INCORPORATION OF PRIVACY CONSIDERATIONS INTO THE EU MERGER CONTROL REGIME

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ABSTRACT

In today's world, where personal data is used extensively, there is a dual dynamic at play: on the one hand, while a personal data protection system is being established with regulations such as General Data Protection Regulation, which has a worldwide impact, and national regulations in the harmonization process, on the other hand, the emerging developments reveal that the concept of big data cannot be confined only to personal data legislation. Factors such as privacy concerns beyond individual rights, rapid technological developments, the fact that more and more data of individuals are processed with digitalization, and their impact on market dynamics -including the creation of dominant position or strengthen the current situation- are pushing big data into another realm, which is competition law, notably merger control.

This master thesis explores the consideration of privacy within the merger control regime. It suggests that privacy can be seen as a quality factor, but at the same time acknowledges the difficulty of quantifying privacy. Despite this challenge, it argues that being difficult to measure is not a reason to avoid privacy as a quality factor. Additionally, the thesis introduces consumer choice as another theory of harm related to privacy. Regarding the integration of privacy into merger assessments, it underlines that merger policies leave room for including both consumer welfare and privacy goals within the competition domain.

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LIST OF ABBREVIATIONS

CJEU	The Court of Justice of the European Union
EEA	European Economic Area
EU	European Union
EUMR	Council Regulation No 139/2004 of 20 January 2004 on the control of concentration between undertakings
GDPR	Regulation (EU) 2016/79 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
Non-Horizontal Merger Guidelines	Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings
OECD	The Organization for Economic Co-operation and Development
PSN	Professional social network
SIEC	Significant impediment of effective competition
SSNIP	Small but Significant and Non-Transitory Increase in Price
SSNQ	Small but Significant and Non-Transitory Decrease in Quality
TEU	Treaty on European Union

1. INTRODUCTION

Collecting and processing of data has become a new source of power in the era of digitalization. Nowadays, almost every business transaction, from the most insignificant to the most extensive one, involves disclosure, collection, process, and transfer of data. In response, companies have reshaped their business models to maximize the benefits of data.[1] New business models allow companies to use data to improve their services or to create targeted advertisements by learning about customer trends, and to grow their businesses and strengthen market position.[2] With the realization of this potential, the importance attributed to data has spread to many areas of law, including competition law. In this regard, data-driven mergers[3] are considered as one of the most effective ways to rapidly obtain market power in digital the realm.[4]

Mergers are subject to rigorous scrutiny by the European Commission as they may impact the market dynamics and disrupt competition. Nevertheless, the long-established approach of the European Commission is to review merger cases based on economic consequences.[5] This examination method, however, no longer meets the current needs. Since data now functions as a strategic asset[6], data should be taken into account when determining whether market competition is altered as a result of a merger transaction. Especially when large companies gain market power

[1] Maurice E Stucke, 'No Mistake About It: The Important Role of Antitrust in the Era of Big Data' 3.
[2] Kalpana Tyagi, 'Big Data Mergers: Bridging the Gap for an Effective Merger Control Framework' 30.
[3] For the purposes of this research, the term 'data-driven merger' is used to refer to mergers involving the transfer of data.
[4] Viktoria HSE Robertson, 'Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data' (24 June 2019) 8 <https://papers.ssrn.com/abstract=3408971> accessed 26 January 2024; 'Privacy and Competitiveness in the Age of Big Data | European Data Protection Supervisor' (25 March 2024) 28 <https://www.edps.europa.eu/data-protection/our-work/publications/opinions/privacy-and-competitiveness-age-big-data_en> accessed 26 March 2024.
[5] Maria C Wasastjerna, 'The Role of Big Data and Digital Privacy in Merger Review*' (2018) 14 European Competition Journal 417, 420.
[6] Margrethe Vestager, 'Big Data and Competition', *European Commission* (2016) <https://wayback.archive-it.org/12090/20191129204050/https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-big-data-world_en> accessed 26 March 2024.

with mergers involving data transfers, there is a risk that they may lower the privacy standards of consumers.[7]

Currently, the regulatory framework addressing privacy concerns in data-driven mergers remains underdeveloped, and practical ambiguity prevails regarding the privacy considerations within merger control assessments. Within this context, this study aims to contribute valuable insights into the evolving landscape of competition law in the digital age while probing whether privacy concerns should be regarded as an anticompetitive factor in the merger control assessment.

The master's thesis first addresses the emerging significance of data in digital markets, while outlining characteristics of big data and highlighting the impacts of big data on market competition. The subsequent chapter discusses the role of data in merger control assessment, emphasizing its impact on market power and consumer welfare separately. This chapter stresses the opposing positive and negative effects of data on competition and underlines the necessity of considering data as a parameter in merger control assessments. The third chapter of this research focuses on distortion of competition in terms of degradation of privacy due to data-driven merger transactions and demonstrates how privacy can be a competition law dilemma. The first subchapter aims to illustrate the possible ways to incorporate privacy into merger control analysis, with an overview of theories of harm related to privacy and the European Commission's current approach with reference to a number of landmark cases. The second subchapter discusses an alternative path, which is to consider privacy as a fundamental right and the mergers to be evaluated according to their impact on the right to privacy, and the last subchapter touches upon the challenges of measuring privacy. The master's thesis concluded with the finding that privacy considerations should be integrated into the EU merger control framework.

[7] Christophe Carugati, 'The Antitrust Privacy Dilemma' (22 November 2021) 168 <https://papers.ssrn.com/abstract=3968829> accessed 26 March 2024.

2. POWER OF DATA IN DIGITAL MARKETS

The new high-tech world has created the 'data=money' equation. That outcome was an inevitable consequence of the vast amount of data being generated and the emergence of methods to monetize it.[8] Accordingly, big players on the digital market, such as Google, Facebook, and Microsoft, began to expand their empires through expensive data-driven mergers. Such mergers at some point caught the attention of the EU Commission, which observed that large amounts of data gave firms a distinct competitive advantage.[9] In order to understand the position and impact of data in competition law, the definition of big data and the related competition concerns should be addressed.

2.1. Big Data

The definition of 'big data' concept is not yet a uniform one. Big data can be defined as economically derivation of value from large amount of diverse data.[10] In the light of this definition, it is commonly held that 'big' does not stand for the magnitude of the data, instead there are other decisive factors involved.[11] In the meeting that Competition Committee held on November 2016, those factors explained as large volume, velocity, variety, and value.[12]

i. *Volume:* Volume of data implies scale of data, and it is one of the most significant and founding elements of big data, since the concept of big data involves analysis of

[8] Marixenia Davilla, 'Is Big Data a Different Kind of Animal? The Treatment of Big Data Under the EU Competition Rules' (2017) 8 Journal of European Competition Law & Practice 370, 371.
[9] Christophe Samuel Hutchinson, 'Incorporating Privacy Considerations into EU Data-Driven Merger Review' European Competition Journal 1, 5.
[10] Han Hu and others, 'Toward Scalable Systems for Big Data Analytics: A Technology Tutorial' (2014) 2 IEEE Access 652, 654; David Reinsel John Gantz, 'Extracting Value from Chaos - EMC' [2011] IDC iView 12.
[11] Viktória Bosáková, 'Big Data a Kontrola Spojování Podniků v EU' 7.
[12] OECD, 'Big Data: Bringing Competition Policy to the Digital Era - OECD' (2016) <https://www.oecd.org/competition/big-data-bringing-competition-policy-to-the-digital-era.htm> accessed 27 March 2024.

extensive volume of data.[13] 328.77 million terabytes[14] of data are generated every day and this amount is expected to increase each year.[15] The great amount of data holds immense appeal for businesses, each trying to extract profitable opportunities from it. Indeed, as the volume of generated data continues to grow, so too does the consequential business advantages it provides to companies. On the other hand, the generation of that vast amount of data also makes it difficult to handle it.

ii. *Velocity:* Velocity refers to the pace of data generation, process, storage, and analysis.[16] Velocity also stands for the speed of data flow from one point to another.[17] Analysis and process of data have to be parallel to the speed of data generation to escalate the value of data.[18] When this parallelism achieved, companies can increase their profits by extracting high value big data. Especially when a business is related to real-time data streaming, such data stream processing can offer several benefits for business in almost any industry. For instance, real-time data streams can give an insight into customers' preferences on a social media platform and accordingly, companies can make accurate and faster business decisions with lower costs.

iii. *Variety:* The many different forms of data collected signifies the variety of data. Big data can stem from different origins and be in various formats.[19] Data can be in a structured, semi-structured or unstructured form. Data can also come from many

[13] Aaqib Javeed, 'Big Data and Emerging Competition Concerns' (14 July 2021) 3 <https://papers.ssrn.com/abstract=3884350> accessed 28 March 2024.
[14] For the reference, one terabyte roughly incapsulates 6.5 million document pages.
[15] 'Data Growth Worldwide 2010-2025' (*Statista*) <https://www.statista.com/statistics/871513/worldwide-data-created/> accessed 28 March 2024.
[16] Ishwarappa and J Anuradha, 'A Brief Introduction on Big Data 5Vs Characteristics and Hadoop Technology' (2015) 48 Procedia Computer Science 319, 320.
[17] Javeed (n 13) 3.
[18] Hu and others (n 10) 654.
[19] Javeed (n 13) 4.

sources, for example, IoT (Internet of Things) devices collecting data from the physical environment, social media platforms providing user-generated data, and health records providing biometric data. This diversity can benefit companies, but it can also pose a number of obstacles. On the one hand, different types of data can enable companies to follow accurate business policies, but on the other hand, it can be more complicated to manage this data as different types of data will be subjected to different processing cycles.[20]

iv. *Value:* The value of big data relates to the benefits and insights that businesses can achieve by analyzing large and various datasets. It is considered as the most critical dimension of big data, because data becomes futile for companies if it cannot be monetized.[21] Companies can turn big data into currency by analyzing it with appropriate methods. Gaining competitive advantage in the industry by way of leveraging remarkable market insights and keeping track of competitors' activities or identifying and implementing emerging trends to their businesses is one of the ways to monetize data.

2.2. Competition Law Concerns Related to Big Data

Big data is a resource for businesses to gain certain competitive advantages. The competitive advantages hinge on the companies' capability to effectively use big data to make informed decisions, innovate and adapt to changing market dynamics. Whilst customers might benefit from the competitive advantage that big data provides (e.g., enhanced customer experiences via

[20] Peter Géczy, 'Big Data Characteristics' (2014) 3 The Macrotheme Review 94, 98.
[21] Ishwarappa and Anuradha (n 16) 321.

personalized services), it can also lead to anti-competitive outcomes.[22] These anti-competitive effects can be derived from mergers and acquisitions, exclusionary conducts, price discrimination or privacy degradation.[23]

2.2.1. Mergers and Acquisitions

Mergers and acquisitions are a suitable vehicle for obtaining large amounts of data, however data-driven mergers may lead to a divergence of data access in markets and increase the data concentration in the market. As the EU Commission has already pointed out, these data-driven mergers have a variety of ways of restricting competition.[24]

Accordingly, anti-competitive effects of data-driven mergers should be addressed from the horizontal, vertical, and conglomerate mergers perspectives separately. Horizontal mergers occur when the merger is between direct competitors operating in the same product and geographic market.[25] Therefore, this type of mergers has the potential to cause the greatest harm to competition. Horizontal mergers between data-rich companies may result in increased market power for the merged company by pooling valuable datasets together and reducing competition in the market. Moreover, if there is no other way to access the information derived from the combined datasets of the merging companies, it is inevitable that companies holding such unique datasets would gain a competitive advantage over their competitors.[26] This may cause higher prices, a decrease in overall consumer welfare, and lessened innovation.

[22] Bruno Lasserre and Andreas Mundt, 'Competition Law and Big Data: The Enforcers' View' (2017) 4 Rivista Italiana di Antitrust / Italian Antitrust Review 90 <https://doi.org/10.12870/iar-12607> accessed 2 April 2024.
[23] However, for the purpose of this thesis only mergers and acquisition and privacy degradation shall be addressed within competition concerns related to big data.
[24] Bundeskartellamt and Autorité de la Concurrence, 'Competition Law and Data' (Bundeskartellamt 2016) 16 <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.html>.
[25] Richard Whish and David Bailey, *Competition Law* (Eighth Edition, Oxford University Press 2015) 854.
[26] Jay Modrall, 'A Closer Look at Competition Law and Data' (2017) 13 Competition Law International 31, 39.

Unlike horizontal mergers, vertical merger is when one company merges with another company that operates at different levels of the market, but exists in the same supply chain, i.e., both companies operate for the same final product.[27] Vertical mergers have the potential to enhance innovation in the market but there is a risk that they may pose a threat to competition because of the foreclosure effects. For instance, vertical mergers between two companies that already have strong market positions in separate upstream and downstream markets may result in foreclosure of these markets for new entrants.[28] Furthermore, by virtue of vertical mergers involving data, personalized pricing may be engaged by the merged company and thus maximizing their profits extracting through consumer data.[29] Such price discrimination may increase the potential harm on consumers and distort competition in downstream markets by causing a reduction in consumer choice. Because in digital markets, consumers may not be able to realize that the prices offered to them while online shopping are different from the prices offered to other consumers, and that they have been exposed to personalized prices.[30]

Conglomerate merger is a merger between companies that are involved in unrelated business activities, therefore not competitors. However, conglomerate mergers can still raise competition concerns, especially because of exclusionary conducts. Restriction of competition is likely to occur when merged companies conclude exclusive agreements to restrict competitors' access to data or reduce competitors' ability to acquire similar data by making it complicated for consumers to adopt their technologies.[31] Additionally, bundling or tying arrangements to maintain market power is another way to alter competition in the market via conglomerate mergers.[32] For example, when

[27] Richard Whish and David Bailey (n 25) 854.
[28] Bundeskartellamt and Autorité de la Concurrence (n 24) 16.
[29] OECD, 'Executive Summary of the Roundtable on Price Discrimination' (2018) 5 <https://www.oecd.org/competition/price-discrimination.htm>.
[30] ibid.
[31] Bundeskartellamt and Autorité de la Concurrence (n 24) 19.
[32] Non-Horizontal Merger Guidelines 2008 [C 265] para 93.

merged company acquires valuable datasets, it may link access to that dataset to the use of its own data analytics services to enhance its market strength in another market in an anticompetitive manner.[33]

Overall, data-driven mergers can have anticompetitive effects across different types of mergers, including horizontal, vertical, and conglomerate mergers.

2.2.2. Privacy Concerns

From a very elemental perspective, privacy concerns are mainly subject to data protection scrutiny. Yet, privacy considerations may be evaluated under the competition law framework, especially when privacy policies adopted by a dominant undertaking relies on data as a key component in its offerings. Such scenarios may reveal a significant interconnection between the market dominance of the undertaking, data collection analytics, and competitive dynamics within the market.[34]

When a data-driven merger occurs, it can strengthen acquiring companies' market position through the flow of data. The undertaking that gains dominant position by obtaining data in this way could lower privacy standards towards its customers. In other words, analyzing privacy concerns solely in the context of data protection may represent a narrow perspective, as privacy degradation could also distort competition in the market.[35] The role of privacy within the EU merger control regime will be discussed in detail hereafter.

[33] Bundeskartellamt and Autorité de la Concurrence (n 24) 20.
[34] ibid 23–24.
[35] Hutchinson (n 9) 6.

3. THE ROLE OF DATA IN MERGER CONTROL ASSESSEMENT

3.1. General

The merger control regime within the EU is designed to maintain competition in the market by preventing mergers that could create a dominant position and thereby disbar consumers from the advantages of effective competition.[36] An undertaking is not prohibited from having a dominant position under the competition law framework; however, it is forbidden to abuse this dominance.[37] Merger control provides an ex-ante examination to circumvent abuse of dominance.

The competent authority for the implementation of the EU merger control regime is either the EU Commission or national competition authorities. EU rules on merger control are regulated under the EC Merger Regulation[38] ('EUMR') and opted for a pre-merger notification system, which means that before the merger proceeds, the EU Commission must investigate the potential anti-competitive effects of the merger.[39] As stated in the Art. 2 EUMR, applicable substantive test for assessment is 'significant impediment of effective competition' ('SIEC') test. Accordingly, for a merger to be cleared by the EU Commission, it must not lead to a significant impediment of effective competition. The traditional approach of the EU Commission is to assess SIEC based on the market shares of the companies and price effects of the merger.[40]

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[36] Moritz Lorenz, *An Introduction to EU Competition Law* (Cambridge University Press 2013) 242 <https://www.cambridge.org/core/books/an-introduction-to-eu-competition-law/FAD691A66366F867A81682019572486E> accessed 5 April 2024.
[37] Richard Whish and David Bailey (n 25) 860.
[38] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance) 2004 (OJ L).
[39] Claire Turgot, 'Killer Acquisitions in Digital Markets: Evaluating the Effectiveness of the EU Merger Control Regime' (2021) 5 European Competition and Regulatory Law Review (CoRe) 112, 112.
[40] Wasastjerna (n 5) 420.

On the other hand, in digital markets, traditional approaches may not yield accurate results. One of the most pertinent examples showing that such an approach is not sufficient is the *Microsoft/Yahoo!* case[41]. The Commission surprisingly found that Yahoo! lacked the ability to compete effectively, and Microsoft lacked the scale needed to compete, given that both companies had a combined market share of less than 10% in Europe. However, the merger of these companies resulted in the pooling of a large dataset, enabling them to gain efficiencies and be better positioned to benefit advertisers and users in the form of better innovation and services.[42] The Commission's reluctance to keep pace with the rapid changes in the market is also evident in the more recent *Google/Fitbit* case[43], where it appears to have continued with its traditional antitrust approach by rejecting privacy concerns and referring them to the General Data Protection Regulation ('GDPR').[44]

The EU Commission's approaches are no longer adapting to the digital age, in particular the effect of data on competition needs to be examined in depth. In this context, the impacts of data on market power and consumer welfare will be analyzed in detail below.

3.2. Impacts of Data on Market Power

Market power is the main issue in assessing whether a merger is likely to harm competition. Market power reflects the capability of a company to raise prices above marginal costs without losing significant market share. Large market shares are considered as a proxy of market power/dominance, but in general terms, market power grants the dominant undertaking to take

[41] *Microsoft/Yahoo! Search Business* [2010] European Commission COMP/M.5727.
[42] Pascale Dechamps and Ilaria Fanton, 'The Impact of Mergers on Innovation in EU Merger Control Economic Focus' (2018) 17 Competition Law Journal 94, 100.
[43] *Google/Fitbit* [2020] European Commission Case M.9660 para. 452.
[44] Jean Wei Lee, 'Data-Driven Mergers: Is It Time to Reform EU Merger Control?' (2023) 6 De Lege Ferenda 103, 115.

business actions freely.[45] This definition is derived from the *Hoffman/ La Roche* case by stating that '*The dominant position relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers*.'.

In addition to market share, data, especially data collection and analysis, can also be considered as a relevant factor when measuring market power. Particularly when new entrants cannot collect or purchase the same type or set of data, data processing can cause barriers to entry[46] and significant entry barriers are another indicator of market power. For instance, data-driven mergers may cause companies to have a significant advantage in terms of data collection or analysis, which can enable them to rapidly gain a dominant position and make it difficult for new market entrants to compete effectively.

Moreover, data-driven markets usually consist of multi-sided platforms and multi-sided platforms are characterized by direct and indirect network effects. Therefore, data-driven platforms often benefit from network effects. Direct network effect occurs when the value of a product increases with the number of people using the product.[47] To exemplify, as the number of users subscribing to a social media platform increases, the value of the platform would also increase. On the other hand, an indirect network effect arises where increased usage from one set of users adds value to another set of users[48], like in the case of Uber, as the number of drivers increases, more users join the platform, making it more attractive to drivers.

[45] *Hoffmann-La Roche & Co AG v Commission of the European Communities* [1979] ECJ Case 85/76 521.
[46] Bundeskartellamt and Autorité de la Concurrence (n 24) 11.
[47] Richard Whish and David Bailey (n 25) 11.
[48] ibid.

As stated in the *Facebook/WhatsApp* case[49], network effects in data-driven mergers have the potential to create entry barriers, leading to the merged company's capacity to foreclose competitors and making it challenging for its competitors to broaden their customer base. Data collection and utilization might result in a company having a dominant position where an increase in a platform's number of users allows it to collect more data, resulting in higher quality products and greater increases in market share.[50]

Furthermore, by leveraging data analytics, companies can offer customers more customized products and services. This could increase customer loyalty and enable the company to increase switching costs, reduce data portability, restrict competitors' access to data, and thus strengthen its market position.

As a result, data collection and analysis can be considered as a source of market power since today's customer-centered marketing approach requires understanding the customer and their needs better. As a matter of fact, businesses that integrate the analysis of data into their processes are likely to become more competitive and to have a dominant position in the market.

3.3. Impacts of Data on Consumer Welfare

The consumer welfare standard aims to promote consumer welfare, in which consumers are the end consumers affected by the markets.[51] Accordingly, consumer welfare includes, but is not limited to, low prices, but also many other parameters, such as consumers having access to a variety of products, higher quality products and services, freedom of choice.[52]

[49] *Facebook/WhatsApp* [2014] European Commission COMP/M.7217 24.
[50] Bundeskartellamt and Autorité de la Concurrence (n 24) 28.
[51] OECD, 'The Consumer Welfare Standard - Advantages and Disadvantages Compared to Alternative Standards' (2023) OECD Competition Policy Roundtable Background Note 11 <https://www.oecd.org/daf/competition/consumer-welfare-standard-advantages-and-disadvantages-to-alternative-standards-2023.pdf>.
[52] Hutchinson (n 9) 8.

Data collection and analysis could lead to consumers having access to innovative and improved products, personalized services, increased choice among a wide range of products, and the ability to compare transparent prices across different platforms. However, consumers enjoy these benefits of data for ‘free’ when, for example, they are visiting websites, online shopping or subscribing to a social media platform. The underlying question is whether these services are genuinely free. Essentially, businesses provide these services in exchange for collecting consumers’ personal data, i.e., data is the price that consumers pay in data-driven markets.[53]

Nevertheless, consumers are also data subjects whose welfare may be in jeopardy when freedom of choice and control over their own personal data is usurped by a company. Offering services to consumers for ‘free’ might be misleading, as it blinds consumers to the real costs they will face downstream (such as loss of privacy), and distorts their perception of decision-making, harming both consumers and competition.[54]

In conclusion, while data processing may appear to have a positive impact on consumer welfare in the short run, it is highly possible that the long-term consequences of the collection, process or analytics of the data will be to the detriment of the consumer.

[53] Wasastjerna (n 5) 422.
[54] European Data Protection Supervisor, ‘Privacy and Competitiveness in the Age of Big Data: The Interplay between Data Protection, Competition Law and Consumer Protection in the Digital Economy’ (2014) 31 <https://www.edps.europa.eu/data-protection/our-work/publications/opinions/privacy-and-competitiveness-age-big-data_en> accessed 10 April 2024.

4. PRIVACY AS COMPETITIVE CONCERN

Mergers in the data-rich industries have raised a number of questions regarding the incorporation of data privacy concerns into competition assessments. Some scholars argue that privacy concerns should be considered under either consumer protection or data protection regulations,[55] as current competition law legislation is not sufficiently equipped to address privacy issues in the context of competition, and it is not the duty of competition authorities to protect privacy, rather, data protection authorities are exclusively competent to protect data privacy.

However, excluding privacy from the competition realm has led to inaccurate decisions and disrupting the balance in the market, as clearly observed in the *Microsoft/Yahoo!* example, and it is for competition authorities to restrict mergers that may reduce privacy-based competition in the market by merging firms competing in the field of data privacy through data collection and processing activities.[56]

As for the data protection regulations, when companies compete based on data protection and privacy standards, the data protection regulations might not offer adequate protection for consumers.[57] Because privacy has a broader scope than data protection regulations. Although data protection and privacy are similar notions, they fundamentally differ from each other. Some features of privacy are not covered by data protection regulations, such as right to access data, data portability etc.[58] The confusion between data protection and right to privacy also prevents the development of data protection as well as competition law, as it leads to a narrow perspective on

[55] D Daniel Sokol and Roisin E Comerford, 'Antitrust and Regulating Big Data' 23 1130.
[56] Roberto Augusto Castellanos Pfeiffer, 'Digital Economy, Big Data and Competition Law' (2019) 3 Market and Competition Law Review 53, 74.
[57] Lilian Klein, 'When Should EU Merger Assessment Address Privacy? The Conditions for Addressing Privacy Issues under the EU Merger Control Regulation' (2023) 0 European Competition Journal 1, 3.
[58] Orla Lynskey and Francisco Costa-Cabral, 'Family Ties: The Intersection between Data Protection and Competition in EU Law' (2017) 54 Common Market Law Review 11, 8.

privacy.[59] For this reason, the failure of competition authorities to examine privacy issues on the grounds that they automatically fall within the scope of data protection causes misleading conclusions. In other words, competition authorities should intervene in mergers where the degradation of privacy is an anticompetitive consequence of the merger, which does not mean protecting privacy by exceeding their powers. Accordingly, it is inevitable that privacy has become an essential factor affecting competition in the market as data-rich companies merge and should be integrated into merger control assessments.

There is not yet a clear framework on how privacy considerations should be included into the merger control regime, but there are two significant approaches:[60] the first is that data privacy is a fundamental right and competition authorities should impose restrictions on mergers that directly affect this right. The second approach, which the EU Commission agrees with, argues that since privacy concerns often emerge in zero-priced digital markets where consumers exchange their personal data for 'free' services, a price-centric approach is not suitable for assessing mergers that may give rise to privacy concerns.[61] Thus, the second approach stresses that data privacy should be treated as a non-price parameter for SIEC test.[62]

Both approaches might be useful when assessing data-driven mergers and shall be discussed in detail below.

[59] Orla Lynskey, 'Deconstructing Data Protection: The "Added-Value" of a Right to Data Protection in the EU Legal Order' (2014) 63 International & Comparative Law Quarterly 569, 596.
[60] Samson Esayas, 'Data Privacy in European Merger Control: Critical Analysis of Commission Decisions Regarding Privacy as a Non-Price Competition' (4 December 2019) 2 <https://papers.ssrn.com/abstract=3498242> accessed 20 January 2024.
[61] Hutchinson (n 9) 9; Stucke (n 1) 5.
[62] Maureen K Ohlhausen and Alexander Okuliar, 'Competition, Consumer Protection, and the Right (Approach) to Privacy' (6 February 2015) 36 <https://papers.ssrn.com/abstract=2561563> accessed 8 May 2024.

4.1. Privacy As a Non-Price Parameter

According to the EU Commission[63], non-price parameters include quality, innovation, and consumer choice and, as much as price parameters can distort competition and harm consumer welfare, non-price parameters have the same effect. For example, two competitors in the social media industry, both offering similar platforms to users, can be distinguished by their users based on their strong privacy policies, offering users greater control over their personal data, solid safeguard mechanisms against unauthorized access of user data etc. However, in a scenario where these two firms merge, there is a risk that the merged company may have reduced privacy standards due to the lack of competitive pressure.

In order to establish the relationship between privacy as a non-price parameter and possible antitrust violations, it is essential to explore the theories of harm related to privacy.

4.1.1. Privacy Related Theories of Harm

In the event that competition authorities claim that a prospective merger violates competition rules, they should rely on a well-structured theory of harm.[64] A satisfactory theory of harm should articulate the reasons underlying why the merger is likely to harm competition and ultimately consumers. The existing literature lacks a concrete theory of harm indicating when a merger may result in reduction of the level of data privacy and therefore harm competition. Thus, to interconnect privacy problems with competition law, firstly, theories of harm related to privacy should be clarified.

[63] 'Revised Market Definition Notice' (*European Commission - European Commission*) <https://ec.europa.eu/commission/presscorner/detail/en/qanda_23_6002> accessed 8 May 2024.
[64] Bosáková (n 11) 39.

4.1.1.1. Quality

Quality is one of the most decisive considerations for consumers when deciding to buy a product or service.[65] EU Non-Horizontal Merger Guidelines highlight this importance by envisaging that the decline in quality is one of the non-price parameters that has an impact on consumer welfare and is therefore an important element to consider when assessing a merger.[66]

Accordingly, data privacy, which constitutes an important non-price parameter of competition in online markets, can be considered as a dimension of quality.[67] In other words, a data-driven merger causing loss of privacy for the consumers can be tantamount to reduced quality for the consumers. As stated in the *Facebook/WhatsApp* case[68], '*…privacy and security, the importance of which varies from user to user, but which are becoming increasingly valued…*'. Hence, the EU Commission has indirectly recognized the privacy factor in its merger control assessment to the extent that consumers attach value to it. Moreover, the EU Commission also approved the position of privacy as a quality factor within the *Microsoft/LinkedIn* case[69] by noting that data privacy can be relevant in competition assessment insofar as it is perceived by consumers as an important quality factor. [70]

As explained above, on multi-sided platforms, where services are offered for free of monetary payment, the evaluation criteria for the consumers shall tend to switch from price to quality. In fact, every time we subscribe to a digital platform or accept 'cookies', the protection of our data privacy falls under the obligation of the company that owns the platform. Therefore, regardless of the main business of the company, the protection of consumers' privacy indirectly becomes one of

[65] Hutchinson (n 9) 12.
[66] Non-Horizontal Merger Guidelines (n 32) para. 10.
[67] Elias Deutscher, 'How to Measure Privacy-Related Consumer Harm in Merger Analysis? A Critical Reassessment of the EU Commission's Merger Control in Data-Driven Markets' 11.
[68] *Facebook/WhatsApp* (n 49) para. 87.
[69] *Microsoft/LinkedIn* [2016] European Commission Case M.8124 para. 350.
[70] Davilla (n 8) 375.

the services provided by the company. When a merger occurs between two data-rich companies resulting in degradation of privacy, the merging companies may use privacy as a substitute for value.[71] Within this situation, consumers' preferences regarding their privacy cannot be measured with small but significant, non-transitory increase in price ('SSNIP') test[72], but instead small but significant, non-transitory decrease in quality ('SSNQ') shall be accurate.[73]

Nevertheless, some scholars argue that quality assessment is a subjective concept, and the perception of quality is highly variable from one person to another. It is difficult to establish an equation, based on a fixed threshold, that a decrease in the users' privacy will lead to a diminishing quality of the service offered and thus distort competition. Because some consumers may not give much value to their privacy and prefer to enjoy free services and personalized ads over anonymity.[74] That may be the reason for competition authorities' hesitance to consider privacy as a quality factor. In the *Facebook/WhatsApp* case, although the EU Commission underlined that privacy can be considered as a quality factor, it ultimately avoided actually assessing whether the merger would entail a reduction in users' privacy as an important element of product quality.[75]

One should not, however, avoid considering data privacy as an element of quality, just because quality is a subjective concept. Indeed, privacy is a fundamental right guaranteed by law. The fact that some consumers prefer the protection of their privacy to receiving better services does not mean that this right should not be protected. It should not be concluded that a reduction in quality

[71] Deutscher (n 67) 15.
[72] SSNIP test is the main test used to define the product market in terms of demand substitution.
[73] 'Revised Market Definition Notice' (n 63); Oskar Törngren, 'Mergers in Big Data-Driven Markets' [2017] Stockholm University 52.
[74] James C Cooper, 'Privacy and Antitrust: Underpants Gnomes, The First Amendment, and Subjectivity' (2013) 13–39 George Mason University Law and Economics Research Paper Series 10.
[75] Deutscher (n 67) 11.

of privacy protection should be disregarded by the competition regulations merely because of the fact that consumers have not reached a consensus on privacy protections.[76]

Furthermore, collection of more data is not the only indicator of reduction of quality in terms of privacy protection. Data collection without clear and informed consent, lack of transparency in the data processing, restriction of data portability, inadequate security measures to protect consumers' personal data, and overall providing lessened control for consumers over their own data constitute breaches of privacy.[77] It would be therefore a narrow perspective to exclude quality as a privacy related theory of harm on the grounds of consumer' different privacy preferences.

When digital platforms compete on non-price dimensions, especially on privacy protection, they tend to increase the quality of their service by improving quality or privacy protections in order to increase their profits and thus make themselves more attractive to consumers. But when, as a result of merger, the merged company imposes reduced data privacy protection by leveraging its dominant position in the market, this reduction should be taken into account as a non-price parameter that distorts competition.

4.1.1.2. Consumer Choice

The fact that there are alternatives to products and services in the market, i.e., that consumers have a choice between products and services, is an indicator of robust competition. In other words, the availability of a wide range of products and services is another significant element when assessing impediment of competition[78], as it increases consumer welfare.

[76] Keith Waehrer, 'Online Services and the Analysis of Competitive Merger Effects in Privacy Protections and Other Quality Dimensions' (8 July 2016) 11 <https://papers.ssrn.com/abstract=2701927> accessed 13 May 2024.
[77] Samson Esayas, 'Privacy as a Non-Price Competition Parameter: Theories of Harm in Mergers' (16 August 2018) 22 <https://papers.ssrn.com/abstract=3232701> accessed 14 May 2024.
[78] Non-Horizontal Merger Guidelines (n 32) para. 10.

The importance of consumer choice is highlighted in the *Microsoft/LinkedIn* case. In the case, the EU Commission started its assessment by identifying several relevant markets, including professional social network ('PSN') and when evaluating the possible anticompetitive effects of Microsoft and LinkedIn's dataset combination after the proposed merger, the EU Commission observed that the data combination might give rise to foreclosure effects in the PSN market. Accordingly, the EU Commission noted that following the merger, LinkedIn's platform would be the sole provider of PSN services accessible to users in the EEA, with slight or limited chances for new PSN service providers entering the market.[79] The EU Commission continued its assessment by stating that the foreclosure effects could lead to marginalization of an existing competitor that offers greater privacy protection than LinkedIn. In this scenario, the merger would restrict consumer choice regarding the level of privacy protection when selecting a PSN, and it is concluded that consumer choice plays a significant role in affecting competition.[80]

With this decision, the EU Commission confirmed that combined datasets can lead to foreclosure effects, which eliminates competitors and therefore prevents consumers from choosing between privacy policies that provide different levels of protection and thus distorting competition in the market.

The EU Commission adopted a similar approach in the *Google/Fitbit* case. The case concerns Google's acquisition of Fitbit, which provides wearable fitness devices and collects sensitive personal data of its customers. The EU Commission's primary concern was that Google's access to Fitbit's sensitive health data could strengthen Google's existing dominant position in online advertising and digital markets, where it could use this data to further personalize its advertising

[79] *Microsoft/LinkedIn* (n 66) para. 349.
[80] ibid para. 350.

services and exclude its competitors from the market.[81] While addressing these concerns, the EU Commission examined that whether Google's and Fitbit's data combination reduce the consumer choice regarding privacy protection by eliminating rivals.[82]

Oftentimes, the application of the consumer choice framework concerning data privacy resembles the quality-based theory of harm, notably as exemplified in the EU Commission's assessment of the *Microsoft/LinkedIn* merger.[83] Therefore, it is worth noting some divergence points of both theories.

A quality-based approach considers reduction in choice regarding data privacy as likely to harm efficiency. On the other hand, the consumer choice approach presumes harm to efficiency from the reduction in variety occurs when choice is limited.[84] Therefore, the consumer choice approach does not require proof of how the conduct reduces efficiency; it is assumed from the reduction in variety, i.e., consumer choice-based theory of harm creates a presumption that the reduction in choice constitutes anticompetitive conduct.[85] In contrast, quality approach requires demonstrating how the reduction in choice harms consumers and leaves room for a more balanced analysis between efficiencies and reduction in privacy, similar to the approach adopted in *Leegin* case.[86] In short, the most significant distinction between the two theories is the burden of proof.

[81] Simon Vande Walle, 'The European Commission's Approval of Google / Fitbit – A Case Note and Comment' (25 July 2021) 3 <https://papers.ssrn.com/abstract=3893079> accessed 14 May 2024.
[82] However, at the end of the decision, the EU Commission dismissed the privacy concerns and held that Fitbit users would not be harmed by reduced privacy.
[83] Esayas (n 77) 30.
[84] ibid 31.
[85] Peter Behrens, 'The "Consumer Choice" Paradigm in German Ordoliberalism and Its Impact Upon EU Competition Law' [2014] SSRN Electronic Journal 28–29 <http://www.ssrn.com/abstract=2568304> accessed 14 May 2024.
[86] Joshua D Wright and Douglas H Ginsburg, 'The Goals of Antitrust: Welfare Trumps Choice' 81 FORDHAM LAW REVIEW 2420; *Leegin Creative Leather Products, Inc v PSKS, Inc, 551 US 877* [2007] Supreme Court of the United States 06-480.

Overall, both theories offer promising perspectives on incorporating privacy concerns into the EU merger control regime and the concept continues to be shaped by the EU Commission's digital merger assessments.

4.2. Privacy As a Fundamental Right

Most consumers don't have a clear understanding of how much of their private data they share with online platforms and also, they have very limited capacity to control over data they are sharing online.[87] Indeed, research conducted in 2022 demonstrated that among the research subjects, 31.28% stated that they understand privacy policies clearly, and 68.13% answered that they do not understand at all.[88] Failure to obtain clear consent from data subjects may lead to a breach of privacy as a fundamental right. This lack of consumer understanding and control over their data is further worsened by Meta's updated privacy policy, which introduces a 'pay or consent' system, radically altering the dynamics of privacy as a fundamental right and its role in competition. Meta's model offers users a choice: they can access the services for free if they consent to Meta to process their private data, or they can choose a paid subscription model where Meta won't process their data. It implies that users' privacy will be guaranteed on condition of a monthly subscription. In other words, consumers have to pay to protect their fundamental right to privacy, and privacy would now become a luxury. Given the vast amounts of data that consumers already generate every day, the monetization of this data by Meta, a gatekeeper that dominates the market, and the new privacy policy, all these factors surely affect competition in the market on the basis of privacy as a

[87] Marco Botta and Klaus Wiedemann, 'EU Competition Law Enforcement Vis-à-Vis Exploitative Conducts in the Data Economy Exploring the Terra Incognita' [2018] Max Planck Institute for Innovation and Competition Research Paper Series.
[88] Wasja Brunotte and others, 'What About My Privacy? Helping Users Understand Online Privacy Policies', *Proceedings of the International Conference on Software and System Processes and International Conference on Global Software Engineering* (Association for Computing Machinery 2022) 63 <https://dl.acm.org/doi/10.1145/3529320.3529327> accessed 16 May 2024.

fundamental right. Therefore, privacy can also be addressed as a fundamental right within the framework of competition law.[89] Consumers' lack of understanding and control over their own data, coupled with policies that monetize privacy, underlines the need for competition law interventions to ensure fair competition and protect consumer welfare.

There are two main arguments stemming from the integration of privacy issues into the merger control realm. The first line of argument suggests that privacy shall be taken into consideration as long as it significantly affects competition, in particular when a merger changes the incentives to compete on privacy. The second argument, which will be discussed within this chapter, is that privacy is a fundamental right and when certain conduct directly affects this right, even pure privacy issues should be considered within the merger control assessment.

Those who argue that standalone privacy issues should not be included in the merger control regime refer to Art. 2(2) of the EUMR and further underlines that the role of the EU Commission in the merger control assessment is to examine whether a merger 'significantly impedes effective competition' and therefore including standalone privacy issues into the merger control assessment is beyond the jurisdiction of the competition authorities.[90] Additionally, it was stressed that privacy is comprehensively protected as fundamental right under the GDPR, and its detailed analysis should be carried out within the framework of data protection regulations, as the privacy breach assessment by competition authorities may be insufficient as suggested in *Google/DoubleClick* merger[91]. The argument in the case asserted that mergers that jeopardize the right to data privacy should be prevented from proceeding. However, the EU Commission rejected this argument by

[89] Lee (n 44) 136.
[90] Ben Holles de Peyer, 'EU Merger Control and Big Data' (2017) 13 Journal of Competition Law & Economics 767, 788.
[91] *Google/DoubleClick* [2008] European Commission COMP/M.4731.

emphasizing that pure privacy issues cannot be considered under the merger control regime, and these are not in the scope of the competition law.[92]

Proponents of the recognition of data privacy as a fundamental right within the merger control framework point out that while Art. 2(2) of the EUMR provides that the merger control regime shall be exercised limited to the SIEC test, but Art. 21(4) of the EUMR also requires Member States to take appropriate measures to safeguard 'legitimate interests' which are compatible with the general principles of Community law.[93]

Considering 'Community law', the European legislative framework attributes high importance to data privacy by protecting it under the Charter of Fundamental Rights of the EU Convention[94], European Convention of Human Rights[95] and GDPR. Additionally, pursuant to Art. 2 the Treaty on European Union ('TEU')[96] the EU institutions have positive obligation on promoting and respecting fundamental rights.

Given these provisions, it can be inferred that the protection of privacy is a legitimate interest that should be protected under the EUMR and that the EU Commission, as an EU institution, has a responsibility to protect the fundamental right to privacy. In other words, it can be concluded that it is in the public interest for competition authorities to evaluate mergers that raise privacy concerns from the standpoint of fundamental rights. Accordingly, Art. 21(4) of the EUMR can be seen as a mechanism enabling the EU Commission to fulfill its obligation to protect the fundamental right to privacy. Enforcement against privacy issues in big data mergers, therefore, could be strengthened

[92] ibid para. 368.
[93] Anca D Chirita, 'Data-Driven Mergers Under EU Competition Law' (20 June 2018) 181 <https://papers.ssrn.com/abstract=3199912> accessed 10 January 2024.
[94] See Art. 7 Charter of Fundamental Rights of the European Union 2012 (2012/C 326/02).
[95] See Art. 8 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 1950 (ETS 5).
[96] Consolidated Version of the Treaty of European Union 1992 (C 115/13).

by enhancing coordination between competition law and data protection.[97] However, in order to avoid excess of power between competition and data protection authorities, it would be more reasonable to include standalone privacy issues in the merger control regime as a last resort. In other words, when a purely privacy-related matter is not dealt with in the area of data protection and is brought before the competition authorities in the context of merger control, the competition authorities should block the merger on the basis of Art. 21(4) of the EUMR.

4.3. Measuring Privacy and Challenges

Privacy is a complicated parameter to quantify. Unlike traditional competition concerns, such as price effects or market concentration, privacy considerations are to some extent a peculiar concept in the context of merger assessments. There are several reasons for this problem: (i) degradation in privacy may not be evident for consumers,[98] (ii) consumers may prefer different levels of privacy protection, and (iii) incorporation of privacy into merger analysis may pose enforcement challenges. *Tucker* argues that[99] enforcing privacy concerns via merger control regime could lead to uneven privacy restrictions among market participants and has the potential to affect competition adversely.

The difficulty of quantification or different preferences does not necessarily exclude privacy as a parameter from the merger control assessment. As explained in the previous chapter, privacy is a fundamental right and therefore, regardless of the consumers' preferences, it should be respected. As for the enforcement difficulties, it stems from the lack of coherent theory of harm in the literature and legal documents for integrating privacy into merger control. Nevertheless, a merger

[97] Chirita (n 93) 181.
[98] Stucke (n 1) 6.
[99] Darren S Tucker, 'The Proper Role of Privacy in Merger Review' (1 May 2015) 4 <https://papers.ssrn.com/abstract=2614046> accessed 23 January 2024.

analysis based on one of the theories of harm proposed above (namely quality or consumer choice approach) can overcome this confusion.

Another challenge could be difficulty demonstrating in concrete terms how privacy affects consumer welfare. While reduced privacy harms consumers, it may be problematic to quantify this harm in a way that fits within traditional competition analysis. However, both the digital environment and privacy standards are dynamic concepts, constantly evolving and changing. Competition authorities need to keep pace with these challenges and move away from traditional analyses and adopt new approaches. For instance, embracing interdisciplinary approaches that integrate outputs from data protection regulations, behavioral economics, and consumer psychology to enable a more holistic interpretation of privacy impacts, or creating standardized metrics to measure privacy related harm, such as consumer surveys, can help transform qualitative privacy concerns into quantifiable data.

Although the EU Commission has not yet formally recognized privacy concerns as a direct anti-competitive factor and blocked a merger on that ground, the evolving case-law from Google/DoubleClick to Google/Fitbit suggests that the EU Commission is rightly leaning towards considering privacy as a significant factor in merger analysis.

5. CONCLUSION

With the evolution of technology, personal data has become one of the most valuable assets for businesses. However, the emerging development of technologies lead to a large portion of personal data being processed and therefore give a rise to privacy concerns.

Data privacy has been primarily subject to scrutiny for many years in the context of the data protection regulations, such as GDPR. Yet, rapidly changing dynamics in the digital age have brought data privacy into contact with different legal spheres, such as consumer protection law and competition law. In particular, the monetization of personal data by companies through personalized services to strengthen their market position and the effects of these processing activities on consumer welfare with respect to the right to privacy have attracted the attention of competition authorities. Indeed, one of the ultimate objectives of competition law is to safeguard competition in the market by protecting consumer welfare. Therefore, competition authorities have started to be more watchful of privacy issues within the scope of merger control.

Due to increasing privacy concerns within data-driven mergers, the positioning of privacy within the framework of competition law, notably merger control, has been a controversial topic. Within this master thesis, it has been discussed how competition authorities should incorporate privacy issues into the merger control analysis.

As companies can increase their profits and thus strengthen their market position by integrating the analysis of datasets into their business activities, data constitutes a significant source of market power. Moreover, in the long run, acquiring large sets of data is likely to have negative impact on consumers by creating data monopoly in the market. Another dimension of all these antitrust effects is the change in the way companies treat consumers' privacy. In the case of businesses that compete on the basis of privacy, especially as a result of data-driven mergers, the degradation in privacy emerges as an anti-competitive factor.

The interplay between data-driven mergers and privacy requires a holistic approach to merger control. Accordingly, in this thesis, the inclusion of privacy in merger control assessments is advocated in two ways: privacy as a non-price parameter or privacy as a fundamental right. Privacy as a non-price parameter can be derived from two theories of harm namely, quality or consumer choice. Privacy as a quality factor emphasizes the importance of the quality of data protection offered by companies. When mergers take place, the potential reduction in privacy protection can significantly impact consumer welfare. Assessing privacy in this context guarantees that consumers can access to high quality services that respect their data protection preferences. However, assessing privacy as a quality factor poses some challenges, including the subjectivity of preferred levels of privacy and the difficulty in measuring the actual impact of the degradation of privacy on competition. Despite these challenges, it is argued that neither the failure to reach a consensus on the desired level of protection nor the inability to precisely determine the impacts of loss of privacy on competition should prevent privacy from being recognized in merger assessments.

As a second theory of harm, the consumer choice approach prioritizes on the range of privacy options available to consumers. In digital markets where services are often traded in exchange for personal data, mergers that result in a reduction of privacy alternatives shall restrict consumer choice and thereby harm competition. By incorporation privacy considerations into merger control, competition authorities can improve consumers' access to a range of privacy standards and thereby promote a competitive environment that favors consumer choice.

A further line of argument for incorporating privacy into merger control is the recognition of privacy as a fundamental right within the framework of merger control regulations. Accordingly, even standalone privacy violations resulting from the merger transactions should be considered as a parameter affecting the public interest and therefore a reason to block the merger.

As can be inferred from the analyzed case law above, the competition authorities, especially the CJEU, do not yet have a clear position on this issue. However, there is a progressive inclusion of data privacy in the EU merger control regime. In recent merger control decisions, the EU Commission has indirectly recognized data privacy as an element of quality and consumer choice in merger control assessments. As a result, data privacy is increasingly seen as part of the consumer welfare standard that influences product or service quality or consumer choice. Although there is no direct and explicit protection of data privacy in the implementation of the EU merger control system, especially in the practice of the CJEU and the EU Commission, competition authorities have started to shift from the neoliberal price-oriented way of thinking. In this respect, new privacy related theories of harm can enable competition authorities to consistently incorporate privacy concerns into their assessments in order to fully protect consumer welfare and realize the ultimate objective of the competition law.

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