The Obligation for the Competition Authorities of the EU Member States to Apply EU Antitrust Law
and the Facebook Decision of the Bundeskartellamt

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Article 3 of Regulation 1/2003 obliges the competition authorities of the EU Member States (national competition authorities or NCAs) to apply Articles 101 and 102 TFEU (EU antitrust law) whenever they apply national competition law to conduct falling within the scope of EU antitrust law. Moreover, the application of national competition law cannot lead to the prohibition of agreements or concerted practices that affect trade between Member States but are not prohibited by Article 101 TFEU. National competition authorities can however use national competition law to prohibit unilateral conduct that is not prohibited by Article 102 TFEU. This paper examines the content and rationale of these provisions of Article 3 of Regulation 1/2003, and the legal consequences in case of non-respect of these provisions, using as an example the Facebook Decision of 6 February 2019 of the German Federal Competition Authority (Bundeskartellamt).

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I. ARTICLE 3 OF REGULATION 1/2003

Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements between undertakings that affect trade between EU Member States and restrict competition without redeeming virtue. Article 102 TFEU prohibits abuse of a dominant position within the EU internal market or in a substantial part of it.[1]

The main implementing regulation for Articles 101 and Article 102 TFEU is Regulation 1/2003, which was adopted on the basis of Article 103 TFEU and entered into application on 1 May 2004.[2] Under Regulation 1/2003, both the European Commission and the competition authorities of the EU Member States (national competition authorities or NCAs), forming together the European Competition Network (ECN), pursue infringements of Articles 101 and 102 TFEU.[3]

In the words of the Joint Statement of the EU Council and the European Commission on the functioning of the network of competition authorities, entered in the Council Minutes at the time of the adoption of Regulation 1/2003,[4] the decentralisation of the enforcement of Articles 101 and 102 TFEU brought about by Regulation 1/2003 has "strengthen[ed] the position of the NCAs [which have been made] fully competent to apply [Articles 101 and 102

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1 These two prohibitions were previously contained in Articles 85 and 86 of the Treaty establishing the European Economic Community (EEC) and in Articles 81 and 82 of the Treaty establishing the European Community (EC).

2 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, [2003] OJ L1/1, last amended by Council Regulation (EC) No 1419/2006, [2006] OJ L269/1.

3 For a detailed analysis of Regulation 1/2003, in comparison with the regime preceding it, see my *Community Report* in D. Cahill and J.D. Cooke (eds), *The Modernisation of EU Competition Law Enforcement in the EU – FIDE 2004 National Reports* (Cambridge 2004), 661-736, also accessible at http://ssrn.com/author=456087, and my book *Principles of European Antitrust Enforcement* (Hart 2005). For a reminder of the genesis of Regulation 1/2003 and an overview of its main results, see my paper 'Ten Years of Regulation 1/2003 – A Retrospective' (2013) 4 *Journal of European Competition Law & Practice* 293, also accessible at http://ssrn.com/author=456087.

4 Council Document 15435/02 ADD 1 of 10 December 2002, accessible at http://register.consilium.eu.int. According to its paragraphs 3 and 4, 'this Joint Statement is political in nature and does therefore not create any legal rights or obligations. It is limited to setting out common political understanding shared by all Member States and the Commission on the principles of the functioning of the Network. Details will be set out in a Commission notice which will be drafted and updated as necessary in close cooperation with Member States'. The said notice is Commission Notice on cooperation with the Network of Competition Authorities, [2004] OJ C101/43. According to its paragraph 72, the principles set out in that notice have been agreed to by the NCAs. On the Joint Statement, see further Judgment in *France Télécom v Commission*, T-339/04, EU:T:2007:80, paragraph 85, and Opinion of Advocate General Mazák in *Pfleiderer*, C-360/09, EU:C:2010:782, paragraph 26.

TFEU], actively contributing to the development of [EU] competition policy, law and practice".[5]

In accordance with settled case-law of the EU Court of Justice, EU law and national law on competition apply in parallel. Competition rules at European and at national level view restrictions of competition from different angles and their areas of application do not coincide.[6]

Article 103(2)(e) TEFU enables the EU Council to regulate the relationship between national laws and Articles 101 and 102 TFEU. The Council has done so through Article 3 of Regulation 1/2003, which reads as follows:

"*Article 3*

Relationship between [Articles 101 and 102 TFEU] and national competition laws

1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of [Article 101(1) TFEU] which may affect trade between Member States within the meaning of that provision, they shall also apply [Article 101 TFEU] to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by [Article 102 TFEU], they shall also apply [Article 102 TFEU].

2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of [Article 101(1) TFEU], or which fulfil the conditions of [Article 101(3) TFEU] or which are covered by a Regulation for the application of [Article 101(3) TFEU]. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

3. Without prejudice to general principles and other provisions of [EU] law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by [Articles 101 and 102 TFEU]."

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5 Idem, paragraph 6.

6 Judgment of 14 February 2012, *Toshiba Corporation and Others*, C-17/10, EU:C:2012:72, paragraph 81 and the case-law cited, and Judgment of 3 April 2019, *Powszechny Zakład Ubezpieczeń na Życie*, EU:C:2019:283, paragraph 25.

Article 3 of Regulation 1/2003 thus in essence contains two distinct rules, each with its own rationale and scope:

- **Article 3(1)** contains an obligation for national competition authorities and national courts also to apply Articles 101 or 102 TFEU when applying national competition law to conduct falling within the scope of Articles 101 or 102 TFEU.

  According to recital 8 of Regulation 1/2003, the purpose of this rule is "to ensure the effective enforcement of the [EU] competition rules and the proper functioning of the cooperation mechanisms contained in [Regulation 1/2003]".[7]

  As far as national competition authorities (NCAs) are concerned, these cooperation mechanisms are those set out in Article 11 of Regulation 1/2003.[8] Article 11(1) provides that the European Commission and the NCAs must apply Articles 101 and 102 TFEU "in close cooperation". Article 11(3) provides that the NCAs, when acting under Article 101 or Article 102 TFEU, must inform the European Commission in writing before or without delay after commencing the first formal investigative measure. Article 11(4) provides that, no later than 30 days before the adoption of a decision requiring that an infringement be brought to an end or accepting commitments, the NCAs must inform the Commission of the envisaged decision. Finally, Article 11(6) provides that the European Commission can relieve the NCAs of their competence to apply Articles 101 and 102 TFEU in a given case by initiating itself proceedings.[9]

- The first sentence of **Article 3(2)** contains what has been called a "convergence rule",[10] precluding the prohibition under national competition law of agreements, decisions of associations of undertakings and concerted practices that fall within the scope of Article 101(1) TFEU but are not prohibited by Article 101 TFEU.

  According to recital 8 of Regulation 1/2003, the purpose of this rule is "to create a level playing field for agreements, decisions of associations of undertakings and concerted practices within the [EU] internal market".

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7 See also text accompanied by notes 61 and 66 below.

8 Details on the application of these cooperation mechanisms have been set out in the Commission Notice on cooperation with the Network of Competition Authorities, [2004] OJ C101/43. According to its paragraph 72, the principles set out in that notice have been agreed to by the NCAs. See also note 4 above.

9 It follows from Article 3 and Article 11(6) of Regulation 1/2003 taken together that, once the European Commission initiates proceedings, the NCAs can no longer apply not only Articles 101 and 102 TFEU but also their national competition law, except for stricter national laws prohibiting unilateral conduct not prohibited by Article 102 TFEU, national merger control laws and provisions of national law that predominantly pursue an objective different from that pursued by Articles 101 and 102 TFEU; see Judgment of 14 February 2012, *Toshiba Corporation and Others*, C-17/10, EU:C:2012:72, paragraphs 75 and 76.

10 See European Commission, *Report on the functioning of Regulation 1/2003*, COM(2009)206 of 29 April 2009, paragraph 21.

This convergence rule only relates to Article 101 TFEU. As for Article 102 TFEU, the second sentence of Article 3(2) provides that EU Member States are not precluded from adopting and applying on their territory stricter national competition laws that prohibit unilateral conduct not prohibited by Article 102 TFEU.

According to recital 8, "[t]hese stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings". According to the European Commission's 2009 Report on the application of Regulation 1/2003, stricter national competition laws that prohibit unilateral conduct not prohibited by Article 102 TFEU "exist in a number of Member States and include notably: national provisions which regulate the abuse of economic dependence, 'superior bargaining power' or 'significant influence'; legal provisions concerning resale below cost or at a loss; national laws that foresee different standards for assessing dominance and stricter national provisions governing the conduct of dominant undertakings".[11]

Article 3(3) provides that Article 3(1) and Article 3(2) do not apply when national competition authorities or national courts apply national merger control laws and that they do not preclude the application of provisions of national law "that predominantly pursue an objective different from that pursued by [Articles 101 and 102 TFEU]". According to recital 9 of Regulation 1/2003, Articles 101 and 102 TFEU "have as their objective the protection of competition on the market". Recital 9 further mentions as an example of provisions of national law that predominantly pursue an objective different from that pursued by Articles 101 and 102 TFEU "national legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual. Such legislation pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market. This is particularly the case of legislation which prohibits undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration".

The relationship between Articles 101 and 102 TFEU and national competition laws was one of the most contentious issues in the legislative history of Regulation 1/2003.[12]

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11 As note 10 above, paragraph 21; see also Commission Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003, SEC(2009)574 of 29 April 2009, section 4.4. More Member States have introduced national laws on abuse of economic dependence since 2009, most recently Belgium in 2019. As to the economic justification for such laws, see I. Kokkoris, *A Gap in the Enforcement of Article 82* (British Institute of International and Comparative Law 2009). The European Commission's Decision 77/327/EEC of 19 April 1977 in Case IV/28.841 *ABG oil companies operating in the Netherlands*, [1977] OJ L 117/1, suggests that Article 102 TFEU could also be interpreted more broadly to cover abuse of economic dependence.

12 See E. Paulis and C. Gauer, 'La réforme des règles d'application des articles 81 et 82 du Traité' (2003) 11 *Journal des tribunaux Droit européen* 65, and my paper 'Ten Years of Regulation 1/2003 – A Retrospective' (2013) 4 *Journal of European Competition Law & Practice* 293, also accessible at http://ssrn.com/author=456087.

Regulation 17, which governed the application of Articles 101 and 102 TFEU from 1962 until its replacement by Regulation 1/2003, did not regulate the relationship between EU competition law and national competition laws.[13] Under Regulation 17, the European Commission had exclusive competence to apply Article 101(3) TFEU through a notification and authorisation system.[14] Whereas Regulation 17 did not prevent the application of Article 102 TFEU by national competition authorities, in practice national competition authorities tended to apply only national competition law.

In its White Paper on Modernisation of 1999,[15] the European Commission advocated the ending of the notification and authorisation system, and its replacement by a system of *ex post* enforcement, allowing the Commission to refocus its action on combating the most serious competition infringements, and allowing an enhanced role for national competition authorities and national courts. In their reaction to the White Paper, industry and the European Parliament expressed the fear that the decentralisation of the application of EU competition law would lead to a renationalisation of competition policy.[16] This concern explains the main addition, as compared to the White Paper, which the European Commission included in the legislative proposal which it submitted to the EU Council in 2000. Article 3 of the proposed regulation excluded the application of national competition laws to all agreements or concerted practices within the meaning of Article 101 TFEU and all abuses of a dominant position within the meaning of Article 102 TFEU that affect trade between Member States, thus ensuring the sole applicability of EU law.[17] This proposal in turn caused significant opposition from a number of Member States, whose national

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13 Council Regulation No 17 [1962] OJ 13/204 (Special English Edition 1959-62, p 87).

14 For a detailed analysis as to why a notification and authorisation system made sense in 1962 but no longer made sense at the turn of the century, see my paper 'Notification, Clearance and Exemption in EC Competition Law: An Economic Analysis' (1999) 24 *European Law Review* 139, and my book *The Optimal Enforcement of EC Antitrust Law* (Kluwer 2002). For a detailed comparison between Regulation 17 and Regulation 1/2003, see my *Community Report* in D. Cahill and J.D. Cooke (eds), *The Modernisation of EU Competition Law Enforcement in the EU – FIDE 2004 National Reports* (Cambridge 2004), 661-736, also accessible at http://ssrn.com/author=456087, and my book *Principles of European Antitrust Enforcement* (Hart 2005).

15 White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty [1999] OJ C132/1.

16 See E. Paulis and C. Gauer, 'La réforme des règles d'application des articles 81 et 82 du Traité' (2003) 11 *Journal des tribunaux Droit européen* 65 at 67, and my paper 'Ten Years of Regulation 1/2003 – A Retrospective' (2013) 4 *Journal of European Competition Law & Practice* 293, also accessible at http://ssrn.com/author=456087, at footnotes 12 to 16.

17 Proposal for a Council Regulation implementing Articles 81 and 82 of the Treaty, COM(2000)582; see also Judgment of 14 February 2012, *Toshiba Corporation and Others*, C-17/10, EU:C:2012:72, paragraph 83.

competition laws prohibited types of unilateral conduct not prohibited by Article 102 TFEU.[18] Article 3 of Regulation 1/2003 reflects the compromise that was ultimately found.[19]

II. THE FACEBOOK DECISION OF THE BUNDESKARTELLAMT

On 6 February 2019 the German Federal Competition Authority (Bundeskartellamt) adopted a decision, in which it finds that Facebook abuses its dominant position on the private social network market in Germany by making the use of the Facebook social network conditional on Facebook being allowed to collect user- and device-related data from Facebook-owned services (such as WhatsApp and Instagram) and from websites visited or third-party mobile apps used and to combine those data with the facebook.com user account (the Facebook Decision).[20]

The Facebook Decision is based on Section 19(1) of the German Act against Restraints on Competition (Competition Act – GWB), the generic German competition law provision concerning abuse of dominance, which provides that "[t]he abuse of a dominant position by one or several undertakings is prohibited".[21]

Based on the concept of demand-side substitutability, the Bundeskartellamt defines the relevant product market as the market for social networks for private use. The geographical market is defined as Germany, based on the finding that the service is predominantly used to connect with people in the users' own country, special national user habits and the lack of opportunities for supply-side substitution.

The finding that Facebook is dominant on the German private social network market is based on an overall assessment of all factors of market power, including market shares, direct network effects and the difficulty of switching to another social network, indirect network effects through the advertising market, and access to competitively relevant data.

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18 See (text accompanied by) note 11 above.

19 See E. Paulis and C. Gauer, 'La réforme des règles d'application des articles 81 et 82 du Traité' (2003) 11 *Journal des tribunaux Droit européen* 65 at 67, and my paper 'Ten Years of Regulation 1/2003 – A Retrospective' (2013) 4 *Journal of European Competition Law & Practice* 293, also accessible at http://ssrn.com/author=456087, at footnotes 12 to 16.

20 Facebook Decision (6 February 2019), B6-22/16, accessible at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.html?nn=3591568; see also Press Release (7 February 2019), Frequently Asked Questions (7 February 2019) and Case Summary (15 February 2019) in English accessible at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Meldungen%20News%20Karussell/2019/07_02_2019_Facebook.html.

21 English translation at https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Others/GWB.

As to the abuse, the Bundeskartellamt finds that Facebook's terms of service, which allow it to collect user- and device-related data from sources outside the Facebook social network and to merge it with data collected via facebook.com, constitute exploitative business terms to the detriment of consumers. In addition, the Bundeskartellamt finds that Facebook's conduct impedes competitors in that it gives Facebook access to a large number of further data sources, thus giving Facebook a further competitive edge over its competitors and elevating barriers to market entry, thus in turn strengthening Facebook's market power vis-à-vis consumers.

In assessing whether Facebook's terms of service constitute exploitative business terms the Bundeskartellamt relies on the *VBL Gegenwert* case-law of the German Federal Court of Justice (Bundesgerichtshof) according to which, to determine whether business terms are exploitative and constitute an abuse pursuant to Section 19(1) GWB, account must be taken of any legal principle that aims to protect a contracting party in an unbalanced negotiation position.[22] The Bundeskartellamt follows this approach by applying the data protection principles contained in particular in the EU General Data Protection Regulation (GDPR).[23] It finds that the collection of data from sources outside the Facebook social network and the merging of these data with the data collected via facebook.com constitutes unlawful data processing in breach of Articles 5(1)(a) and 6 GDPR. This data processing is not necessary to fulfil contractual obligations and the balancing of interests under Article 6(1)(f) GDPR does not result in the conclusion that Facebook's interests in data processing (taking also into account Facebook's dominant position[24]) outweigh the users' interests. Also, Facebook did not obtain its users' effective consent for the purposes of Articles 6(1)(a) and 7 GDPR, given Facebook's dominant position and the fact that the provision of the service of facebook.com is made subject to this condition.[25]

As to the applicability of Article 102 TFEU, paragraph 914 of the Facebook Decision acknowledges that, pursuant to Article 3(1), second sentence, of Regulation 1/2003, Article 102 TFEU must also be applied when national competition law is applied to abuses prohibited by Article 102 TFEU, and that according to Article 102(2)(a) TFEU an abuse can also consist in the direct or indirect imposition of unfair purchase or selling prices or other unfair trading conditions. However, according to the Facebook Decision, the *VBL Gegenwert* case-law of the German courts, according to which, when assessing the existence of abuse

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22 Judgment of 24 January 2017, KZR 47/14, *VBL Gegenwert II*.

23 Regulation (EU) 2016/679 of the European Parliament and 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.

24 In line with Opinion 06/2014 of the Article 29 Data Protection Working Party of 9 April 2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC.

25 According to Article 7(4) GDPR, "[w]hen 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 the contract". See also Article 29 Data Protection Working Party Guidelines on consent under Regulation 2016/679 (revised 10 April 2018).

under Section 19(1) GWB, account must be taken of fundamental rights and secondary legislation, has not yet found equivalent expression in the EU case-law and decisional practice, and, for this reason, the Facebook Decision is based on Section 19(1) GWB and the corresponding case-law. According to Article 3(2), second sentence, of Regulation 1/2003, Member States are not precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.[26]

In the "Frequently Asked Questions" accompanying the Press Release following the adoption of the Facebook Decision,[27] the question "Is European competition law also applicable in this case?" is answered as follows:

"*In such proceedings the application of European abuse control provisions is always an issue. Such an abuse control proceeding against Facebook would generally also be possible under the relevant norm of Article 102 TFEU. So far, however, only the case-law of the highest German court has been established which can take into account constitutional or other legal principles (in this case data protection) in assessing abusive practices of a dominant company. However, due to the cross-border dimension of this case, the Bundeskartellamt closely liaised with the European Commission and other competition authorities in the course of the proceeding.*"

Speaking in Brussels on 17 April 2019, Andreas Mundt, the President of the Bundeskartellamt, expressed the view that the Facebook Decision could easily be replicated under EU competition law, German competition law being practically identical to EU competition law.[28]

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[26] In the German original: "Nach Art. 3 Abs. 1 S. 2 VO 1/2003 ist im Fall, dass einzelstaatliches Wettbewerbsrecht auf nach Art. 102 AEUV verbotene Missbräuche angewendet wird, auch Art. 102 AEUV anzuwenden. Zwar kann nach dem Katalogtatbestand des Art. 102 Satz 2 lit. a AEUV ein Missbrauch auch in der unmittelbaren oder mittelbaren Erzwingung von unangemessenen Einkaufs- oder Verkaufspreisen oder sonstigen Geschäftsbedingungen bestehen. Die Prüfung hat jedoch gezeigt, dass das von der deutschen Rechtsprechung zur Generalklausel des § 19 Abs. 1 GWB entwickelte Schutzkonzept, das sich zur Feststellung der Missbräuchlichkeit maßgeblich auf grundrechtliche oder einfachgesetzliche Wertentscheidungen bezieht, in der europäischen Rechtsprechung und Anwendungspraxis bisher keine Entsprechung gefunden hat. Die beabsichtigte Untersagung wird daher auf § 19 Abs. 1 GWB i.V.m. der hierzu ergangenen innerstaatlichen Rechtsprechung gestützt. Den Mitgliedstaaten ist es nach Art. 3 Abs. 2 S. 2 VO 1/2003 nicht verwehrt, in ihrem Hoheitsgebiet strengere innerstaatliche Vorschriften zur Unterbindung oder Ahndung einseitiger Handlungen von Unternehmen zu erlassen oder anzuwenden."

[27] As note 20 above.

[28] Global Competition Law Centre (GCLC) 108th Lunch Talk (17 April 2019), reported by MLex, "Facebook's antitrust order in Germany 'easily' replicated in EU law, Mundt says" (17 April 2019). President Mundt referred on this point also to the statement by Professor von Danwitz at the 19th International Conference on Competition (IKK) in Berlin on 15 March 2019; see note 29 below.

III. THE QUESTION OF THE APPLICABILITY OF ARTICLE 102 TFEU

It could indeed be argued that conduct such as that at issue in the Facebook Decision also falls under Article 102 TFEU.[29]

Like Section 19(1) GWB, on which the Facebook Decision is based, Article 102 TFEU prohibits abuse of a dominant position. However, Article 102 TFEU additionally requires that the dominant position must be held in the whole or a substantial part of the EU internal market and that the abuse may affect trade between EU Member States.

As to the first of these conditions, the Bundeskartellamt finds that Facebook has a dominant position on the German market for social networks for private use. Germany being the largest EU Member State, there can be little doubt that this market constitutes a substantial part of the EU internal market.[30] While the Bundeskartellamt did not make any finding in this respect, it is also plausible that Facebook could be found to be dominant throughout the whole EU.

As to the potential effect of the abuse on trade between EU Member States, the Facebook Decision mentions that the facebook.com services are provided in Germany by Facebook Ireland Ltd., whereas most of the smaller competitors are based in Germany.[31] The exclusionary effect of Facebook's conduct vis-à-vis competing private social network providers, as found by the Bundeskartellamt, thus appears capable of influencing the pattern of trade between Member States.[32] Moreover, while this was not examined by the Bundeskartellamt, there might be smaller social network providers active in Member States other than Germany whose potential entrance into the German market Facebook's conduct, as found by the Bundeskartellamt, would be capable of affecting negatively.

The concept of dominance in Section 19(1) GWB and in Article 102 TFEU being in essence identical, there appears to be no reason why the finding of dominance made by the Bundeskartellamt under Section 19(1) GWB could not have equally been made under Article 102 TFEU.

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29 See also T. von Danwitz, 'Privacy and competition law', Statement for the 19th IKK International Conference on Competition (Berlin, 15 March 2019), reported by MLex, 'Privacy-abusing tech companies could attract EU antitrust enforcement, judge warns' (15 March 2019).

30 Indeed, each Member State is likely to be considered to be a substantial part of the EU; see R. Whish and D. Bailey, *Competition Law* (9th edition, Oxford 2018) at 196.

31 Facebook Decision, as note 20 above, paragraphs 3, 187, 197, 199, 207, 268 to 271 and 392.

32 Patterns of trade are also affected when the abuse causes an increase in trade; see Judgments of 13 July 1966, *Consten and Grundig* v *Commission*, 56/64 and 58/64, EU:C:1966:41, p. 341; and of 23 November 2006, *Asnef-Equifax and Administración del Estado*, C-238/05, paragraph 38. See also European Commission, Guidelines on the effect on trade concept in Articles 81 and 82 of the Treaty, [2004] OJ C101/81, paragraph 34.

As for the concept of abuse, it is true that there is no judgment of the EU Courts or decision of the European Commission concerning Article 102 TFEU that is identical to the *VBL Gegenwert* judgment of the German Federal Court of Justice concerning Section 19(1) GWB.[33] However, according to Article 1(3) of Regulation 1/2003, "[t]he abuse of a dominant position referred to in [Article 102 TFEU] shall be prohibited, no prior decision to that effect being required".

The second sentence of Article 102 TFEU expressly provides that "abuse may, in particular consist in (a) directly or indirectly imposing unfair purchase or selling prices or other unfair conditions".

It would thus seem that Article 102 TFEU could also cover the imposition of unfair conditions in relation to access to personal data. This would appear all the more true in a market such as that for private social networks, where services like that of facebook.com are offered ostensibly for "free" to users, while in economic reality the "purchase price" of those services is the personal data that users must make available in order to use the services offered.[34]

As has also been pointed out by Professor von Danwitz,[35] according to the case-law of the EU Court of Justice, the application of EU competition law always needs to take into account the legal context of a practice,[36] and non-compliance with other branches of the law can be a relevant factor.[37]

Article 7 TFEU provides that the EU is to "ensure consistency between its policies and activities, taking all of its objectives into account". According to Article 6(1) of the Treaty on European Union (TEU), the Charter of Fundamental Rights of the European Union has "the same legal value as the Treaties". Article 8 of the Charter provides that "[e]veryone has the right to the protection of personal data concerning him or her" and that such data "must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law". The General Data Protection

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33 See text accompanied by note 22 above.

34 See also Article 3(1) and recital 24 of 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, [2019] OJ L136/1, which equates the provision of personal data by a consumer to obtain digital content or a digital service with the payment of a price.

35 As note 29 above.

36 Judgments of 26 September 2018, *Infineon Technologies* v *Commission*, C-99/17 P, EU:C:2018:773, paragraph 156 and the case-law cited, and of 10 December 1991, *Merci Convenzionali Porto di Genova*, C-179/90, EU:C:1991:464, paragraphs 3, 4 and 17 to 20.

37 Judgment of 14 March 2013, *Allianz Hungária*, C-32/11, EU:C:2013:160, paragraphs 46 and 47. See however also Judgment of 6 December 2012, *AstraZeneca* v *Commission*, C-457/10 P, EU:C:2012:770, paragraph 132.

Regulation (GDPR) sets out in detail the rights of data subjects and the obligations of those who process and determine the processing of personal data.[38]

As has also been pointed out by Professor von Danwitz,[39] the case-law of the EU Court of Justice shows that the "fairness" of trading conditions within the meaning of Article 102(a) TFEU can be assessed by using the principles of necessity, proportionality and transparency as relevant benchmarks.[40] These are also core principles of data protection law.[41]

It would thus appear possible also under Article 102 TFEU to use the principles of the General Data Protection Regulation (GDPR) as a benchmark for the assessment of the unfairness of trading conditions and hence the existence of an abuse.

Of course, this in no way means that any infringement of data protection law automatically constitutes an infringement of EU competition law. Indeed, the EU Court of Justice has stated in *Asnef Equifax* that privacy issues are not as such competition law issues.[42] As has been pointed out by Professor von Danwitz,[43] it is thus necessary to examine individually, according to the specific circumstances of the case at hand, whether conduct caught under the privacy rules may amount to an anticompetitive practice.

In the Facebook Decision, the Bundeskartellamt conducts such an examination. In doing so, it finds not only that Facebook's terms of service constitute exploitative business terms to the detriment of consumers, but also that Facebook's conduct impedes competitors in that it gives Facebook access to a large number of further data sources, thus giving Facebook a further competitive edge over its competitors and reinforcing market entry barriers, which in turn strengthen Facebook's market power vis-à-vis consumers. The Facebook decision thus goes well beyond a mere 'recycling' of a finding of infringement of data protection law.[44]

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38 As note 23 above, Article 1(1) and recital 11.

39 As note 29 above.

40 Judgments of 21 March 1974, *BRT and SABAM*, 127/73, EU:C:1974:25, of 16 July 2009, *Der Grüne Punkt – Duales System Deutschland* v *Commission*, C-385/07 P, EU:C:2009:456, paragraph 142, and of 6 December 2012, *AstraZeneca* v *Commission*, C-457/10 P, EU:C:2012:770, paragraph 93.

41 See Articles 5 and 6 GDPR; see also H. Kalimo.and K. Majcher, 'The concept of fairness: linking EU competition and data protection law in the digital marketplace' (2017) *European Law Review* 210 at 213; G. Schneider, 'Testing Art. 102 TFEU in the Digital Marketplace: Insights from the *Bundeskartellamt*'s investigation against Facebook' (2018) 9 *Journal of European Competition Law & Practice* 213 at 223; and I. Graef, D. Clifford and P. Valcke, 'Fairness and enforcement: bridging competition, data protection, and consumer law' (2018) 8 *International Data Privacy Law* 200.

42 Judgment of 23 November 2006, *Asnef Equifax and Administración des Estado*, C-238/05, EU:C:2006:734, paragraph 63.

43 As note 29 above.

44 Compare with Judgments of the EU General Court of 10 March 1992, *SIV* v *Commission*, T-68/89, EU:T:1992:38, paragraph 360 and of 23 October 2003, *Van den Bergh Foods* v *Commission*, T-65/98, EU:T:2003:281, paragraph 162.

The applicability of Article 102 TFEU to conduct such as that found in the Facebook Decision could thus not be denied either on the ground that there would be an insufficient link between the conduct and the dominant position.[45] Indeed, the Facebook Decision shows a double link: *first*, Facebook's dominance is relevant for both the interest balancing and the effectiveness of the consent under data protection principles and thus for the assessment of the unfairness of the terms of use, and *second*, Facebook's conduct has an exclusionary effect vis-à-vis competitors, reinforcing Facebook's dominant position vis-à-vis consumers.

The conclusion of the above is that conduct such as that found in the Facebook Decision of the Bundeskartellamt arguably also falls under Article 102 TFEU. If the applicability of Article 102 TFEU were to be confirmed, it would follow that the Bundeskartellamt has infringed Article 3(1), second sentence, of Regulation 1/2003 by not also applying Article 102 TFEU in its Facebook Decision.[46]

IV. THE DISTINCT QUESTION OF OPTIMAL CASE SELECTION

Beyond the legal question of the applicability of Article 102 TFEU to the conduct at issue in the Facebook Decision of the Bundeskartellamt, a different question is whether, as a matter of policy, it is desirable or appropriate that the European Commission and/or the competition authorities of the EU Member States take up cases such as the Facebook case taken up by the Bundeskartellamt.

Following the adoption of the Facebook Decision by the Bundeskartellamt, a member of the European Parliament asked the European Commission whether it "consider[s] it desirable to convert the decision of the German Federal Cartel Office into a European standard in order to further strengthen the position of consumers".[47] Commissioner Vestager responded on behalf of the European Commission that the Commission "took note of the decision of the German Federal Cartel Office. The German Federal Cartel Office's concerns are based on German competition law. The European legislator has made sure that the type of conduct in question is addressed by the General Data Protection Regulation (Regulation (EU) 2016/679)".[48]

This appears to express the view that conduct such as that found by the Bundeskartellamt in the Facebook Decision should be addressed by the data protection supervisory authorities empowered by the EU General Data Protection Regulation rather than by the European

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45 On this requirement, see Judgment of the EU Court of Justice of 13 February 1979, *Hoffmann-La Roche* v *Commission*, 85/76, EU:C:1979:36, paragraph 91, and P. Vogelsang, 'Abuse of a Dominant Position in Article 86: The Problem of Causality and Some Applications' (1976) 13 *Common Market Law Review* 61.

46 As to the possible consequences of such an infringement, see text accompanied by notes 58 to 66 below.

47 Question for written answer P-001183/2019 by Ms Ruohanen-Lerner.

48 Answer given by Ms Vestager on behalf of the European Commission to Question P-001183/2019 (8 May 2019).

Commission and the competition authorities of the EU Member States applying EU competition law.

According to the case-law of the EU Court of Justice, the European Commission has a broad discretion to select the cases that it deals with under Articles 101 and 102 TFEU.[49] Article 4(5) of the 'ECN+' Directive 2019/1 ensures that the competition authorities of the EU Member States have a similar discretion to set their enforcement priorities.[50]

In setting enforcement priorities, the fact that another authority is also capable of dealing with the issue, and may indeed be better placed to do so, is obviously a highly relevant consideration.[51]

Under the EU General Data Protection Regulation (GDPR),[52] which entered into application on 25 May 2018,[53] each EU Member State has an independent data protection supervisory authority responsible for monitoring the application of the GDPR, and empowered to investigate possible infringements, order their termination and impose fines up to 4% of the undertaking's annual turnover.[54]

Pursuant to Article 56 GDPR, the supervisory authority of the Member State of the main establishment of the company concerned is competent to act as lead supervisory authority for

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49 Judgments of 14 December 2000, *Masterfoods*, C-344/98, EU:C:2000:689, paragraph 46, of 4 March 1999, *Ufex and Others* v *Commission*, C-119/97 P, EU:C:1999:116, paragraphs 88 and 89, and of 17 May 2001, *IECC* v *Commission*, C-449/98 P, EU:C:2001:275, paragraphs 35 to 37; see further my paper 'Discretion and Prioritisation in Public Antitrust Enforcement, in Particular EU Antitrust Enforcement' (2011) 34 *World Competition* 353, also accessible at http://ssrn.com/author=456087.

50 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, [2019] OJ L11/3; see further my papers 'Independence of Competition Authorities: The Example of the EU and its Member States' (2019) 42 *World Competition* 149, text accompanied by footnotes 85 to 97, and 'Competition authorities: Towards more independence and prioritisation? The European Commission's 'ECN+' Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers', *Concurrences* N°4-2017, pp.60-80, both also accessible at http://ssrn.com/author=456087, and L. Idot, 'Reform of Regulation 1/2003: Power to set priorities', *Concurrences* N° 3-2015, 51.

51 See, on the possibility for the European Commission to reject a complaint because the case can be dealt with by a national court, Judgment of 18 September 1992, *Automec* v *Commission*, T-24/90, EU:T:1992:97, paragraphs 88 to 96, and European Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, [2004] C 101/65, paragraphs 17 and 44, and, on the possibility for the European Commission or a national competition authority to reject a complaint because another competition authority is dealing with the case, Article 13 of Regulation 1/2003 and Judgment of 21 January 2015, *EasyJet* v *Commission*, T-355/13, EU:T:2015:36.

52 As note 23 above.

53 Article 99(2) GDPR.

54 Articles 51(1), 58 and 83 GDPR.

the cross-border data processing by that company. In the case of Facebook, this is the Irish Data Protection Commission.[55]

If the Irish Data Protection Commission had taken up a case against Facebook instead of the Bundeskartellamt, it might have adopted a decision ordering the termination of Facebook's conduct throughout the European Union, whereas the Bundeskartellamt's decision only covers the German territory. This would obviously have been preferable. The fact remains however that the Irish Data Protection Commission has not, so far at least, taken up a case against Facebook in respect of the conduct at issue in the Facebook Decision.[56] Also, the Bundeskartellamt has indicated that it "closely cooperated with data protection authorities in this case which explicitly supported the authority's proceeding".[57]

V. LEGAL CONSEQUENCES OF THE NON-RESPECT OF ARTICLE 3 OF REGULATION 1/2003

The question arises what the legal consequences are of the non-respect by a national competition authority of the obligations set out in Article 3 of Regulation 1/2003.

It has been argued in the literature that "decisions adopted in breach of the obligations contained in Article 3 are invalid and unenforceable".[58]

Such a remedy may indeed be suitable to enforce respect for the rule in Article 3(2), first sentence, of Regulation 1/2003, which precludes the prohibition under national competition law of agreements, decisions of associations of undertakings and concerted practices that fall within the scope of Article 101(1) TFEU but are not prohibited by Article 101 TFEU. If a national competition authority breaches this rule, the undertakings whose agreement has been prohibited will have the ability and the incentive to challenge the decision of the national competition authority and to raise before the national review court the non-respect of Article 3(2), first sentence, of Regulation 1/2003. The national review court can then assess, possibly

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55 See text accompanied by note 31 above.

56 A recent Transatlantic Politico Investigation (N. Vinocur, 'One Country Blocks the World on Data Privacy – Millions of Americans rely on Europe's tough new privacy rules to safeguard their data, but the law's chief enforcer – Ireland – is in bed with the companies it regulates' (24 April 2019), accessible at https://www.politico.eu/interactive/ireland-blocks-the-world-on-data-privacy) argues that there might be a structural weakness in the GDPR lead supervisory authority system, given Member States' possible incentives to attract international companies through lax regulatory enforcement. In contrast, the system of parallel competence of the European Commission and the competition authorities of the EU Member States under Regulation 1/2003 does not suffer from a similar weakness; see further my book *Principles of European Antitrust Enforcement* (Hart 2005), sections 1.1.4.3.4 and 1.2.8.

57 Frequently Asked Question (7 February 2019), as note 20 above, at 7.

58 Faull & Nikpay, *The EU Law of Competition* (3rd edition, Oxford 2014), at 107.

with assistance from the EU Court of Justice pursuant to Article 267 TFEU or from the European Commission pursuant to Article 15(1) of Regulation 1/2003, whether the agreement indeed falls within the scope of Article 101 TFEU and is not prohibited by it, and, in case of a positive conclusion, annul the decision of the national competition authority. Such an outcome would be fully in line with the purpose of Article 3(2), first sentence, of Regulation 1/2003.[59]

Such a remedy would however appear neither workable nor desirable in a case like that of the Facebook Decision of the Bundeskartellamt, where, as advanced above,[60] Article 3(1), second sentence, of Regulation 1/2003 has arguably not been respected by the national competition authority. In such a case, the undertaking whose behaviour has been found to violate national competition law will have no incentive to request the national review court to make a finding that its behaviour in addition also violates Article 102 TFEU. An annulment of the decision of the national competition authority on this ground by the national review court would also not appear satisfactory in the light of the purpose of Article 3(1), second sentence, of Regulation 1/2003. The purpose of this provision is not to prevent national competition authorities to apply their national competition law to conduct prohibited by Article 102 TFEU, but to ensure that the prohibition is also based on Article 102 TFEU.[61]

Another possibility would be for the European Commission to bring proceedings pursuant to Article 258 TFEU against the Member State whose competition authority has not respected Article 3(1), second sentence, of Regulation 1/2003, with a view to obtain a judgment by the EU Court of Justice that the Member State has failed in its obligations under EU law. While it is not common for the European Commission to bring such proceedings for a single failure by an independent authority of a Member State,[62] the legal possibility exists.[63] Such proceedings would however not directly affect the decision of the national competition authority, which would continue to be based only on national competition law. In the case of the Facebook Decision of the Bundeskartellamt, it is most unlikely that the European Commission would bring such proceedings, given that, as mentioned above,[64] it appears to consider that conduct such as that apprehended by the Facebook Decision of the Bundeskartellamt should be dealt with by data protection supervisory authorities rather than by competition authorities.

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59 See text accompanied by notes 10 and 11 above.

60 See text accompanied by notes 23 to 46 above.

61 See text accompanied by note 7 above.

62 On the independence of national competition authorities, see Article 4 of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, [2019] OJ L11/3, and my paper 'Independence of Competition Authorities: The Example of the EU and its Member States' (2019) 42 *World Competition* 149, also accessible at http://ssrn.com/author=456087.

63 See Judgment of 4 October 2018, *European Commission* v *French Republic*, C-416/17, EU:C:2018:811.

64 See (text accompanied by) note 48 above.

In my view, the best remedy lies in the direct application of Article 3(1), second sentence, of Regulation 1/2003 by the national court reviewing the decision of the national competition authority. Indeed, the addressees of decisions of national competition authorities finding a violation of national competition law often appeal against such decisions before the competent national review courts. In the case of the Facebook Decision of the Bundeskartellamt, an appeal is indeed pending before the Düsseldorf Higher Regional Court (Oberlandesgericht Düsseldorf).[65] As is clear from the text of Article 3 of Regulation 1/2003, the obligations contained in it apply not only to national competition authorities but also to national courts. In cases where national courts are reviewing a decision of a national competition authority that applies only national competition law to conduct that is also prohibited by Article 102 TFEU, those courts should thus, on their own motion, and possibly with assistance from the EU Court of Justice pursuant to Article 267 TFEU or from the European Commission pursuant to Article 15(1) of Regulation 1/2003, also apply Article 102 TFEU. In this way the primary purpose of Article 3(1), second sentence, of Regulation 1/2003 is served, in that in the end not only national competition law but also Article 102 TFEU is applied.[66]

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65 See Bundeskartellamt, Press release (7 February 2019), as note 20 above.

66 As mentioned above (text accompanied by notes 7 to 9), the secondary purpose of Article 3(1), second sentence, of Regulation 1/2003, as apparent from recital 8 and the legislative history of Regulation 1/2003, is that the cooperation mechanisms set out in Regulation 1/2003 are applied. In the case of the Facebook Decision, this aspect does not appear to pose problems, as it appears that "due to the cross-border dimension of this case, the Bundeskartellamt closely liaised with the European Commission and other competition authorities in the course of the proceeding" (Frequently Asked Question (7 February 2019), as note 20 above, at 6). In any event, the use by the national review court of Article 267 TFEU and Article 15(1) of Regulation 1/2003 could further remedy any deficiencies in this respect.