not harm to competition even if the firm in question has a stronger bargaining power *vis-à-vis* the end users than other firms that could commit similar breaches.

The remedies for breaches of the GDPR are at hand and equivalent to competition remedies. A supervisory authority established under the GDPR has the power, *inter alia*, to order firms to bring their operations into compliance with the GDPR⁴¹ and to impose fines of up to 4 percent of the total worldwide annual turnover of the preceding financial year.⁴² If dominant undertakings, as well as breaching the GDPR, also manipulate privacy standards in a way that is either a particularly severe form of exercise of market power amounting to an exploitative abuse or exclusionary of actual or potential competitors so as to constitute an exclusionary abuse, then, subject to the principle of *ne bis in idem*,⁴³ they would also breach competition law but not simply because they are dominant and they breached the GDPR but because, by

breaching the GDPR or manipulating privacy standards, they have brought about the district, specific harm to competition that Article 102 prohibits.

¹ Professor of Law, King's College London.

² The decision is adopted only under Section 19(1) of the German Competition Act ("GWB") and not under Article 102 TFEU. Section 19(1) prohibits "the abuse of a dominant position by one or several undertakings." Section 19(2) sets out an illustrative list in terms that are different to Article 102(a) – (d). It may be doubted whether the conduct would not have an effect on trade between Member States so that the BKA was under an obligation to apply Article 102 as well. In any event, since national competition law may prohibit conduct that is not an abuse under Article 102, the issue is largely theoretical in the actual case. This approach, however, may raise significant issues in terms of consistency of application of EU competition law as Article 3 of Regulation 1/2003 was enacted precisely for the purpose of preventing Member States from applying their national competition law only in order not to take a position under EU law, thus escaping the safeguards applicable when a national competition authority adopts a decision under EU competition law.

³ Case Summary, Facebook, Exploitative business terms pursuant to Section 19(1) GWB for inadequate data processing, B6-22/16, February 15, 2019, https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3, accessed on 6 March 2019, p. 7 ("Case Summary"), p. 1.

⁴ Case Summary, pp. 5 – 7.

⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1 ("GDPR").

⁶ Case Summary, pp. 10 – 11.

⁷ Case Summary, pp. 11 – 12.

⁸ Case Summary, p. 12.

⁹ At the time of writing, the text of the decision had not been published. This article is based on the Case Summary, as well as on the BKA's Press Release of 7 February 2019 and on a document titled "Facebook FAQ's," of the same date, all available at the BKA's website, accessed on 6 March 2019. The author is aware that without the benefit of reading the full text of the decision, it is not possible to engage in full with the analysis of the BKA in what is, clearly, a complex and novel case. This is why this article looks at the broader implications of this type of approach and is not a comment on the decision itself or the actual analysis of the BKA in the case.

¹⁰ Case Summary, p. 7.

¹¹ Case Summary, p. 8.

¹² See, e.g. V. Rose & D. Bailey (eds.), *Bellamy & Child, European Union of Competition Law* (Oxford, OUP, 7th edition, 2013) 815-816.

¹³ Case 27/76 *United Brands Company and United Brands Continentaal BV v. Commission*, [1978], ECR 207, para 248; Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e. V.*, [1989] ECR 803, para 43; Case 127/73 *Belgische Radio en Televisie e société belge des auteurs, compositeurs et éditeurs (BRT) v. SV SABAM e NV Fonior*, [1974] ECR 313, para 15; Case 395/87 *Ministère public*

v. *Jean-Louis Tournier*, [1989] ECR 2521, para 34; Joined cases 110/88, 241/88 and 242/88 *François Lucazeau and others v. Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others*, [1989] ECR 2811, para 25.

¹⁴ Case 62/86 *AKZO Chemie BV v. Commission*, [1991] ECR I-3359, paras 70 – 72; Case C-333/94P *Tetra Pak International SA v. Commission (Tetra Pak II)*, [1996] ECR I-5951, paras 41 and 44.

¹⁵ Case 27/76 *United Brands*, para 183.

¹⁶ Case 27/76 *United Brands*, para 250; Case C-52/07 *Kanal 5 Ltd and TV 4 AB v. Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa*, [2008] ECR I-9275, para 28; Case 26/75 *General Motors Continental v. Commission* [1975] ECR 1367, para 12. See also R. Nazzini, *The Foundations of European Union Law: The Objective and Principle of Article 102*, pp. 275-282 and R. Nazzini, “Abuse Beyond Exclusion: Exploitation and Discrimination Under Article 102 TFEU,” in B. Hawk (ed.) *2012 Fordham Competition Law Institute* (Huntington NY, Juris 2013) 459-472.

¹⁷ Case 127/73 *BRT v. SABAM*, para 6; Case 395/87 *Tournier*, para 34.

¹⁸ Case 127/73 *BRT v. SABAM*, paras 3 – 4.

¹⁹ *Ibid.* para 8.

²⁰ *Ibid.* paras 9 – 10.

²¹ *Ibid.* para 11. See also Case 395/87 *Tournier*, para 43.

²² *Tetra Pak II* [1992] OJ L72/1, recitals 106 – 145, upheld on appeal in case T-83/91, *Tetra Pak International v. Commission*, [1994] ECR II-755, paras 210 – 214 (further appeal dismissed in Case C-333/94P *Tetra Pak II*).

²³ *Tetra Pak II*, recital 146 and Case T-83/91 *Tetra Pak International*, para 135.

²⁴ *Tetra Pak II*, recital 106 – 107.

²⁵ *Der Grüne Punkt - Duales System Deutschland* [2001] OJ L166/1.

²⁶ *Ibid.* recital 112.

²⁷ *Ibid.* recital 112.

²⁸ *Ibid.* recital 112.

²⁹ Case Summary, p. 10.

³⁰ Case Summary, p. 8.

³¹ R. Nazzini, *The Foundations of European Union Law: The Objective and Principle of Article 102* (Oxford, OUP 2011), pp. 97 – 100. In relation to prices, see Case C-177/16 *Biedrība ‘Autortiesību un komunikēšanās konsultāciju aģentūra – Latvijas Autoru apvienība’ v. Konkurences padome* ECLI:EU:C:2017:689, para 61 and Whal’s opinion in the same case ECLI:EU:C:2017:286, para 106.

³² On the argument that exploitative abuses need strong limiting principles if they are not to become an unstructured form of random market intervention, see R. Nazzini, *The Foundations of European Union Law: The Objective and Principle of Article 102*, pp. 275-282 and R. Nazzini, “Abuse Beyond Exclusion: Exploitation and Discrimination Under Article 102 TFEU,” in B. Hawk (ed.) *2012 Fordham Competition Law Institute* (Huntington NY, Juris 2013) 459-472.

³³ Case Summary, p. 11.

³⁴ Case Summary, p. 11.

³⁵ Case C-209/10 *Post Danmark A/S v. Konkurrencerådet* ECLI:EU:C:2012:172 (Grand Chamber), para 24.

³⁶ Case 6/72 *Europemballage Corp and Continental Can Co Inc v. Commission* [1973] ECR 215, para 26; Case C-280/08 P *Deutsche Telekom v. Commission* [2010] ECR I-9555, para 176; Case C-52/09 *Konkurrensverket v. TeliaSonera Sverige AB* [2011] ECR I-527, para 24.

³⁷ Case C-457/10 P *AstraZeneca v. Commission* ECLI:EU:C:2012:770, paras 18, 93 and 96.

³⁸ *Ibid.* paras 105 – 112.

³⁹ As had happened in Germany: *ibid.* para 109.

⁴⁰ *Ibid.* paras 96 and 111.

⁴¹ GDPR, Art 58(2)(d).

⁴² GDPR, Art 83(5).

⁴³ Which may be relevant in certain circumstances although, if the approach suggested in this article is adopted, data protection infringements and competition infringements should be quite distinct both in law and in fact, as the harm addressed by competition law and the ingredients of an competition infringement would be clearly different from the harm and the ingredients of a data protection breach: see R. Nazzini, “Parallel Proceedings in EU Competition Law: *Ne Bis in Idem* as a Limiting Principle,” in B. van Bockel, *Ne Bis in Idem in EU Law* (Cambridge, Cambridge University Press, 2016) 131 – 166 and R. Nazzini, “Fundamental Rights beyond Legal Positivism: Rethinking the *Ne Bis in Idem* Principle in EU Competition Law,” (2014) 2 *Journal of Antitrust Enforcement* 1 – 35.