

# Social Media & Competition Law

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*Virtually all of the important IT companies have been under scrutiny from the competition authorities, often on a worldwide basis. However, this is not yet true for the main actors in the field of social media. This article explores the competition law concerns of this sector focusing on the most popular platform, i.e., Facebook, and its potential abuses of dominant position under Article 102 TFEU. In the world of social media markets, market definition is complicated because of the two-sided nature of the platforms. Hence, a new version of the SSNIP test is proposed here which rejects the application of a price-based test to free Internet services and re-evaluates the importance of quality as opposed to price. Network effects and other barriers to entry are traditionally discussed for the establishment of dominance. Prohibited behaviour may be either exploitative or exclusionary. Potential exploitative conduct is reviewed from the perspective of private social media users, which highlights the controversial attitude of Facebook towards changes in administration and design by the platform, protection of information and deletion of profiles. Past IT-related case law is still relevant for the identification of exclusionary behaviour, especially as regards the rules on tying, bundling and leveraging. Developing data protection law influences restrictions on data portability. Overall, the hopeful conclusion tends to be that competition law misgivings could be allayed by a suitable adaptation of the general regulatory framework to avoid abuse in this rapidly growing area.*

## 1 DEVELOPMENTS IN IT COMPETITION LAW

### 1.1 STARTING POINT: THE NOTORIOUS IT CASES

It is no coincidence that the IT sector has produced some of the most important competition law cases worldwide. The particular competition law exposure of this industry is due to its economic features: the considerable increase in efficiency is not simply due to new technologies, but also to direct and indirect network effects triggering a tendency towards natural monopolies. This inclination is strengthened by high economies of scale and scope, and the need for standardization creating more advantages, path dependency and lock-in. Against this backdrop, competition law control is inescapable, although its national or regional character is not always easy to reconcile with the international orientation of the related companies. Thus,

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many IT competition law cases exist at least in an American and in a European version, although other jurisdictions have taken the stage in the meantime.

The *IBM* case<sup>1</sup>, for example – the earliest of the classical IT competition law cases – concerned market power based on a de facto standard. In 1981, *IBM* had brought to market the first Personal Computer (PC). The manufacturers of peripherals and software became dependent on being ‘*IBM* compatible’ and requested that *IBM* provide the necessary interface information. Although an antitrust procedure in the US was closed without result, the firm had to give a commitment to the European Commission to disclose the requested information to interested parties in a timely manner.<sup>2</sup> This outcome has become typical of the approach to IT competition cases. In all jurisdictions, the goal of keeping markets open has to be weighed against the impact of competition law intervention on the incentives to innovate. However, the outcome of this balancing may vary. In the US, the risks of regulation for the incentives to innovate are emphasized, and the self-healing powers of markets are relied upon. In the EU, by contrast, the responsibility of the state to keep markets contestable is underlined, and the positive influence of competition law application on innovation is highlighted. For example, keeping markets open may promote follow-on innovations of third parties and even of the dominant firm itself, since it is exposed at least to competition by substitution.

The different intensity of competition law control on both sides of the Atlantic may be illustrated by the *Microsoft*<sup>3</sup> case. In both jurisdictions, competition authorities intervened. In the EU, however, the degree of intervention was higher as more interface information had to be disclosed and the freedom to integrate new functions into the operating system was more restricted.<sup>4</sup> Similar patterns may be discerned in the *Intel* and in the *Google* cases. In the EU, *Intel* was fined for abuse of dominance by giving conditional rebates with exclusive effect and by making direct payments to retailers that give preference to *Intel*’s products.<sup>5</sup> In the US, the Federal Trade Commission (FTC) entered into a consent agreement according to which the firm renounced exclusivity contracts and undertook not to

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<sup>1</sup> Cf. Case C-60/81 *IBM v. Commission* [1981] ECR 2639.

<sup>2</sup> European Commission, Fourteenth Report on Competition Policy 1984, Brussels, Luxembourg 1985, nn. 94–95. The commitment was in force until 1995, see Inge Graef, *How can Software Interoperability be Achieved under European Competition Law and Related Regimes?* J. European Competition L. & Prac. 2013, at 4–5 (Advance Access 25 Nov. 2013).

<sup>3</sup> European Commission Decisions: *Microsoft* IP/94/653 [1994], COMP/C3/37.792 [2004], OJ L32/23 [2007].

<sup>4</sup> For a comparison of the European and the US *Microsoft* case see Andreas Heinemann, *Compulsory Licenses and Product Integration in European Competition Law – Assessment of the European Commission’s Microsoft Decision*, IIC, 63, 75–76, 78–79 (2005).

<sup>5</sup> European Commission Decision, 13 May 2009 – *Intel*, OJ 2009 C 227/13.

discriminate against companies which buy processors from competitors.<sup>6</sup> In the *Google* case, different objections were at stake, primarily violations of search neutrality, for example by giving precedence to its own services over those of competing firms. In the US, the FTC did not intervene in the core business of the search engine, but contented itself with having *Google* abstain from exclusivity in the *AdWords* business and to allow firms to opt out of *Google*'s vertical search offerings while still appearing in the 'organic' search list.<sup>7</sup> In the EU, by contrast, *Google* will have to improve search neutrality considerably by extending links to rivals.<sup>8</sup>

The cases mentioned concern some of the most important companies in the field of hardware, software and the Internet. As social media moves centre stage, the question arises if competition law problems exist in this field, too.<sup>9</sup> There is not yet a *Facebook* antitrust case, but strong network effects and other particularities indicate considerable market power as well as the potential for anticompetitive behaviour. Before presenting the outline of this article, it is useful to briefly describe the world of social media. The overview will show that the relevant websites are quite heterogeneous. As this article is on the competition law aspects of social media, the most powerful of these virtual communities, i.e., *Facebook*, will serve as the continuous paradigm. A limitation of the subject has to be made, however. Because of the sheer volume of data available on social networking websites, many firms now closely monitor these portals and use them as sources for competitive intelligence. The point here is to say that, while the behaviour of any firm on social networking sites can be subject to competition law inspection, this article focuses on the actual or potential behaviour of social networking sites, in particular Facebook.<sup>10</sup> We will discuss the relevant problems on the basis of EU competition law.

<sup>6</sup> FTC, *Decision & Order*, 2 Nov. 2010, <http://ftc.gov/os/adjpro/d9341/101102inteldo.pdf> (accessed 3 Mar. 2014).

<sup>7</sup> FTC, 3 Jan. 2013, <http://www.ftc.gov/opa/2013/01/google.shtm> (accessed 3 Mar. 2014).

<sup>8</sup> See for example Joaquín Almunia, *The Google Antitrust Case: What is at Stake?* 1 Oct. 2013, *SPEECH/13/768*, available at <http://europa.eu/rapid/search.htm> (accessed 3 Mar. 2014).

<sup>9</sup> The discussion of competition law aspects of social media is still at the beginning. First reflections have been made by: Spencer Weber Waller, *Antitrust and Social Networking*, 90 N.C. L. Rev. 1771 (2012); Christopher S. Yoo, *When Antitrust Met Facebook*, 19 Geo. Mason L. Rev. 1147 (2012) with an overview on early case law (in the US) at 1158–1166 available at SSRN: <http://ssrn.com/abstract=2160519> (accessed 3 Mar. 2014); Andreas Heinemann, *Wettbewerb auf den Märkten der Informationstechnologie – Die Perspektive des Europäischen Kartellrechts*, in: Astrid Epiney/Stefan Diezig (eds.), *Schweizerisches Jahrbuch für Europarecht 2012/2013*, Zurich (2013), p. 355, 370–372 Rolf H. Weber, *Competition Law Issues in the Online World* (2013), part 4.3, available at SSRN: <http://ssrn.com/link/20th-St-Gallen-ICF.html> (accessed 3 Mar. 2014).

<sup>10</sup> Seth M. Cohen, Zurich North & David K. Park *The Opportunities and Risks Posed by Social Media for Antitrust Compliance*, <http://www.bna.com/the-opportunities-and-risks-posed-by-social-media/> (2012): 'New social media do not change the substance of antitrust and competition law'.

## 1.2 THE PHENOMENON OF SOCIAL MEDIA

### 1.2[a] *Definition*

Social media, i.e., social networking sites, are web-based services that allow individuals to construct a public or semi-public profile within a limited forum, to articulate a list of other users with whom they share a connection ('friends' on Facebook), and to view and traverse their list of connections and those made by others within the system.<sup>11</sup> Examples of such platforms are: XING, Facebook, Myspace, Google+, and studiVZ. The differences lie in the features offered: sharing of written statuses on your own profile, videos, images, chat, private messages, creation of online albums to store photos and share them with others. There are debates about including Twitter in this group because its service allows sharing of short text messages or 'tweets' with anyone who decides to 'follow you', i.e., read what you post on your profile.<sup>12</sup> Another question revolves around the position of LinkedIn, because of its professional focus, and yet another question regarding video-sharing on YouTube. Their inclusion or exclusion depends on the characterization and interpretations given to the definition of a social networking site.<sup>13</sup> What is clear is that Facebook satisfies both the broad and narrow definitions.

### 1.2[b] *From a Large Number of Websites to a Unique One*

The real expansion of the social media phenomenon worldwide hit at the turn of the twenty-first century as a new and appealing tool for communication. The social face of the internet was no longer reserved solely for the adventures of celebrities, but the regular citizen could now also post details about his life for everyone to see. There were many websites, some remaining national in their territorial coverage and languages (V Kontakte in Russia, NaszaKlasa and Grono in Poland, StudiVZ and SchülerVZ in Germany), and others wider reaching (Skyblog, Friendster, MySpace),<sup>14</sup> and they were referred to as YASNS, 'Yet Another Social Networking Service'. The biggest triumph of all of these, however, is undoubtedly Facebook.

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<sup>11</sup> A precise definition, including the difference between 'social network sites' and 'social networking sites', has been elaborated in Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. Computer-Mediated Communication 210, 211 (2008).

<sup>12</sup> Twitter and Tumblr have also been defined as 'micro-blogging' websites: see <http://www.britannica.com/EBchecked/topic/1370976/Twitter> (accessed 3 Mar. 2014).

<sup>13</sup> See *supra* n. 11.

<sup>14</sup> For this historical discussion illustrated with an almost exhaustive list of websites, see the entirety of: Boyd/Ellison, *supra* n. 11.

The success story is well-known. In 2004, a group of Harvard students decided to create a website for sharing opinions about photos. The site started as a campus-only website and expanded beyond the University of Harvard to more universities, then to private persons with internet access, until it finally became a global phenomenon. At its initial public offering on 17 May 2012, the company was valued at USD 104 billion. Even if everyone does not use Facebook, everyone knows about it, and it has outgrown most other websites in number of users and popularity.<sup>15</sup> It can be argued that the main reason for this popularity is the fact that it does not limit itself to a specific group of people. Currently in the international arena, excluding countries such as Russia or China which protect their markets, Facebook's only official real competitor is Google+, launched by Google Inc. in 2011,<sup>16</sup> which naturally leads to a number of competition law concerns.

### 1.3 OUTLINE OF THE REASONING

The aim of this article is to carve out the potential competition law problems with the activities of Facebook as an economic entity, in its capacity as a social media platform. So far, competition authorities have not intervened in this field. However, in view of the growing significance of social networking, it may be only a question of time before the first cases will arise. The focus of this article is on unilateral conduct and the concept of dominance in the social media market, through the prime example of the omnipresent Facebook. Upon close scrutiny, it appears that the conventional instruments, such as the SSNIP test, have to be adapted in order to fit to the environment of 'free' internet services. As a result, a proper definition of relevant markets in the context of social media will be possible (see section 2 below.). On this basis, firms in a dominant position can be identified (see section 3 below.). As dominance is not anticompetitive in and of itself, business strategies have to be assessed as to their legitimacy. To this end, exploitative and exclusionary abuses have to be identified (see section 4 below) before conclusions can be drawn (see section 5 below).

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<sup>15</sup> See the World Map showing the popularity of social networks around the world with the changes and evolution of Facebook between August 2008 and October 2011, <http://oxyweb.co.uk/blog/socialnetworkmapoftheworld.php> (accessed 3 Mar. 2014).

<sup>16</sup> Google does not seem to hide the fact that Google+ is an official competitor to Facebook. See, for example, online news article *Social Wars! Google Unveils Facebook Competitor Google+* available at: <http://www.foxnews.com/tech/2011/06/28/social-wars-google-unveils-facebook-competitor-google/> (accessed 3 Mar. 2014). And *Google Launches Google+ Facebook Competitor, Publishes New Privacy Policies* available at: <http://nakedsecurity.sophos.com/2011/06/29/google-launches-facebook-competitor-publishes-new-privacy-policies/> (accessed 3 Mar. 2014).

## 2 MARKET DEFINITION IN THE CONTEXT OF SOCIAL MEDIA

### 2.1 THE TWO-SIDED NATURE OF SOCIAL MEDIA MARKETS

#### 2.1[a] *Definition*

In order to properly define what market Facebook operates on, we must look at the effects that using it may have on the lives, choices and attitudes of its users. Facebook is an internet website, but the internet market as such is particularly broad and heterogeneous, with websites varying in scope and importance for users (e-mail, research, shopping, entertainment, advertising, etc.). In consequence, we must identify the distinguishing characteristics of Facebook as a website, what services it offers to its users and what it receives in return, in order to achieve a relatively straightforward definition of the relevant market – the prerequisite to the analysis of whether there is a dominant position and abuse thereof.<sup>17</sup>

A *two-sided market* is a platform which connects two distinct groups of users seeking a mutual benefit,<sup>18</sup> thus permitting both bodies of customers to obtain value from one another. For example, credit cardholders get interest benefits and more flexibility by using credit cards, and conversely merchants may generate more business by accepting credit cards. The platform profits them both in different ways. A further example is an online dating platform, which is dependent on two incoming sides of interest – men and women, who can be viewed as distinct groups of users who benefit through connections forged via the website. The end value of the website is dependent on how many individuals for each group use the platform, because that way it will attract more individuals from the other group, who will in turn attract more from the first and so on and so forth. The platform must cater to two distinct groups simultaneously in order to maintain them as users, and it is that maintenance that allows it to remain attractive to both separately.

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<sup>17</sup> See also the reflections on market definition and market power in the context of social networking sites by Spencer Weber Waller, *supra* n. 9, at part I B.

<sup>18</sup> For a general discussion of various kinds of two sided-markets, see David S. Evans, *Two-Sided Market Definition* (2009), p. 2, available at <http://ssrn.com/abstract=1396751> (accessed 3 Mar. 2014). We applied his definitions. See also Patrick G.J. Van Cayseele & Stijn Vanormelingen, *Prices and Network Effects in Two-Sided Markets: The Belgian Newspaper Industry*, Working Paper Series, 26 Feb. 2009, p. 2, available at <http://ssrn.com/abstract=1404392> (accessed 3 Mar. 2014). This is an example of the application of the two-sided market definition and how it applies in the newspaper sector. For an analysis with particular regard to the application of competition law, see Lapo Filistrucchi, Damien Geradin & Eric van Damme, *Identifying Two-Sided Markets*, 36 *World Competition* 33 (2013), who distinguish between qualitative and quantitative aspects of two-sidedness.

## 2.1[b] *Facebook as a Two-Sided Market*

There are two distinct ways in which Facebook can be considered as a two-sided market. As already stated Facebook is a social networking site – a place to construct a profile, connect with other users, share information about oneself and view that shared by those to whom we are connected. The first two-sided aspect is the linking of people to others and creating a web of social connections. When Facebook was first designed it was limited to linking users with other users. However, now a different second aspect has emerged, which still makes Facebook a two-sided market, but no longer private user to private user.

Facebook currently serves as a point of contact between its private users – the same ones it was connecting before – and other users, usually professional, who advertise their products or services targeting specific groups. It is a profitable relationship for both sides, as private profile holders receive information about products they may wish to purchase, and for advertisers Facebook is a platform through which to reach old and new customers. Facebook earns most of its money through advertising and thus can afford to remain free for private users.<sup>19</sup> It grew out of its purely social bubble into a forceful two-sided platform, and has to be analysed accordingly, as traditional antitrust analysis and economic models have to be modified in order to make sure that they do not only show one side of the enterprise. Much like newspapers that are full of colourful pictures designed to attract readers' attention, one can no longer separate Facebook or its private users of the advertising, which attracts considerable online criticism. It is undeniably true that the advert percentage on the average newsfeed sometimes spreads over half the surface of the page.<sup>20</sup> This is to illustrate the fact that Facebook is now a two-sided market in two dimensions – between friends and private persons and the advertisers who target them.

The question has been raised whether stronger weight should be given to the second side of this market, i.e., to the advertising business in its context to the user-oriented side. In this view, internet activities are primarily seen as a means to generate advertising revenues. The first side of the market, i.e., the kind of services proposed over the internet, is perceived as an instrument to obtain information on

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<sup>19</sup> Cf. Nicholas Carlson, *How Does Facebook Make Money*, available at <http://www.businessinsider.com/how-does-facebook-make-money-2010-5> (accessed 3 Mar. 2014). Thanks to earnings from one side, a two-sided market may afford to offer its services to the other side below incremental costs, or in our case, free profiles.

<sup>20</sup> For sites that criticize the amount of advertising on Facebook, see for example: Dan Graziano, *Facebook's Advertising Strategy Could Be its Downfall* available at: <http://bgr.com/2013/07/02/facebook-criticism-advertisements/> (accessed 3 Mar. 2014). And a comparison of Google and Facebook in graphs and pictures *Google versus Facebook – from an Advertising Perspective*, available at <http://www.tnooz.com/2013/05/08/news/google-versus-facebook-from-an-advertising-perspective-infographic/> (accessed 3 Mar. 2014).

users who use the offered services. The relevant market in this sense would extend to any ‘monetizing of users’ information by online advertising’ encompassing online search and social networking websites.<sup>21</sup> On the basis of this broad concept, companies like Google or Facebook would operate on the same relevant market so that it would be less probable that any of them have a dominant position.

In our view, this perspective does not achieve the goal of better addressing the two-sided nature of web portals. The realization of revenues depends on the success of the main activity of the platform. Therefore, the substitutability of the specific service from the perspective of its users is highly relevant. Competitive pressure – or its absence – could not adequately be taken into consideration if the kind of services offered to the consumer is modified or disappears entirely behind the general commercial interest underlying any business activity. This does not argue against larger market definitions on advertising markets<sup>22</sup> as long as the user side of the market is not neglected. It is true that the ‘free’ character of certain internet services creates problems, and that the two-sided nature of markets has to be taken into consideration when assessing market power and problematic behaviour. However, these problems should rather be fixed by refining traditional market definition tests as proposed in the following discussion.

## 2.2 SSNDQ: A NEW TEST TO DEFINE A MARKET FOR A FREE PRODUCT OR SERVICE?

After looking at the nature of the markets that Facebook operates on, the next important step for the purposes of applying EU competition law on abuse of dominant positions is the precise definition of what said markets cover. This step is needed because once we define a market we can determine whether a company has a dominant position on that market, and only then whether it can or has abused that position.

Initially, relevant product markets are delineated according to the criterion of demand substitutability, i.e., the interchangeability of products from the perspective of the other market side.<sup>23</sup> The problem in our context with this traditional

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<sup>21</sup> See the discussion by Florence Thépot, *Market Power in Online Search and Social Networking: A Matter of Two-Sided Markets*, 36 *World Competition* 195, 217–218 (2013) referring to Waller, *supra* n. 9.

<sup>22</sup> Thépot, *supra* n. 21, at 210–214 with a thorough analysis of online/offline and search/non-search advertising.

<sup>23</sup> Cf. Richard Whish, *Competition Law* 28–31 (6th ed., Oxford 2009).

approach is the following: the Commission Notice on Market Definition<sup>24</sup> suggests a test to define the relevant product or service market, based on a ‘Small but Significant Non-Transitory Increase in Price’ (SSNIP).<sup>25</sup> This means that after supplier A decides to increase the prices of his products by a small margin, but for a period of time lasting enough to be felt as non-transitory by the market, then consumers affected by the change will turn to supplier B for the same product in numbers significant enough for the original increase in price and ensuring loss of trade to not be profitable for supplier A. If this is the case, then the two products offered by suppliers A and B are within the same relevant product market. The European Commission makes use of the SSNIP test often, but not systematically. In fact, it has never given the SSNIP test absolute value. In the notice on market definition, for example, it has introduced the SSNIP test as ‘one way of making this determination’, i.e., the determination of demand substitutability from the consumers’ perspective.<sup>26</sup> The Courts of the European Union have not explicitly endorsed the SSNIP test, but they mention it when they examine the legality of Commission decisions in which the test has been used.<sup>27</sup> There is no need for the courts to subscribe to specific tests of market definition, since, according to their position, ‘in so far as the definition of the relevant market involves complex economic assessments on the part of the Commission, it is subject to only limited review by the Courts of the European Union’.<sup>28</sup> Hence, for the courts, even more than for the European Commission, the SSNIP test is one of many different ways to determine demand substitutability.

A cautious approach to the SSNIP test is indeed advisable. A price-related test must fail in situations where the price is not the decisive parameter for the purchasing decisions of the clients. Moreover, the SSNIP test comes from the static world of price theory which is particularly inadequate for highly innovative and dynamic industries. Above all, the SSNIP test is designed for conventional markets where monetary charges apply.<sup>29</sup> It does not work where the remuneration takes another form, for example attention<sup>30</sup> or personal data.<sup>31</sup> This is exactly the case

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<sup>24</sup> Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ 1997, C 372/5.

<sup>25</sup> *Ibid.*, para. 17.

<sup>26</sup> *Ibid.*, para. 15.

<sup>27</sup> See for example Case C-333/94 P *Tetra Pak v. Commission* [1996] ECR I-5951, para. 16; Case T-30/89 *Hilti v. Commission* [1991] ECR II-1439, n. 56; Case T-427/08 *CEAHR v. Commission* [2010] ECR II-5865, n. 69; Case T-336/07 *Telefónica and Telefónica de España v. Commission*, not yet reported, para. 139.

<sup>28</sup> Case T-427/08 *CEAHR v. Commission* [2010] ECR II-5865, para. 66.

<sup>29</sup> Therefore, the SSNIP test is in principle applicable to the advertising aspect of two-sided markets. But even here, it has to be adapted in order to respond to the two-sided context, see Thépot, *supra* n. 21, at 215–216.

<sup>30</sup> See the groundbreaking study of Georg Franck, *Ökonomie der Aufmerksamkeit – Ein Entwurf*, Munich 1998; for the subject area of this article see David S. Evans, *Attention Rivalry among Online Platforms*, 2013, p. 4, available at, <http://ssrn.com/abstract=2195340> (accessed 3 Mar. 2014).

with Facebook or other social media sites as these websites do not charge for the use of their services. Hence, the easiest reaction would be to join the critics and to plead for the withdrawal of the SSNIP test, but this path shall not be taken here. The SSNIP test has its virtues and is helpful to a certain degree if its inherent limitations (e.g., the cellophane fallacy) are not overlooked.

It is possible to adapt the test to the world of 'free' Internet services. The starting point to defend this statement is to acknowledge that consumers will necessarily take the *quality* of a product in relation to its price into consideration. This criterion can be used as an alternative basis for a modified SSNIP test. Facebook's source of pride is its reliability, i.e., an accumulation of small certainties which make its use a pleasure: the servers rarely crash, there are few login or password problems, and the protection of one's profile is relatively high. Thus the statistically average user encounters relatively few purely 'usage' issues. This does not include the changes in the layout of the page, which may not please the private user, but constitutes a conscious choice of the proprietors of the website.

Facebook has accustomed its users to a certain level of quality. This is a very laudable accomplishment because, as a general rule, the average user will consider it a dependable website. However, you could say that this has somewhat spoiled the consumer, in the sense that now the lack of problems and availability of various features is something he expects from the website, rather than being an additional quality that makes usage easier. Taking this reasoning further, if Facebook suddenly suffered a small but significant non-transitory *decrease* in the quality (SSNDQ) of the website<sup>32</sup> – i.e., the average user would have problems logging in, the site would often be down for maintenance, crash due to user overload, or become a victim of spam or hacking – then the question we might ask is whether the private user will switch to other social media sites, such as Twitter or Google+, or even slightly more distant sites like Tumblr or YouTube. If we assume that a quality decrease were a way for Facebook to limit its maintenance expenses, and if at the same time we accept that the value of the site and the income it generates (be it from advertising to users or users paying for features) depends on large amounts of users present in the network, then the test is whether private users will switch to other networks in numbers significant enough for the decrease in income to be felt on the Facebook balance sheet. If they do impact their finances then 'it is not worth it' for Facebook to cut its maintenance budget by decreasing its quality.

It is important to underline that the decrease in quality must be small, not wide scale, and non-transitory, constant, not only on one occasion. The moment the average user switches to Google+ in order to use the same features that

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<sup>31</sup> Spencer Weber Waller, *supra* n. 9, at part I.B.3.

<sup>32</sup> The SSNIP test suffers from its fixation on price although it is generally recognized that many other parameters are relevant in the competitive process.

Facebook offers, the two websites belong to the same relevant market. The test can be performed further until the consumers no longer switch.

### 2.3 CONCLUSIONS ABOUT DEFINING THE RELEVANT MARKET

A brief comment must be made about the famous ‘Cellophane fallacy.’<sup>33</sup> If one starts to analyse a product which is already offered at monopolist price, then many other products will be substitutes for consumers who are not able to afford the expensive one, which will lead to a distorted market definition. One must start at a competitive price and then increase it to identify real change. The issue with Facebook is, it is submitted, the complete opposite. If there were twenty social media websites available for free, then the average user will pick the one that crashes least, is the most reliable, protects his data best, and is the most user-friendly. However, if the majority of people use Facebook, then there is an overwhelming probability that a new consumer will choose this platform, too, even if it has faults, in order to be in contact with everyone.

In conclusion to this analysis, there are two ways of perceiving the situation. Either we accept that the user market will be defined as social media of various kinds, including Twitter and Google+, which is an official competitor for Facebook<sup>34</sup> and offers many of the same sharing and gaming features. Another option would be to view Facebook as its own market, because people who already use it will not switch because all their friends are on Facebook, even though they may dislike the increasing amount of advertisements. Consequently, they are locked in users.<sup>35</sup> It is submitted in the following, however, that in either of these markets Facebook would be considered to have a dominant position.

## 3 DOMINANCE

### 3.1 MARKET SHARE

A dominant position on the market has been defined as ‘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, customers and

<sup>33</sup> Pierluigi Sabbatini, *The Cellophane and Merger Guidelines Fallacies Again*, Government of the Italian Republic (Italy) - Italian Competition Authority (24 May 2001), p. 1, available at <http://ssrn.com/abstract=271113> (accessed 3 Mar. 2014).

<sup>34</sup> See *supra* n. 16.

<sup>35</sup> Cf. Spencer Weber Waller, *supra* n. 9, at part IV: ‘If Facebook’s market dominance remains durable, the question of market power becomes easier over time as network effects and data lock-in make it increasingly likely that Facebook is a market onto itself’.

ultimately of its consumers'.<sup>36</sup> In order to determine dominance, several factors have to be taken into account, in particular actual competition, potential competition and countervailing buyer power. For actual competition, market shares play a preeminent role. Without going into a theoretical academic debate about what exactly should be included in the calculation of market share, we will utilize practical data concerning the number of private users and advertisers, and the number of visits on the website, which give a rough idea of how 'popular' (i.e., how important) that website is in the market.

It is agreed that at the time of writing that Facebook is the leading 'social media' website, even given a broad construction of the term,<sup>37</sup> with over 55% of the market share of visits in June 2013, with YouTube coming second with less than 25%. Another indication of Facebook's dominance is territorial dominance – by listing countries where it is the most used social media.<sup>38</sup> A third source shows Facebook's dominance by measuring internet traffic. Facebook held almost three quarters of the market share in social media in March 2013, again followed by YouTube with less than one-tenth.<sup>39</sup>

### 3.2 NETWORK EFFECTS AND BARRIERS TO ENTRY

Following the usual competition law analysis, market share is not the only element determining dominance. There is a presumption of market dominance where the market share in the relevant market exceeds 50%, but it can be counteracted by low barriers to entry for competitors.<sup>40</sup> It is submitted that barriers to entry for websites involving profiles for users are very high because people naturally prefer to stick to their old profile instead of constantly creating new ones. Furthermore, there is the idea of 'I will have a Facebook profile because everyone is on Facebook', which suggests facility and as such guarantees less effort, and in consequence attracts more and more people. The consequences of this statement are twofold. First, Facebook is dominant to its current average users because they are locked-in and will not change social networks, even though they are completely free to do so if they wish. But they do not leave because the profile has

<sup>36</sup> Case C-27/76 *United Brands v. Commission* [1978] ECR 207, para. 65.

<sup>37</sup> Including video sharing with YouTube, professional networks like LinkedIn, and forums like Yahoo!Answers. Cf. <http://www.dreamgrow.com/top-10-social-networking-sites-by-market-share-of-visits-june-2013/> (accessed 3 Mar. 2014).

<sup>38</sup> Cf. <http://www.socialmediastrategist.co.uk/blog/1-news/204-facebooks-market-share-june-2013> (accessed 3 Mar. 2014).

<sup>39</sup> Cf. <http://socialmediatoday.com/1311981/social-media-marketing-share-2013> (accessed 3 Mar. 2014).

<sup>40</sup> European Commission, Guidance on the Commission's enforcement priorities in applying Art. 82 of the EC Treaty [now: Art. 102 TFEU] to abusive exclusionary conduct by dominant undertakings, OJ 2009 C 45/7, para. 16.

been created, all the friend connections are established and they probably have links to their favourite advertising pages.

The second repercussion stemming from the amount of people already owning profiles, as well as new arrivals, is that the utility for a single user is increased by the fact that more and more people join the same network. This is a positive externality called ‘network effects’.<sup>41</sup> These exist when the general value of the network – i.e., connection and interaction between individuals – increases as more and more users join that network. Furthermore, this reasoning can be applied to both aspects of Facebook’s two-sided market nature.<sup>42</sup> On the mere social contact side, the more friends the average user can connect with via Facebook, the more his profile and participation are worth to him personally, because he does not have to go elsewhere to keep in touch.<sup>43</sup> On the other hand, for advertisers who post on the site, the more users join, the more people they can reach with their product offer, while the users are attracted by the fact that they can find out information about products and services which are valuable to them as consumers (e.g., prices, sales, descriptions) on Facebook.

It is submitted that it would be extremely difficult for a newcomer to beat both the lock-in of old users and the attraction of new ones. Thus, the barrier that any competitor would have to overcome is very high. It is argued that Facebook is not only dominant because of its market share, but also due to the difficulties of competitors to enter, let alone to succeed in the relevant market of social media. Dominant firms are subject to specific rules of conduct under Article 102 TFEU, as they must not abuse their privileged position. In the following, a review of the most striking possibilities for abuse of a dominant position on the part of Facebook is given. This list is by no means exhaustive, rather it is meant to cover obvious issues that could constitute points of interest from a competition law point of view.

#### 4 ABUSE OF A DOMINANT POSITION

Article 102 TFEU covers two forms of abuses. On the one hand, exploitative abuses which are designed to exploit customers or suppliers, for example getting consumers to pay more than justified by the costs incurred plus a reasonable profit, and exclusionary abuses, directed at competitors and attempting to limit their scope, eject them from or prevent them from entering the market. By contrast, the

<sup>41</sup> See the analysis in Patrick G.J. Van Cayseele & Stijn Vanormelingen, *Prices and Network Effects in Two-Sided Markets: The Belgian Newspaper Industry*, Working Paper Series (26 Feb. 2009) available at <http://ssrn.com/abstract=1404392> (accessed 3 Mar. 2014).

<sup>42</sup> See Yoo, *supra* n. 9, at 1148–1154. He does a detailed economic analysis of network effects in the precise context of Facebook.

<sup>43</sup> Spencer Weber Waller, *supra* n. 9, *Antitrust and Social Networking*, 90 N.C. L. Rev. part I B 4 (2012).

American Sherman Act is said to focus more on exclusionary behaviour and attempted monopolization of the market.<sup>44</sup>

The vital issue with all of the following types of abuses is that they are all defined, designed and analysed in the context of a product or service a consumer pays to receive. Facebook is free, so one has to adapt the logic to see how else a dominant position can be abused and the consumer harmed without him paying.

#### 4.1 POTENTIAL EXPLOITATIVE ABUSES

One of the most characteristic differences between US antitrust law and European competition law is the treatment or rather the existence of exploitative abuses. For instance, US antitrust law does not prevent monopolies from charging monopoly prices.<sup>45</sup> In European law, by contrast, firms in a dominant position must not directly or indirectly impose unfair purchase or selling prices or other unfair trading conditions, Article 102(2) lit. a TFEU. It is important to note that, according to this prohibition, potentially abusive conduct is not restricted to the field of price-related behaviour but can consist of any other exploitation of economic power conferred by the dominant position. In the same vein, the limitation of production, markets or technical development to the prejudice of consumers (Article 102(2) lit. b TFEU) may amount to an exploitative abuse.<sup>46</sup>

The deeper reason for the prohibition of exploitative abuses in European competition law is the wish to correct market results in the absence of effective competition. In well-functioning markets, firms are controlled by their competitors. The inherent self-correcting forces of the market prevent firms from charging excessive prices because they would lose customers to their competitors. This mechanism does not work anymore if dominance has conferred the ability to behave independently from other market participants.<sup>47</sup> In this case, the control by competition must be replaced by a specific legal (i.e., artificial) control against the abuse of dominant positions. It is worthwhile to underline that the existence of

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<sup>44</sup> Cf. Giorgio Monti, *EC Competition Law* 217–218 (Cambridge 2007).

<sup>45</sup> U.S. Supreme Court – *Pacific Bell Telephone Co. v. Linklinecommunications, Inc.*, 555 U.S. 438 (2009). To the contrary, high prices are considered important for spurring competition, see US Court of Appeals for the DC Circuit, 22 Apr. 2008, No. 07-1086, *Rambus v. FTC*, 18: ‘high prices and constrained output tend to attract competitors, not to repel them’. In the same sense U.S. Supreme Court – *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko*, 540 U.S. 398 (2004).

<sup>46</sup> Cf. the European Commission’s Guidance on abusive exclusionary conduct, *supra* n. 40, at para. 19, according to which the harm to consumer welfare may not only occur in the form of higher prices but also ‘in some other form such as limiting quality or reducing consumer choice’. The Commission’s Guidance only applies to exclusionary, not to exploitative conduct (see para. 7 of the document), but the adverse effects on consumers have to be dealt with in the context of exclusion as well.

<sup>47</sup> See *supra* n. 36.

exploitation does not require the proof of harm to competition. The prohibition of exploitative abuses aims at protecting the other market side as such.<sup>48</sup> However, exploitative and exclusionary conduct meet where the exploitative conditions prevent customers from choosing competing products.

#### 4.1[a] *Forcing Decisions upon Users*

These principles can also be applied to the phenomenon of social media. There are changes that Facebook can impose on its private users' profiles over which they themselves have no influence. The average user signs up and has to accept all the personal profile aspects and administration modifications without having the opportunity to object. Remedies such as online petitions have an unfortunate reputation of disappointing ineffectiveness.<sup>49</sup> The issue is that the average user does not have a commercial contract signed with Facebook that guarantees what their profile is going to look like or what features will be available. He does not have anything to base a claim on and has to accept that Facebook has exclusive jurisdiction regarding their profile, at least when it comes to the external appearance. Of course he can select his own profile picture, but has no say regarding the physical layout of the information or where the ads appear on the screen. Arguably, Facebook changes the layout to make it easier for users to browse the website and keep up to date with their friends' activities. Therefore, it might be considered a laudable attempt at usage optimization, but the average user may have liked the previous layout more than the current one.

The relevant question in our context is if unilateral changes to product qualities of a social media platform may amount to an exploitative abuse. Starting point is the fact that suppliers, including dominant ones, are perfectly entitled to change their supplied products catalogue and the products' features. For dominant firms, this freedom ends where changes of the product have to be qualified as a limitation of the production or technical development in the sense of Article 102(2) lit. b TFEU.<sup>50</sup> Therefore, a decrease in quality might be considered an abuse,<sup>51</sup> especially if one keeps in mind that the same criterion determines –

<sup>48</sup> Cf. Richard Whish, *Competition Law* 706–715 (6th ed., Oxford 2009).

<sup>49</sup> Which is not to say that users do not try, see for example this invitation to share your opinion: *Facebook Timeline: Here's How Users Would Change It*, <http://mashable.com/2012/01/27/facebook-timeline-changes-communit/> (accessed on 3 Mar. 2014).

<sup>50</sup> See, for example, Case C-179/90 *Merci Convenzionali Porto di Genova v. Siderurgica Gabrielli* [1990] ECR I-5889, para. 19; Case C-41/90 *Höfner and Elser v. Macrotron* [1991] ECR I-1979, para. 31.

<sup>51</sup> See Bruce Lyons, *The Paradox of the Exclusion of Exploitative Abuse*, in *The Pros and Cons of High Prices* 67 (Swedish Competition Auth. ed., Kalmar 2007): 'In principle, product quality, service levels and product range may also be abused by a dominant firm. It is difficult to measure these in order to compare them with an appropriate benchmark, but the same, to a lesser extent, can be said of high prices'.

according to the SSNDQ test proposed above – the relevant market and thus restricts the users’ fallback options. It has to be underlined that this is, in the context of social media, a purely hypothetical statement. Of course, it is a well-known and universally acknowledged fact that Facebook is very active in constantly trying to innovate.<sup>52</sup> There could not be a greater difference to the ‘quiet life’<sup>53</sup> of the state monopolists in the cases cited above.<sup>54</sup> However, the question may be asked if the ‘special responsibility’<sup>55</sup> does not require the dominant firm to respect certain procedural safeguards before recurring to far-reaching modifications of the product, for example timely announcements in order to allow users to withdraw personal material which they prefer not to show in the new surroundings. If the average user has nowhere else to turn to, as in the social media market, then dominant websites such as Facebook must be very careful when taking far-reaching decisions with respect to their main product because the users are much less likely to leave despite being dissatisfied with it.<sup>56</sup>

#### 4.1[b] *Protection of Information Shared Online*

When the average user signs up to Facebook, he transfers far reaching rights to his data. It is true that the scope of the transfer of rights is outlined in the Facebook Data Use Policy<sup>57</sup> and declarations, but these texts leave open what the website is really entitled to do with the information it receives. Of course, it is comforting to read announcements that all data is securely kept on their servers, and that they anonymize the information before transmitting it to anyone, but it does not provide comfort and safety. While there are options available to hide private information, it is all nevertheless logged on the Facebook servers and then used to personalize ads on your profile. For example, one author designed an advertisement that was specifically targeted at his girlfriend, without ever mentioning her name, only where she graduated from and what she was interested

<sup>52</sup> See, for example, *Kennt mich jemand? Neue Graph Search von Facebook*, available at, <http://www.sueddeutsche.de/digital/neue-graph-search-von-facebook-kennt-mich-jemand-1.1718917> about a new Facebook function called ‘Graph search’ to collect data about boost connections between its users (accessed on 3 Mar. 2014).

<sup>53</sup> John R. Hicks, *The Best of All Monopoly Profits Is a Quiet Life*, in *Annual Survey of Economic Theory: The Theory of Monopoly*, 3 *Econometrica* 1, 8 (1935).

<sup>54</sup> See *supra* n. 50.

<sup>55</sup> Case 322/81 *NV Nederlandsche Banden Industrie Michelin v. Commission of the European Communities* [1983] ECR 3461, para. 57.

<sup>56</sup> Moreover, alternatives are diminished by Facebook’s recent takeovers of Instagram and WhatsApp (whereas the takeover of Snapchat failed). For the takeover of WhatsApp see *Facebook to Buy Messaging app WhatsApp for \$19bn*, available at, <http://www.bbc.co.uk/news/business-26266689> (accessed on 3 Mar. 2014).

<sup>57</sup> Cf: <https://www.facebook.com/about/privacy> (accessed 3 Mar. 2014).

in. The ad then appeared on her profile.<sup>58</sup> Thus, even if her name is stripped off of the average user's personal info, it is doubtful that there will be someone who has graduated from the same school in the same year, went to the same University, done the same internships and ended up in the same professional situation. This topic is much more within the realm of data protection than competition, but the amount of data available to Facebook (including IP addresses) is considerable and users are forced to disclose it in order to be able to participate.

The question has to be asked therefore, if violations of the company's data use policy or exaggerations within this set of rules may amount to an abuse for the purposes of competition law. If we begin with the idea that the remuneration for social media services paid by the user is not monetary in character, but instead consists of his attention (to the website, including advertisements which generate income for the website's owner) and in his personal data (allowing personalized advertising and data marketing), an undue increase in the use of personal data may very well be compared to excessive prices. An unreasonable expansion of the data use policy and, all the more, violations of data protection rules, may therefore constitute an abuse of a dominant position. Thus, in the field of social media, data protection law and competition law may overlap considerably.

It has to be underlined in this context that the application of competition law is not excluded or predetermined by data protection law. It is very well conceivable that behaviour which is perfectly legal under data protection law violates competition law. In European competition law, this possibility results from the hierarchy of norms with Articles 101 and 102 standing above 'simple' regulations or directives. But even if this were not the case, competition law pursues goals different from data protection law so that different results are possible. For a comparable question, i.e., the relationship between competition law and telecommunications law, the European Court of Justice has underlined the autonomy of competition law from other branches of law. Even if tariffs have been authorized by the competent regulator, there may be still an abuse of a dominant position if the undertaking in question had a sufficient margin to adapt its behaviour.<sup>59</sup> These principles apply to the relationship of competition law and data protection law. A dominant undertaking is subject to more restrictions than an ordinary firm without that degree of market power.<sup>60</sup>

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<sup>58</sup> Katherine K. Roberts, *Privacy and Perceptions: How Facebook Advertising Affects its Users*, 1 The Elon J. Undergraduate Research Commun. 24, 26 (2010).

<sup>59</sup> Case T-271/03 *Deutsche Telekom v. Commission* [2008] ECR II-477, paras 85–151 confirmed by Case C-280/08 P *Deutsche Telekom v. Commission* [2010] ECR I-9555.

<sup>60</sup> For the interface between data protection law and competition rules with respect to the procedure of competition authorities, see Monika Kuschewsky & Damien Geradin, *Data Protection in the Context of Competition Law Investigations: An Overview of the Challenges*, 37 World Competition 69 (2014).

4.1[c] *Onerous Deletion*

Third, there are two elements that create an unbreakable oath of allegiance with Facebook. Account deactivation, and deletion is an onerous process which does not lead to the deletion all of one's personal data from the servers, and one's account can be easily reactivated.<sup>61</sup> The average user, however, may not desire to delete his account, because studies have shown signs of a growing 'Facebook addiction',<sup>62</sup> especially amongst young people at school or university. In competition law, it is recognized that 'unfair trading conditions' in the sense of Article 102(a) TFEU may also consist of an unreasonably long duration of contractual relationships.<sup>63</sup> If in practice it is not possible, with reasonable efforts, to delete one's profile and to terminate the use of one's personal data, the limits of an appropriate contract term seem to be overstepped.

If one bears in mind that one of the tributes paid by the user is personal data, it seems excessive to impose a duty unlimited in time. It follows from Article 102(a) TFEU that the dominant firm proposes a reasonable mechanism to delete one's profile. In the case of Facebook, it is suggested every step of the way to the user not to delete, but to temporarily deactivate their profile while their data is kept warm for when they come back.<sup>64</sup> Actual deletion is theoretically possible, but requires the user to wait two weeks after confirming during which time they cannot log back in or use any Facebook option on any device because that would cancel the delete order – which from the website's perspective is an argument that they make efforts to make consumers happy and accept them even if they change their minds, but is actually a way to suggest to the consumers that they will want to come back. One must also be very careful to delete all apps on other devices and the cache on the computer because any inadvertent sharing or logging in will jeopardize the whole process.

There are two issues with this: the first is that even after the two weeks expire, some data is still kept in their system for 'technical reasons',<sup>65</sup> which means the user is never completely gone off the internet, and second, it seems as though the name of the account still remains in one's old friends' friend lists, albeit without

<sup>61</sup> Cf. Rolf H. Weber, *supra* n. 9, at part 4.3.d.

<sup>62</sup> See *The True Costs of Facebook Addiction: Low Self-esteem and Poor Body Image* available at: <http://www.forbes.com/sites/alicegwalton/2012/04/05/the-true-costs-of-facebook-addiction-low-self-esteem-and-poor-body-image/> (accessed 3 Mar. 2014). And *How is Facebook Addiction Affecting Our Minds?* available at: <http://mashable.com/2012/11/03/facebook-addiction/> (accessed 3 Mar. 2014).

<sup>63</sup> Andreas Fuchs/Wernhard Möschel, in Ulrich Immenga/Ernst-Joachim Mestmäcker (eds.), *Wettbewerbsrecht*, Vol. 1/1 EU, 5th edition, Munich 2012, Art. 102 AEUV n. 187.

<sup>64</sup> See, for simplicity <http://www.wikihow.com/Permanently-Delete-a-Facebook-Account>, no. 5 (accessed on 3 Mar. 2014). Facebook also provides a mechanism for downloading all the data that one has ever shared.

<sup>65</sup> See [http://www.pcworld.com/article/242956/how\\_to\\_delete\\_your\\_facebook\\_account.html](http://www.pcworld.com/article/242956/how_to_delete_your_facebook_account.html) (accessed on 3 Mar. 2014).

any hyperlink or information.<sup>66</sup> In summary, it is difficult to delete one's profile, psychologically and technically, and Facebook is almost patronizing in its insistence that you really want to stay or really want to come back, for example once exam period is over. Average internet users are not ready to allocate much effort to delete profiles like that, and are thus less likely to look elsewhere. This is all the more important since here exploitative abuse overlaps with exclusionary abuse. The difficulties in deleting one's profile on a certain social media website may prevent users from migrating to a competing one. In the following chapter, exclusionary behaviour in the context of social media has to be reviewed in detail.

## 4.2 POTENTIAL EXCLUSIONARY ABUSES

### 4.2[a] *Tying and Bundling*

This part covers the most obvious exclusionary abuses that one would expect from a company in Facebook's position. Tying is a commercial sales practice whereby one product or service is sold as a mandatory addition to the purchase of another product or service, making the sale of one good to the consumers de facto conditional on the purchase of a different good. The consumer is forced to pay for the second good in order to get the one he actually wants. Bundling describes offering several products for sale as one combined product or 'package deal', usually for a lower price than the sum of each of the products' prices if purchased separately. It is slightly less aggressive than tying, where you cannot get the products separately, but remains nevertheless a powerful incentive for the consumer to buy the bundle. Apart from the exploitative aspects, the main problem of tying and bundling is the risk of foreclosure.<sup>67</sup> Competition on the market for the tied product may be hampered if clients have to buy the product with the manufacturer of the tying product.<sup>68</sup> A thorough analysis is necessary in order to determine the impact of tying and bundling on competition in the different markets.<sup>69</sup>

<sup>66</sup> This point is an observation from the authors, dated September 2013, and might no longer be accurate.

<sup>67</sup> Leading tying cases include Case T-30/89 *Hilti v. Commission* [1991] ECR II-1439; Case C-333/94 P *Tetra Pak v. Commission* [1996] ECR I-5951. For a critical analysis, see Hedvig Schmidt, *Competition Law, Innovation and Antitrust – An Analysis of Tying and Technological Integration* (Cheltenham 2009).

<sup>68</sup> For a competition law analysis of tying and bundling see the European Commission's Guidance on abusive exclusionary conduct, *supra* n. 40, at paras 47–62.

<sup>69</sup> See for example Case T-79/12 *Cisco Systems and Messagenet v. Commission* [2013], not yet reported (Microsoft/Skype merger): The European Commission and the General Court did not accept Cisco's argument that tying or bundling of Skype with Microsoft's product would significantly impede effective competition.

Upon creating a Facebook account, the average user was introduced to a multitude of different features, including sharing posts, photos, links, applications and videos, private messages, and even instantaneous chat exchange with a video feature. Arguably all of these features are different products, with each having a separate competitor: YouTube for video sharing, Twitter for short status updates, Skype for video calls and chat, Instagram for sharing photos with interesting editing options for visual effects.<sup>70</sup> When a private user signs up to Facebook, he automatically has the possibility to use all of these features. It has already been mentioned that the strength of Facebook lies in its universality, in the sense that one and the same profile can be used for all of those different features, without having to go through the administrative trouble of organizing various profiles on separate websites. The average user is not forbidden from using other platforms, quite the contrary, if you upload a YouTube video it can be played directly on the Facebook website. If one pushes the analysis further, from a purely product-related perspective, all of those features are bundled together into one big platform offered to users. They are even tied, because you cannot choose which features are available, you get them all or none.

There is an entire series of comments that go alongside this analysis. First and foremost, Facebook is a free website for any private user to join and use. Thus, offering as wide a choice of features as possible only works to Facebook's advantage, because it shows that they made the effort of giving the average user lots of choice in ways to share and develop his experience of social media. The case that comes to mind in this context is *Microsoft v. Commission*<sup>71</sup>, where Microsoft was accused of anti-competitive behaviour because it bundled the Windows operating system with the Windows Media Player, thus creating disincentives for OEMs and users to install competing media players.<sup>72</sup> The European Commission imposed a duty on Microsoft to offer a Windows version without the media player. This remedy was not successful because *Microsoft* was allowed to sell the full-fledged Windows version at the same price as the version without the media player.<sup>73</sup> Consequently, very few people were interested in the slim version. However, the European Commission made clear that the dominant

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<sup>70</sup> Instagram has now even become a verb describing editing a photo: 'She instagrams all her photos'.

<sup>71</sup> Case T-201/04 *Microsoft Corp. v. Commission of the European Communities* [2007] ECR II-3601. See for example Carl Baudenbacher, *The CFI's Microsoft Judgment – Three Seconds That Changed the IT World*, European L. Rptr. 342 (2007); *Microsoft on Trial: Legal and Economic Analysis of a Transatlantic Antitrust Case* (Luca Rubini ed., Cheltenham 2010).

<sup>72</sup> The other part of the case concerned the market for server software. The refusal to supply developers of competing server software with the information necessary to create interoperability with the ubiquitous Windows operating system was considered abusive. Microsoft had to make the relevant interface information available to all interested undertakings.

<sup>73</sup> See the in-depth analysis by Nicholas Economides & Ioannis Lianos, *A Critical Appraisal of Remedies in the E.U. Microsoft Cases*, Colum. Bus. L. Rev. 346 (2010).

position on a market of strategic importance must not be used to conquer adjacent markets by measures other than competition on the merits.

Subsequently, the same reasoning was applied to the browser market. *Microsoft's* Internet Explorer was pre-installed with the operating system and difficult to get rid of. This was held to be anti-competitive behaviour because *Microsoft*, which was dominant on the market for PC operating systems, was hindering effective competition in the web browser market, as fewer consumers opted to use alternative browsers. The company was forced to allow consumers the choice between its own browser and several alternative browsers by providing a 'choice' or 'ballot' screen upon first starting a new computer.<sup>74</sup> The outcome in the browser case seems to be a much more appropriate remedy than that in the media player part of the Commission's 2004 decision, whereby the dominant firm is not prevented from integrating new functionalities in its products and developing these further. At the same time, competitors get the same platform to recommend their own products and allow users decide which one they prefer.

Returning to Facebook, other social media providers, e.g., Skype, could argue that Facebook is hindering competition in the online video call programmes as Facebook offers the option to its users without the possibility of deleting it or indicating the existence of competing video call systems. The same is true for the other supplementary functions of Facebook.<sup>75</sup> In our view, however, there is an important difference to the *Microsoft* constellation. In the case of Facebook, there is no software whose strategic importance comes close to that of an operating system and whose outstanding importance is used in order to impose other products or functions.<sup>76</sup> As long as social media has not gained fundamental significance comparable to that of an operating system, the freedom of companies to develop their products further should prevail. Even if network effects of social media are strong, the dissemination of platforms such as Facebook does not reach the same percentage as the one of the Windows operating systems installed on personal computers. The average user is fully entitled never to use the Facebook video calls feature and use Skype instead. Facebook is free and voluntary to sign up to, not pre-installed and forced upon users. Thus, by signing up, the average user chooses to use Facebook and be exposed to all its advantages, because one cannot dispute that from a consumer entertainment point of view, having as many features as possible greatly contributes to the value of the website. Against this backdrop,

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<sup>74</sup> European Commission Decision 16 Dec. 2009 – *Microsoft (Tying)*, OJ 2010 C 36/7. However, the company did not respect its commitments and was heavily fined for non-compliance with the commitment decision; see European Commission, 6 Mar. 2013 – *Microsoft (Tying)*, OJ C 120/15.

<sup>75</sup> The relevance of the bundling part of the European *Microsoft* decision is underlined by Spencer Weber Waller, *supra* n. 9, at part IV.

<sup>76</sup> For the importance of Window's ubiquity in the *Microsoft* case, see nn. 430–472, 806, 833, 843–878, 951, 1066 of the European Commission's decision COMP/C3/37.792 [2004].

the balance of interests which always has to be considered in order to find an abuse in the sense of Article 102 TFEU, does not militate in favour of Facebook being obliged to advertise the features of its competitors.

#### 4.2[b] *Leveraging*

Leveraging describes the use by a firm of its dominance on a market to conquer and or abuse another market, usually neighbouring or downstream. The dominance and the abuse do not happen on the same relevant market.<sup>77</sup> The reason for including this in the context of Facebook's activity online is that because the company is so strong in the market of social networking websites, there seems to have so far been very little stopping it from expanding onto other markets without necessarily being dominant there. For example, Facebook allows video sharing, the realm usually attributed to YouTube. The latter does not offer all the other features that Facebook does that define it as a social media website, but can compete on the arguably separate but neighbouring market of video sharing. The main problem of leveraging is that a firm uses its dominance on a main market to be successful on related markets without relying simply on better products or lower prices.<sup>78</sup> In the field of social media, this risk exists, but seems to be low at present. Services in question are offered 'for free' and users are not prevented from choosing the service they value most. The situation would change, however, if consumers' choices were reduced. Consequently, the market has to be observed carefully with respect to strategies which do not aim at convincing users in terms of quality, but rather to urge them to use the dominant firm's products.

#### 4.2[c] *Data Portability*

Social media practice different policies as regards data portability. While some allow the transfer of user data to competing websites, others prohibit it, or at least make it difficult. This phenomenon is most easily exemplified with the 'sync' option of most applications: you can sync your email addresses so that they all arrive into the same inbox, or your mobile phone contacts with your computer ones, or, in our case, linking Facebook accounts to any other sharing device. The question arises whether restrictions on data portability amount to an exclusionary abuse if they are imposed by a dominant undertaking. It can be argued that restrictions on data portability render market entry of competing firms more burdensome. On the

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<sup>77</sup> See the analysis of leveraging by Giorgio Monti, *EC Competition Law* 186–195 (Cambridge 2007).

<sup>78</sup> See Andreas Heinemann, *The Contestability of IP-Protected Markets*, in *Research Handbook on Intellectual Property and Competition Law* 68–69 (Josef Drexel ed., Cheltenham 2008).

other hand, dominant firms are not under a duty to help competitors. Therefore, a considerable margin should be left as regards the design of portability rules.<sup>79</sup> The situation would be different if a social media supplier were not content with not granting data portability but would impose exclusivity on its users thus preventing them from using competing platforms. A comparable behaviour is part of the European Google case. The European Commission expressed concerns about exclusivity agreements imposed by Google on publishers and advertisers using its advertising programmes. Under the binding commitments proposed by Google to the European Commission, Google will remove exclusivity requirements and admit that advertisers can run search advertising campaigns at the same time across Google's and competing search advertising platforms.<sup>80</sup> In the context of a dominant social media supplier, exclusivity requirements would raise similar foreclosure concerns. Besides, data portability raises numerous questions which should be dealt in the context of data protection law. In the EU, the Draft Data Protection Regulation contains a right to data portability and specifies some important details in this respect.<sup>81</sup>

Finally, the American case *Facebook v. Power Ventures*<sup>82</sup> raises most of the aforementioned issues. Power Ventures accused Facebook of exclusionary conduct by linking its user accounts to those of the same people on Gmail, Hotmail, Yahoo!, AOL and others. Facebook requested users to provide their passwords to accounts on those websites in order to establish access, whilst denying the competitors the chance to do the same. The district court ruled that Facebook was under no obligation to give access to its user accounts merely because its competitors gave it access. Introducing a new product that is not compatible with those already present does not of itself constitute violation.<sup>83</sup>

## 5 CONCLUSIONS

Social media is a good example for the insight that the general rules of competition law are flexible enough to adapt to the developments and new types

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<sup>79</sup> Also in this sense Yoo, *supra* n. 9, at 1154–1158 (2012), who argues that mandating data portability is unconvincing because it threatens to structure interactions in a way that might limit functionality of social media and similar systems.

<sup>80</sup> See Joaquín Almunia, *Statement on the Google Investigation*, 5 Feb. 2014, *SPEECH/14/93*, available at <http://europa.eu/rapid/search.htm> (accessed 3 Mar. 2014).

<sup>81</sup> Article 18 of European Commission, Proposal for a Regulation of the European Parliament and the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), COM(2012) 11 final of 25 Jan. 2012.

<sup>82</sup> *Facebook, Inc. v. Power Ventures, Inc.*, [2012] WL 542586 (N.D. Cal. 16 Feb. 2012).

<sup>83</sup> Yoo, *supra* n. 9, at 1158–1160 where he provides summaries of cases and the types of issues that have already arisen in the social media context.

of services available online. There is neither a justification to renounce competition law control in cyberspace, nor a need for stricter rules in the field of network economics. The key is to develop a dynamic understanding of competition law, taking into account the impact of competition law enforcement on the incentives to innovate, not only of the dominant firm but also of all market actors. Although no radical change is required, the categories of competition law sometimes have to be adapted. For example, we propose to transform the SSNIP test into a 'SSNDQ' test (small but significant non-transitory *decrease* in quality) in order to respond to the 'free' character of many internet services, including social media, given the two-sidedness of the relevant markets and high barriers to entry. On this basis, potential abuses, exploitative and exclusionary, are identified. At present, no clear abuse can be found. However, the analysis may be used to avoid competition law infringements in the future.

Furthermore, data protection law is of particular importance in order to minimize competition law problems from the outset. The Draft EU Data Protection Regulation<sup>84</sup> provides for data portability and the 'right to be forgotten', which would have important consequences for social media as well. These new rights would alleviate potential competition law concerns, but they would not block the resort to competition law. In European economic law, it is recognized that 'general' competition law and 'specific' regulatory law are applicable simultaneously, as competition law has overarching goals which are not exhausted by the regulatory purposes of the more targeted rules.<sup>85</sup> Therefore, dominant firms will still have to respect the general prohibition of abuse even if data protection rules are tightened. It is the ambition of social media to inspire new forms of interaction, creativity and visibility, thus strengthening decentralized opinion making. It is of great importance that these goals are not foiled by abuses of power by the new platforms themselves.

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<sup>84</sup> See n. 52. Art. 17 of the Draft Regulation contains the 'Right to be forgotten and to erasure'.

<sup>85</sup> See Weber, *supra* n. 9, at part 1.2.