Monopolkommission

Data access from a competition policy perspective

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Chapter IV

Data access from a competition policy perspective

Summary

K1. Control over data as a competitive factor is not only gaining importance in digital but also in traditional markets. It may therefore be desirable, from the competition policy perspective, to make it easier for undertakings to access other undertakings' data. Analogous to the previous chapter, which set out an economic concept for assessing digital ecosystems, the aim of this chapter is to provide greater conceptual clarity as regards assessing claims for data access so as to be able to identify relevant problems and possible solutions.

K2. There are already several statutory norms in place which deal with data access. A claim for data access can, for instance, be established under the provisions of general competition law. More specific rules on data access have also been created in relation to digital platforms, for example, and the Data Act contains rules on cross-sectoral data access for connected products and related services. Their application is based on two principles: First, that more specific legal norms take precedence, and, second, the hierarchy of norms, notably the primacy of European Union (EU) law over national law. At the same time, sector-specific provisions generally explicitly stipulate that general rules, such as those under competition law, remain unaffected. **Since many statutory norms do not themselves specifically regulate the conditions under which data access is to be granted and only include them as a possible case of application, it is, in practice, often still not clear how exactly they are to be applied.** With this in mind, this chapter **elaborates assessment schemes for merger control and abuse control** respectively which are intended to serve as an initial basis for more refined future schemes.

K3. As regards **merger proceedings**, the Monopolies Commission recommends (1) **identifying, for each of the merging parties, those data which are relevant to competition** to which third parties already have access, those to which third parties have not yet been granted access although the data are already being recorded, and those to which access could be granted if they were recorded. In a next step the Monopolies Commission recommends (2) clarifying, for each of the identified (potential) data accesses, **whether the merger is expected to lead to any changes which will have a significant effect on the competitive environment**. Finally, the Monopolies Commission recommends (3) examining **whether the expected changes will have a negative or positive effect on the competitive environment**. Data which serve as input for services or products could either increase or decrease competitive intensity. Undertakings could use data concerning market activities to coordinate prices or quality, for instance, in an anticompetitive manner.

K4. As regards **abuse proceedings**, in the view of the Monopolies Commission the **key question** should be **whether any special data access exists** which a dominant undertaking can use to avoid competitive pressure. It therefore recommends a six-step scheme for assessing relevant criteria: **(1) analysis of the initial situation; (2) identification of context-specific factors; (3) assessment of the effects on market structure and the competitive process; (4) consideration of interests when deciding on claims for data access; (5) determination of adequate remuneration; and (6) specification of the technical configuration of the data access**.

1 Introduction

1. One consequence of an increasingly digitalised economy is that more and more undertakings are accumulating data. At the same time, systems such as language assistants which use artificial intelligence (AI) to support undertakings' internal processes are becoming ever more user-friendly and accessible. Large volumes of data are needed to train AI systems, for instance. Access to data is thus a key aspect of the regulatory landscape around AI systems. In future, de facto control over data as a competitive factor will continue to gain importance not only in digital but also in traditional markets. The importance for the economy of data and access to data can thus hardly be overestimated. Numerous statutory norms concerning data access and competition procedures bear witness to that. Rules on data access, some of which are already very specific, have already been put in place in some sectors (e.g. concerning digital platforms). Moreover, the European Commission's data strategy of 2020 applies a cross-sectoral approach with the aim of improving access to data and in some cases even make it mandatory. Claims for data access can be established under general competition law, too.

2. This wealth of statutory norms as well as the very different possible scenarios in which access to data is a relevant issue pose huge challenges in practice. This chapter therefore set out first guidelines for merger control and abuse control in the context of competition procedures. They could lay the foundations for a systematic approach to dealing with the complex issues raised and could be developed further in practice. The Monopolies Commission intends to develop comparable guidelines relating to the ban on cartels. Analogous to the previous chapter, which set out an economic concept for assessing digital ecosystems, the aim of this chapter is to provide greater conceptual clarity as regards assessing claims for data access so as to be able to identify relevant problems and possible solutions. In a first step, section 2 systematises existing statutory norms relating to data access and explains their respective areas of application, in particular with a view to the concurrence of laws. Based on that, section 3 introduces the economic and technical foundations for an understanding of data and data access so that sections 4 and 5 can then address merger and abuse control in more detail. The latter two sections outline schemes which are to help systematise and facilitate an assessment of the potential need to grant data access.

2 Existing rules on data access

3. To provide an overview of those rules of competition law which explicitly or implicitly cover or include access to data, in a first step the EU's current efforts to create a cross-sectoral data governance framework will be set out (see section 2.1). This serves to explain the context in which the current debate is taking place. Based on these very topical and broad-based developments, the next step will be to look at those statutory norms on data access which have already been in place for some time now regarding digital platforms (see section 2.2) and which also need to be seen in light of this debate. In a next step, the relevant provisions of general competition law will be examined (see section 2.3). This section serves to provide an overview of the legal framework of general competition law in relation to claims for data access. At the same time, though, it casts a bridge to what lies at the heart of this investigation and to the specific questions around how the competition authorities can systematically

assess possible data access in the context of merger and abuse control (see sections 4 and 5). A presentation of the limits of data access which could in particular arise from the ban on cartels rounds off the legal overview (see section 2.4). Finally, a conclusion is drawn regarding the systematisation of the statutory norms presented and how they relate to each other (see section 2.5).

2.1 Cross-sectoral rules in the European data strategy

4. In its data strategy of 2020 the European Commission set out proposed measures to ensure the EU remains a leader in the data economy. At the same time, it seeks to respect and promote fundamental European values.[1] The measures proposed include the establishment of a cross-sectoral governance framework for data access and use. The Data Governance Act (DGA)[2] and the Data Act (DA),[3] which together form the core of the EU's data legislation, are particularly relevant in this context. The DGA establishes those processes and structures which are needed to be able to provide and share data, in particular to re-use data held by public sector bodies; the DA contains rules on who is allowed to use the data generated by connected products[4] (e.g. smart watches, industrial facilities) under which conditions.[5] Both the DGA and the DA are horizontal, fully harmonising regulations which can be supplemented by sector-specific statutory norms.[6] Because they are of key relevance to data (access) legislation, an overview of these two regulations will be provided in the following.

2.1.1 The Data Governance Act: Facilitating the voluntary exchange of data

5. The DGA was published in the Official Journal of the European Union on 2 June 2022. Key objectives and elements of the DGA had previously been outlined in the European data strategy.[7] Chapters II to IV DGA cover three regulatory areas which all serve to promote shared data use.[8]

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1 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European strategy for data, COM(2020) 66 final, Brussels, 2020, p. 2. Regarding this strategy, see, for example, Schreiber, K./Pommerening, P./Schoel, P., Das neue Recht der Daten-Governance: Data Governance Act (DGA), Baden-Baden, 2023, p. 34–37.

2 Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European Data Governance and amending Regulation (EU) 2018/1724 (Data Governance Act), OJ L 152, 3.6.2022, p. 1–44.

3 Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act), OJ L, 2023/2852, 22.12.2023, p. 1–71.

4 For the definition of "connected product", see Article 2 no. 5 DA and para. 10 below.

5 Federal Government, Driving progress with data – A strategy for more and better data for new, effective and forward-looking data use, Berlin, 2023, p. 16.

6 Specht-Riemenschneider, L., Der Entwurf des Data Act, MMR, 2022, p. 809–826, p. 810.

7 European data strategy, loc. cit., see footnote 1, p. 14–15.

8 Hennemann, M./Specht-Riemenschneider, L., in: Specht-Riemenschneider, L./Hennemann, M. (eds.), Data Governance Act, 2023, Einführung, margin no. 41.

6. Chapter II DGA sets out requirements concerning the re-use of certain categories of protected data held by public sector bodies. It thus supplements Directive 2019/1024, which also includes provisions on the re-use of non-protected ("open") data held by public sector bodies.[9] The DGA includes provisions on protected data, as a result of which the two legal acts complement each other. To be classified as "protected", data need to be protected on grounds of business secrets, statistical confidentiality, the protection of intellectual property rights or the protection of personal data (Article 3 DGA). Pursuant to recital 6 DGA, both Acts are based on the idea that data generated or collected by public sector bodies should benefit society. Nevertheless, neither Directive 2019/1024 nor the DGA establish a right to access. Rather, it is taken as given.[10] The question of the primacy[11] of more specific statutory norms or of the provisions of competition law ought not to cause any problems in relation to data access, since the DGA does not itself establish any claims thereto. In addition, special provisions of Union law or of national law concerning access to certain categories of data remain unaffected by the DGA (Article 1(2) DGA). As regards competition law, Article 1(4) DGA explicitly states that competition law remains unaffected by the DGA.

7. The DGA is, however, not restricted to data held by public sector bodies. Chapter III DGA contains rules concerning the requirements applicable to data intermediation services. In accordance with Article 2 no. 11 DGA, "data intermediation service" in principle[12] refers to a service which aims to establish commercial relationships for the purposes of data sharing between data subjects[13] and data holders[14] on the one hand and data users[15] on the other. To promote the use of data intermediation services, trust in these services is to be increased by establishing highly harmonised requirements and having these implemented by the competent authorities (recital 32 DGA).

8. Chapter IV DGA contains rules on data altruism. In accordance with Article 2 no. 16 DGA, this refers to the voluntary sharing of data on the basis of the consent of data subjects or permissions of data holders to allow the use of their non-personal data without receiving a reward which goes beyond compensation and for objectives of general interest, such as

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9 Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (recast), OJ L 172, 26.6.2019, p. 56–83. In Germany, the Directive was transposed by means of the Data Use Act (Datennutzungsgesetz, DNG), see Federal Government, Draft Act to Amend the E-Government Act and to Introduce an Act on the Use of Public-Sector Data (Entwurf eines Gesetzes zur Änderung des E-Government-Gesetzes und zur Einführung des Gesetzes für die Nutzung von Daten des öffentlichen Sektors), Bundestag Printed Paper 19/27442, 9 March 2021, p. 2.

10 Article 1(2) DGA and Article 1(3) Directive 2019/1024, see Tolks, D., Die finale Fassung des Data Governance Act, MMR- Zeitschrift für IT-Recht und Recht der Digitalisierung, 2022, p. 444–449, p. 445.

11 Regarding the relationship between the DGA and other legal acts and fields, see Hennemann/Specht-Riemenschneider, in: Data Governance Act, loc. cit., see footnote 8, Einführung, margin no. 76 ff.

12 Article 2 no. 11 half-sentence 2 DGA regulates exceptions to this definition.

13 Pursuant to Article 2 no. 7 DGA, "data subjects" within the meaning of Article 4 no. 1 of the General Data Protection Regulation (GDPR), i.e. the person who is identifiable on the basis of the specific data in question.

14 Pursuant to Article 2 no. 8 DGA, "data holder" means a legal or a natural person who is not a data subject with respect to the specified data in question who has the right to grant access to or share certain data.

15 Pursuant to Article 2 no. 9 DGA, "data user" means a person who has lawful access to certain data and, in the case of personal data, has the right to use those data.

healthcare, combating climate change and improving mobility. The aim of including such rules in the DGA is to promote those forms of data sharing and to contribute to the emergence of "sufficiently-sized data pools" (recital 45 DGA).

2.1.2 The Data Act: Provisions on data access

9. In accordance with Article 1(1) and recital 5 DA, the Act serves several purposes: First, it aims to ensure that users of a connected product or related service can access the data generated by the use of that product or service under fair, reasonable and non-discriminatory terms and conditions and that they can share these with third parties of their choice (Chapters II to IV DA). Second, the DA includes provisions on the making available of data to public sector bodies ("B2G") on the basis of an exceptional need (Chapter V DA). Third, it contains provisions on switching between data services (Chapter VI DA) and, fourth, on improving the interoperability of data and data sharing (Chapter VIII DA). The sets of rules on data access in Chapters II to IV DA and on improving interoperability appear to be the most relevant to the present investigation and will thus be outlined in brief in the following.

10. Chapter II DA primarily deals with connected products (and related services[16]) within the meaning of Article 2 no. 5 DA, that is items which obtain, generate or collect data concerning their use or environment and are able to communicate product data.[17] The term "connected product" is to be understood in a broad sense. As listed in recital 14, it covers items found in all aspects of the economy and society, including in vehicles, medical devices, lifestyle equipment, home equipment and industrial machinery. Given the wide range of products and services covered by the term, the DA can be regarded as applying a "cross-sectoral approach" which leads to an overlap with numerous sector-specific regulations.[18] Articles 1 and 44 DA delimit the rules of the DA from other legal fields by dealing with, firstly, data protection law and, secondly, sector-specific rules on data access.[19] The DA thus applies without prejudice to national and Union data protection law, which prevails in the event of a conflict (Article 1(5) DA). Under Article 44 DA, which is explained in more detail in recital 115, sector-specific EU rules on data access also remain unaffected. Recital 116 makes it clear, in a rather more

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[16] In accordance with Article 2 no. 6 DA, "related service" means a digital service, other than an electronic communications service, which is connected with the product at the time of the purchase, rent or lease in such a way that its absence would prevent the connected product from performing one or more of its functions, or which is subsequently connected to the product by the manufacturer or a third party to add to, update or adapt the functions of the connected product.

[17] In accordance with Article 2 no. 15 DA, "product data" means data generated by the use of a connected product which the manufacturer designed to be retrievable, via an electronic communications service, physical connection or on-device access, by a user, data holder or a third party, including, where relevant, the manufacturer.

[18] Wiedemann, N.T./Conrad, T./Salemi, S., Bereitstellung von Daten nach dem Data Act - offene Fragen und verbleibende Probleme, K&R, 2024, p. 157–163, p. 157.

[19] For more details, see Schmidt-Kessel, M., Einordnung des Data Act in das Mehrebenensystem des Unionsprivatrechts, MMR, 2024, p. 122–128 (Supplement 1); Wiedemann et al., Bereitstellung von Daten nach dem Data Act- offene Fragen und verbleibende Probleme, loc. cit., see footnote 18, p. 157–159.

declaratory manner, that application of the Treaty on the Functioning of the European Union (TFEU),[20] more specifically Articles 101 and 102 TFEU, remain unaffected by the DA.

11. Chapters II to IV DA essentially regulate the relationship between users, data holders and data recipients. In accordance with Article 2 no. 12 DA, "users" are natural or legal persons who own a connected product or to whom temporary rights to use that connected product have been contractually transferred, or who receive related services. The term "user" therefore not only refers to consumers (see Article 2 no. 23 DA) but also to undertakings. In accordance with Article 2 no. 13 DA, "data holder" refers to a natural or legal person who has the right or obligation[21] to use or make available data which have been retrieved or generated during the provision of a related service. Consequently, the factor relevant to be classified as a "data holder" is who has de facto control over the data generation.[22] In accordance with Article 2 no. 14 DA, "data recipient" refers to a natural or legal person, acting for purposes which are related to that person's trade, business, craft or profession, other than the user of a connected product or related service, to whom the data holder makes data available. "Gatekeepers", to whom the European Commission refers in the Digital Markets Act (DMA),[23] cannot be considered as eligible data recipients (Articles 5(3) and 6(2)(d) DA).[24] Overall, the DA applies a strictly user-centred model with mandatory data access, data use and data sharing rights on the part of the user which apply to both the B2C and B2B area.[25] This user-centred model is revealed in the fact that, in accordance with Article 4(13) DA, data users may only use the generated non-personal data on the basis of a contract with each user.[26] An overview of the key provisions of this approach will be provided in the following.

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[20] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 202, 7.6.2016, S. 1.

[21] The definition thus contains a certain amount of circular reasoning, as the requirements of the DA in many cases actually take data ownership as their point of reference, see Deutscher Anwaltverein, Stellungnahme des Deutschen Anwaltvereins durch den Ausschuss Informationsrecht, den Ausschuss Geistiges Eigentum und den Ausschuss Europa zum Vorschlag für eine Verordnung des Europäischen Parlaments und des Rats über harmonisierte Vorschriften für einen fairen Datenzugang und eine faire Datennutzung (Datengesetz) vom 23. Februar 2022- COM(2022) 68 final (im Folgenden "Entwurf"), Stellungnahme Nr.: 40/2022, p. 13.

[22] Heinzke, P./Herbers, B./Kraus, M., Datenzugangsansprüche nach dem Data Act, Betriebs-Berater, 2024, p. 649–655, p. 649.

[23] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265, 12.10.2022, p. 1–66.

[24] Heinzke et al., Datenzugangsansprüche nach dem Data Act, loc. cit., see footnote 22, p. 650.

[25] Antoine, L., Datenzugangsrechte im finalen Data Act – Fortschritt, Rückschritt, neue Fragen? — Schlüssel zur Förderung datengetriebener Geschäftsmodelle?, CR, 40, 2024, p. 1–8, p. 2. Funk, for instance, argues against this user-centred approach: Funk, A., Das Prinzip der Nutzerzentriertheit des Data Act – ein gravierender Strukturfehler – Untersuchung und Bewertung der zentralen Rolle des Nutzers in der Datenökonomie nach der Konzeption des Data Act, Computer und Recht, 2023, p. 421–427.

[26] Antoine, Datenzugangsrechte im finalen Data Act – Fortschritt, Rückschritt, neue Fragen? — Schlüssel zur Förderung datengetriebener Geschäftsmodelle?, loc. cit., see footnote 25, p. 6.

12. As the title of Chapter II DA states, it regulates "business to consumer and business to business data sharing".[27] Article 3 DA requires connected products and related services to be designed and manufactured/provided in such a manner that the product data and related service data are, by default, easily, securely, free of charge, in a comprehensive, structured, commonly used and machine-readable format and, where relevant and technically feasible, directly accessible to the user. This is an obligation which is incumbent on the manufacturers of connected products and the developers of related services, which are often one and the same as the data holder.[28] Under Article 4 DA, and subsidiarily to a user's direct data access as set out in Article 3 DA, users have a right to the data holder making readily available data[29] accessible continuously and in real-time. Further, Article 5 DA grants users the right to share data with third parties. To that end, the data holder is required to make data readily available, upon request by a user, to a third party (paragraph 1).

13. Chapter III DA contains provisions on B2B relations concerning the conditions under which data are made available to third parties, including compensation (Article 8 ff. DA).[30] It is worth noting that the obligations imposed on data holders in Chapters III and IV DA and the prohibited clauses addressed in Article 8(1) DA not only apply in regard to the obligation under Article 5 DA but also to all those obligations to make data available under applicable Union law or national legislation which are adopted in accordance with Union law. As a result, Articles 8 to 13 DA represent a kind of general law of obligations in relation to data access and third-party data access rights.[31] However, pursuant to Article 50(4) DA, this only applies to statutory obligations to make data available which enter into force after 12 September 2025. Article 8 DA expands the presupposed obligation to contract into FRAND conditions[32] and includes a sector-specific prohibition of discrimination and a reversal of the burden of proof.[33]

14. Chapter IV DA comprises only a single article – Article 13 – with rules which prevent undertakings agreeing unfair contractual terms in relation to data access and data use.[34] The

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[27] For a more in-depth analysis of Chapter II DA, see also Schmidt-Kessel, M., Heraus- und Weitergabe von IoT-Gerätedaten, MMR, 2024, p. 75–82 (Supplement 1).

[28] Heinzke et al., Datenzugangsansprüche nach dem Data Act, loc. cit., see footnote 22, p. 651.

[29] Article 2 no. 17 DA contains the legal definition of "readily available data", which refers to product data and related service data which a data holder lawfully obtains or can lawfully obtain from the connected product or related service, without disproportionate effort going beyond a simple operation.

[30] Antoine, Datenzugangsrechte im finalen Data Act – Fortschritt, Rückschritt, neue Fragen? — Schlüssel zur Förderung datengetriebener Geschäftsmodelle?, loc. cit., see footnote 25, p. 2. For a more detailed analysis of the requirements under Articles 8 and 9 DA, see Louven, S., Vorschriften im Data Act zur Ausgestaltung und Kompensation von Datenbereitstellungspflichten, MMR, 2024, p. 82–86 (Supplement 1).

[31] Schmidt-Kessel, Heraus- und Weitergabe von IoT-Gerätedaten, loc. cit., see footnote 27, p. 76.

[32] FRAND means fair, reasonable and non-discriminatory. When it comes to the "fairness" of the agreed conditions, the monitoring of contractual terms as required by Article 13 DA is likely to be decisive; see recital 44 DA.

[33] Louven, Vorschriften im Data Act zur Ausgestaltung und Kompensation von Datenbereitstellungspflichten, loc. cit., see footnote 30, p. 83–84.

[34] For more details, see Schwamberger, S., Die Klauselkontrolle in Art. 13 Data Act, MMR, 2024, p. 96–101 (Supplement 1).

provision is very similar to the control of terms and conditions (section 305 ff. German Civil Code (Bürgerliches Gesetzbuch, BGB[35])) which is a familiar feature of the general law of obligations. Under Article 13(1) DA, the legal consequence of using unfair contractual terms is that they are unilaterally not binding.

15. Finally, Chapter VIII DA contains provisions on interoperability (Articles 33 to 36 DA)[36] and thus forms the "regulatory core" needed to create an internal data market at the factual level.[37]

2.2 Rules on data access relating to digital platforms

16. Pursuant to Article 1(2) DMA, the Act applies to core platform services provided or offered by gatekeepers to users in the EU. The scope of the DMA is thus limited to those core platform services which are included in the exhaustive list in Article 2 no. 2 DMA.[38] An undertaking is designated as a gatekeeper if it has a significant impact on the internal market, provides a core platform service which is an important gateway for business users to reach end users and enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future (Article 3(1) DMA). Article 3 DMA lists several quantitative thresholds and other qualitative criteria in that regard.[39]

17. The DMA, which includes obligations which are to some extent based on the European Commission's established practice,[40] adopts two approaches when it comes to the use of data: First, pursuant to Articles 5(2), 6(2) and 7(8) DMA, a gatekeeper may not use certain (personal) data. The particular aim of this is, on the one hand, to make it more difficult for gatekeepers to create economies of scope, to raise barriers to entry and thus to jeopardise the contestability of a market and, on the other hand, to serve as a preventive measure to ensure users are not exploited.[41] These considerations are likely also the reason why gatekeepers are excluded from those data access rights which are included in the DA (see para. 11). Second, Article 6(8) to (11) DMA defines data access rights. Some of these are quite specific: Provision is, for instance, made for an access right for advertisers and publishers, that is the providers of online content for which gatekeepers provide advertising services and publish

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[35] Civil Code in the version promulgated on 2 January 2002, Federal Law Gazette I p. 42, 2909; 2003 I p. 738, last amended by Article 9 of the Act of 16 July 2024, Federal Law Gazette I Nr. 240 of 19 July 2024.

[36] The legal definition of "interoperability" is provided in Article 2 no. 40 DA: the ability of two or more data spaces or communication networks, systems, connected products, applications, data processing services or components to exchange and use data in order to perform their functions.

[37] Siglmüller, J., Standardisierungsbestrebungen für das Rückgrat der europäischen Digitalwirtschaft, MMR, 2024, p. 112–116 (Supplement 1), p. 112, with further references.

[38] König, M., in: Säcker, F. J. et al. (eds.), Münchener Kommentar zum Wettbewerbsrecht, Europäisches Wettbewerbsrecht, Vol. 1/1, 4th ed., 2023, Article 2 DMA, margin no. 10.

[39] As regards gatekeepers and core platform services referred to in the above, see Chapter II para. 178.

[40] König, M., in: Säcker, F. J. et al. (eds.), Münchener Kommentar zum Wettbewerbsrecht, Europäisches Wettbewerbsrecht, Vol. 1/1, 4th ed., 2023, Introduction to DMA, margin nos. 19 and 27.

[41] Bueren, E./Weck, T., in: Säcker, F. J. et al. (eds.), Münchener Kommentar zum Wettbewerbsrecht, Europäisches Wettbewerbsrecht, Vol. 1/1, 4th ed., 2023, Article 5 DMA, margin no. 55.

advertisements as part of an ad-funded business model.[42] Such customers of a gatekeeper are to be given access to the gatekeepers' performance measuring tools as well as to the data they need to be able to carry out their own independent verification of the advertisements inventory[43] (paragraph 8). The aim is to ensure that the gatekeepers' customers are able to assess the performance of the core platform services made available by the gatekeepers. Paragraph 11 establishes a right to be given information by gatekeepers providing online search engines which is specifically tailored to the providers of competing online search engines. This right encompasses access to ranking, query, click and view data on fair, reasonable and non-discriminatory terms for the purposes of optimising one's own search engine.[44] Paragraph 10 grants end users, that is non-commercial users of core platform services (Article 2 no. 20 DMA), a right of data portability which is derived from, and supplements, the right of data portability under Article 20 of the EU's General Data Protection Regulation (GDPR)[45].[46]

18. The provision which is most relevant to the investigation at hand is Article 6(10) DMA. Under that provision, a gatekeeper is required to provide business users, free of charge, with effective, high-quality, continuous and real-time access to, and use of, aggregated and non-aggregated data provided for or generated in the context of the use of the relevant core platform services provided by these business users and the end users. As regards personal data, this only applies under certain additional conditions, especially the consent of the end users concerned. The idea on which this provision is based thus corresponds to one of the recitals of the DA: Since business users and end users ultimately provide and generate a vast amount of data, they are also to be given access to those data.[47] The DA and the DMA thus overlap in this regard. It is likely that the two sets of rules can stand alongside each other, since special obligations to make data available under Union law which entered into force before 11 January 2024 remain unaffected by Article 44(1) DA. Moreover, the provisions of general competition law remain unaffected by the DMA (Article 1(6) DMA).

19. Since the 10th Amendment to the German Act against Restraints of Competition (ARC; Gesetz gegen Wettbewerbsbeschränkungen, GWB) came into effect, section 19a ARC has also provided a legal basis at the national level for digital platforms. It allows the Federal Cartel Office (Bundeskartellamt) to impose special obligations as set out in section 19 (2) ARC on

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42 Bueren, E./Weck, T., in: Säcker, F. J. et al. (eds.), Münchener Kommentar zum Wettbewerbsrecht, Europäisches Wettbewerbsrecht, Vol. 1/1, 4th ed., 2023, Article 6 DMA, margin no. 194.

43 The term "advertisements inventory" refers to the number of advertising spaces available to a publisher to sell to an advertiser, ibid., margin no. 198.

44 See recital 61 DMA.

45 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1.

46 Regarding the purpose of this statutory norm and the relationship between Article 6(9) DMA and Article 20 GDPR, see Bueren/Weck, in: Münchener Kommentar zum Wettbewerbsrecht, Europäisches Wettbewerbsrecht, Vol. 1/1, loc. cit., see footnote 41, Article 6 DMA, margin nos. 201 and 206.

47 See recital 60 DMA.

undertakings which are of paramount significance for competition across markets. In accordance with section 19a (2) sentence 1 no. 5 ARC, the Federal Cartel Office may prohibit undertakings from refusing the interoperability of products or services or data portability, or making it more difficult, and in this way impeding competition. In consequence, although this statutory norm does not establish an independent right of access, it does make data portability are requirement. However, this is an essential requirement of data access.[48] Conversely, that is to stop contractual access rights, the Federal Cartel Office, in a preliminary judgment, drew on section 19a (2) sentence 1 no. 4 (a) ARC to stop conduct which has led to the granting of wide-ranging data access rights by undertakings with a significant market presence.[49] Pursuant to section 19a (3) ARC, abuse control in accordance with sections 19 and 20 ARC remains unaffected thereby. As regards the provisions of EU law, the primacy of Union law must be complied with unless the provisions of the respective legal acts stipulate that national provisions continue to apply. Pursuant to Article 3(2) sentence 2 of Regulation 1/2003,[50] member states are permitted to adopt stricter national laws for the purposes of abuse control, meaning that sections 19, 19a and 20 ARC continue to apply. In respect of the relationship between section 19a ARC and the DMA, reference should, finally, be made to Article 1(6)(b) DMA. According to that provision, the DMA is without prejudice to the application of national competition rules prohibiting other forms of unilateral conduct insofar as they are applied to undertakings other than gatekeepers or amount to the imposition of further obligations on gatekeepers.[51] Accordingly, on the basis of section 19a ARC the Federal Cartel Office is not restricted in terms of any actions taken against undertakings which have not yet been designated as gatekeepers, although once an undertaking has been designated as a gatekeeper it may only take measures which go beyond the obligations under Articles 5 to 7 DMA.[52]

2.3 General competition law

20. Further, a claim for data access may also be established on the basis of any of the three "pillars" of competition law: It may derive from the prohibition of abusive conduct (sections 19 and 20 ARC, Article 102 TFEU) if the refusal to grant data access amounts to abuse of a market position (see section 2.3.1); it can also result from the ban on cartels (section 1 ARC, Article 101 TFEU); and it may also result from merger control (see section 2.3.2). Where there has been a significant and continuous disruption to competition, access to data may also be ordered in accordance with section 32f ARC (see section 2.3.3). Given this complex situation,

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[48] Wagner, C./Oehm, T., in: Jaeger, W. et al. (eds.), Frankfurter Kommentar zum Kartellrecht, Vol. VII, Sonderbereich Audovisuelle Medien, margin no. 240.

[49] Federal Cartel Office, B7-70/21, 5 October 2023, Google Datenverarbeitung. See para. 32 and chapter II para. 206 ff.

[50] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4 January 2003, p. 1.

[51] For more details, see also chapter II para. 210.

[52] König, M., in: Säcker, F. J. et al. (eds.), Münchener Kommentar zum Wettbewerbsrecht, Europäisches Wettbewerbsrecht, Vol. 1/1, 4th ed., 2023, Article 1 DMA, margin no. 43.

which will be presented in the following,[53] it is apparent that those applying the law will in each case have difficulties investigating the problems involved. For that reason, in a first step, sections 4 and 5 of the report at hand set out assessment schemes for merger and abuse control which serve to facilitate case processing. However, these guidelines are by no means to be regarded as final and conclusive, but will have to be developed further going forward. They are intended as a catalyst for greater systematisation of case processing. It will also be necessary to develop such a scheme in relation to bans on cartels. The Monopolies Commission intends to look at this issue in future reports.

2.3.1 Refusal of data access as an abuse of a dominant market position

21. General competition law provides various legal bases for abuse control from which undertakings can derive a claim for data access. It can, in particular, result from the prohibition of unfair impediment and discrimination as defined in section 19 (1) and (2) no. 1 ARC (possibly in conjunction with section 20 (1) and (1a) ARC) and Article 102 TFEU (see section 2.3.1.1 below). In addition, the essential facilities doctrine enshrined in section 19 (2) no. 4 ARC and Article 102 TFEU may be relevant (see section 2.3.1.2 below). The following sections are intended to provide a brief overview of the legal bases which may establish a claim for data access. Building on that, section 5 then proposes a scheme which can be used to assess data access in the context of abuse control.

2.3.1.1 Refusal of data access as a violation of the prohibition of unfair impediment and discrimination

22. Refusal of data access by a dominant undertaking may constitute a violation of the prohibition of unfair impediment and discrimination under section 19 (1) and (2) no. 1 ARC. This will be the case, for instance, where the data holder discriminates against individual providers. The Federal Cartel Office's decision of 26 June 2023 can serve as an example of such a case. The decision concerned Deutsche Bahn, which by refusing to make available certain data fulfilled the statutory definition of unfair impediment and discrimination under section 19 (1) and (2) no. 1 alternatives 1 and 2 ARC.[54] Refusal to grant data access may also prove to be abusive within the meaning of Article 102 TFEU. No distinction is, therefore, drawn between traditional resources and data.[55] The Federal Cartel Office, too, held that the forecasting data which Deutsche Bahn withholds from some undertakings constitutes a violation of the prohibition of discrimination under Article 102 TFEU.[56] Many other possible scenarios are conceivable in which the refusal to grant data access may constitute abuse (see also section 5).

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[53] See, in particular, section 3 below.

[54] Federal Cartel Office, B9-144/19, 26 June 2023, Deutsche Bahn, para. 710. See also, as regards these proceedings, the overview in chapter II para. 202 and, as regards the significance of this data access and the existence of the constituent elements set out in section 19 (2) no. 1 ARC, Monopolies Commission, 9th Sector Report Railways (2023): Time to GO: Finally quality effective in competition!, Baden-Baden, 2023, para. 117 ff.

[55] Schmidt, S., Zugang zu Daten nach europäischem Kartellrecht, Tübingen, 2020, p. 390, with further references.

[56] Federal Cartel Office, B9-144/19, Deutsche Bahn, loc. cit., see footnote 54, para. 917 ff.

23. The ARC makes explicit mention of other cases in which the refusal to grant access to data may be abusive within the meaning of section 19 (1) and (2) ARC. First, the 10th Amendment to the ACR introduced a statutory norm in section 19 (2) no. 4 ARC which now explicitly regulates access to data under the essential facilities doctrine (see 2.3.1.2 below). Second, pursuant to section 20 (1a) ARC, refusal of access to data in return for adequate remuneration may constitute an unfair impediment under section 19 (1) and (2) no. 1 ARC. Section 20 (1a) ARC was introduced in the context of the 10th Amendment to the ARC. The aim was to introduce a statutory rule establishing a claim for data access under competition law in which special significance is attached to access to data from the point of view of competition.[57] In the legislature's opinion, adding this provision creates clarity given that no robust and nuanced court decisions relating specifically to data have yet been handed down.[58] Pursuant to section 20 (1) ARC, the prohibition of unfair impediment and discrimination under section 19 (2) no. 1 ARC also applies to undertakings with a relatively powerful market position, that is where there is a relationship of dependence between a supplier and a demander. Subsection (1a) now makes it clear that such a relationship of dependence may also arise from the fact that an undertaking is dependent on accessing data. Under these conditions, refusal of access to data in return for adequate remuneration may constitute an unfair impediment (section 20 (1a) sentence 2 ARC) – unless there is objective justification therefor in the individual case. This may be the case, for instance, where there is a risk of privacy breaches. In such cases, however, the basic right to access may mean that the data holder is, in some cases, under the obligation to cooperate in achieving the requisite compliance with data protection legislation.[59]

24. The Federal Government's Explanatory Memorandum on the 10th Amendment to the ARC refers to two scenarios which were regarded as relevant when the law was being drafted:[60] First, contractual relationships within value-creation networks, such as exist in regard to the Internet of Things (IoT).[61] Where joint contributions are made to value creation within value-creation networks, it is, in principle, to be made possible for the data created in

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[57] Federal Government, Draft Act to Amend the Act against Restraints of Competition in the Interests of a Focused, Proactive and Digital Competition Law 4.0 and Other Provisions of Competition Law (Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 und anderer wettbewerbsrechtlicher Bestimmungen; ARC-Digitalisierungsgesetz), Bundestag Printed Paper 19/23492, 19 October 2020, p. 56.

[58] Ibid., p. 80.

[59] Berlin Regional Court, 16 O 49/23 Kart, 7 September 2023, Ride-Hailing-Apps, para. 78.

[60] Federal Government, Bundestag Printed Paper 19/23492, loc. cit., see footnote 57, p. 80.

[61] This is similar to the scenario in the DA (see 2.1.2): When using connected products (Internet of Things, IoT) and services, both the users of a particular device and those who have access to the data generated by that device contribute to the creation of the data (referred to as "value-creation networks"). The DA resolves this tension by adopting a user-centred approach (see Article 4(13) DA). It is questionable to what extent the DA prevails in relation to the IoT and whether it constitutes an exhaustive special rule. The relationship between the DA and other statutory norms is regulated in Articles 1 and 44 DA, although they do not make explicit reference to that relationship (see para. 10). Recital 116 DA, however, speaks in favour of the ARC at least being subsidiarily applicable, given that according to that recital the applicability of the provisions of competition law are to remain unaffected even though reference is only made to Articles 101 and 102 TFEU.

the context of the corresponding contractual relationship to be used jointly. The legislature believed that this is often likely to be in the mutual interest of the contracting parties anyway, for example by improving each party's contributions to value creation. The second scenario which the legislature had in mind was one in which a third party requests access to data and that third party wishes to provide services in an upstream or downstream market.[62] Section 20 (1a) sentence 3 ARC – which probably goes beyond the existing legal situation – explicitly requires that the rule also encompass the first-time delivery of data to third parties, because previous past court decisions appeared not to be clear on this matter.[63] This is a situation similar to that in the abuse proceedings against Deutsche Bahn concerning the refusal of access to forecasting data and is why the Federal Cartel Office based its decision in that case also on these specific constituent elements.[64]

25. As is regulated in the ARC, the refusal to grant access to data may also constitute exclusionary conduct pursuant to Article 102 TFEU.[65] Nevertheless, in its decision in the Deutsche Bahn case, the Federal Cartel Office left open the question of whether these constituent elements had been fulfilled.[66]

2.3.1.2 Data access as an essential facility

26. Following the 10th Amendment to the ARC and in view of the essential facilities doctrine[67] set out in section 19 (2) no. 4 ARC, section 19 ARC now makes explicit reference to the refusal to grant access to data as possible abuse. The new rule was merely intended to provide clarity about the fact that the refusal to grant access to data which is relevant to competition in particular may also constitute abuse of a dominant position.[68] The conditions set out in section 19 (2) no. 4 ARC are stricter than those in section 20 (1a) ARC. Accordingly, it is, first, necessary for the data access to be objectively necessary in order to operate in a market. Second, the refusal to grant access must threaten to eliminate effective competition in that market. Section 20 (1a) ARC, by contrast, merely presupposes, in order for there to be (possible) data-related dependence, that an undertaking is "dependent" on accessing data.[69] In the opinion of the Federal Cartel Office, this constituent element will already be fulfilled where the undertaking requesting access needs that access to improve its own services, even

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62 Federal Government, Bundestag Printed Paper 19/23492, loc. cit., see footnote 57, p. 81.

63 Ibid., p. 81.

64 Federal Cartel Office, B9-144/19, Deutsche Bahn, loc. cit., see footnote 54, para. 900 ff. See also Monopolies Commission, 9th Sector Report Railways, loc. cit., see footnote 54, para. 169 ff.

65 For more details, see Schmidt, Zugang zu Daten nach europäischem Kartellrecht, loc. cit., see footnote 55, p. 381 ff.

66 Federal Cartel Office, B9-144/19, Deutsche Bahn, loc. cit., see footnote 54, paras. 921 and 922.

67 Regarding Article 102 TFEU, see para. 27 below.

68 Federal Government, Bundestag Printed Paper 19/23492, loc. cit., see footnote 57, p. 72.

69 Federal Cartel Office, B9-144/19, Deutsche Bahn, loc. cit., see footnote 54, para. 906. See also Monopolies Commission, 9th Sector Report Railways, loc. cit., see footnote 54, para. 169.

if those services could be offered without the data access.[70] Objective justification may, in some cases, be conceivable in the context of section 19 (2) no. 4 ARC, for instance in the case of privacy breaches which have an effect on competition.[71]

27. The essential facilities doctrine is also recognised as a basic type of abusive refusal to do business when applying Article 102 TFEU.[72] Information may, in principle, also be classed as an "essential facility".[73] As regards goods protected by copyright, the European Court of Justice (ECJ) held in the IMS Health case that the exclusive right of reproduction forms part of the rights of the owner of an intellectual property right and, as a result, exercise of that exclusive right may (only) in exceptional circumstances involve abusive conduct, for instance when the access is indispensable.[74] The latter is the case where the refusal prevents the emergence of a new or innovative product for which there is a potential consumer demand, that it is unjustified and such as to exclude all competition in a secondary market.[75] When these criteria have been fulfilled can, ultimately, only be decided on a case-by-case basis.[76] Section 5 goes into the essential facilities doctrine in more detail.

2.3.2 Relevance of data access in the context of the ban on cartels and merger control

28. The ban on cartels under section 1 ARC and Article 101 TFEU can also be relevant as regards access to data: First, it is conceivable that violations may occur in the form of agreements about data prices[77] or other agreements which make it more difficult for third parties to access data, for instance lock-out agreements.[78] Second, the ban on cartels can also pose an obstacle to data access, for example if it constitutes unlawful information-sharing between undertakings (see section 2.4). The latter aspect could gain increasing importance

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[70] Federal Cartel Office, B9-144/19, Deutsche Bahn, loc. cit., see footnote 54, para. 906. As regards the scenarios the legislature had in mind when introducing this statutory norm, see para. 24 above.

[71] Berlin Regional Court, 16 O 49/23 Kart, Ride-Hailing-Apps, loc. cit., see footnote 59, para. 78.

[72] ECJ, Case C-7/97, 26 November 1998, Bronner. Regarding the case law of the ECJ, see Bien, F., in: Säcker, F. J. et al. (eds.), Münchener Kommentar zum Wettbewerbsrecht, Europäisches Wettbewerbsrecht, Vol. 1/1, 4th ed., 2023, Article 102 TFEU, margin no. 488.

[73] Bien, in: Münchener Kommentar zum Wettbewerbsrecht, Europäisches Wettbewerbsrecht Vol. 1/1, loc. cit., see footnote 73, Article 102 TFEU, margin no. 495.

[74] ECJ, Case C-418/01, 29 April 2004, IMS Health. See also Dreher, M./Kulka, M., Wettbewerbs- und Kartellrecht: eine systematische Darstellung des deutschen und europäischen Rechts, 11th revised ed., Heidelberg, 2021, margin no. 1233.

[75] For a summary, see Dreher/Kulka, Wettbewerbs- und Kartellrecht, loc. cit., see footnote 74, margin no. 1234.

[76] For more details regarding the prerequisites for claims for data access under Article 102 TFEU, see Schmidt, Zugang zu Daten nach europäischem Kartellrecht, loc. cit., see footnote 55, p. 381 ff.

[77] Dewenter, R./Louven, S., Plattformwettbewerb, Wert von Daten und Schadensschätzung, Wirtschaft und Wettbewerb, 2023, p. 197–203, p. 198.

[78] Kemper, R., EU-Data Governance Act (DGA) und EU-Data Act (DA) im Kontext der EU-Strategie für digitale Daten, juris GmbH, AnwZert ITR 5/2022 note 2, 2022. See also no. 382 of the Horizontal Guidelines, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements of 1 June 2023, OJ C 259, 21.7.2023, p. 1–125.

going forward. Possible applications are data pools[79] into which two or more undertakings input similar data which they each accumulate. An assessment scheme should in future therefore also be developed for such scenarios.

29. In addition, merger control[80] can be used to examine which data the merging parties have or could have at their disposal and whether the merger will have an impact on whether and, if so, how these data are made available to other undertakings. Section 4 outlines a scheme which can be used to systematically assess data access in the case of planned mergers. A third-party claim for data access can also be established as part of merger control. The Google/Fitbit merger procedure is such an example:[81] Among other devices, Fitbit has developed and sells fitness trackers and smartwatches which collect health and activity metrics (e.g. heart rate, daily number of steps taken, oxygen saturation, distance travelled).[82] These devices can either be connected to the manufacturer's own app or to a third-party app which imports the generated data via an interface.[83] The European Commission had raised concerns during its investigation that the existing access available to competing health service providers might be restricted following the merger.[84] To allay these concerns, in the further course of the procedure Google committed, among other things, to maintain access for third parties using a web interface for a period of 10 years.[85]

2.3.3 Data access order following sector inquiry by the Federal Cartel Office

30. Another statutory norm which deals explicitly with data access is section 32f (3) sentence 7 no. 1 in conjunction with sentence 6 ARC. It covers remedial measures which can be taken following a sector inquiry conducted in accordance with section 32e ARC. Where the Federal Cartel Office determines during a sector inquiry that a significant and continuing malfunctioning of competition exists and the application of the authority's other powers under Part 1 ARC appears unlikely to be sufficient to eliminate that malfunctioning of competition effectively and permanently, the Federal Cartel Office may in particular impose the remedies referred to in sentence 7 of section 32f ARC. Section 32f ARC was introduced as part of the 11th Amendment to the ARC.[86] The Federal Cartel Office may, in particular, order the granting of access to data, interfaces, networks or other facilities. The measure of last resort under section 32f (4) ARC is an order to dispose of shares or assets. The European

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79 For more details, see Schäfer, L., Datenkooperation durch Datenpooling: eine rechtstatsächliche, rechtsökonomische, kartell- und datenregulierungsrechtliche Untersuchung, Baden-Baden, 2023.

80 Regarding merger control in relation to data collaboration through data pooling, see also ibid., p. 429 ff.

81 See Monopolies Commission, Biennial Report XXIV: Competition 2022, Baden-Baden, 2022, para. 201.

82 European Commission, Case M.9660, 17 December 2020, Google/Fitbit, C(2020) 9105 final, para. 28.

83 Ibid., para. 41.

84 Ibid., para. 503 ff.

85 Ibid., para. 898 ff.

86 See chapter II para. 157 ff.

Commission threatened to issue a similar order against Google in the AdTech abuse case.[87] The aim when refining the instrument of a sector inquiry was to make it possible to address malfunctioning competition, which up until that point could neither be examined as part of merger control nor stopped on account of constituting a restrictive agreement/coordinated conduct or an abuse of market power.[88]

2.4 Legal limits of data access

31. Data access can be restricted for legal reasons: First, where undertakings have reached agreement on data access but that access is not permissible for legal reasons (see paras. 32–33). Second, the legislature also comes up against limits – in particular fundamental rights – when establishing new rules on data access (see paras. 34–35).

32. First, agreements which provide a data access may not be allowed from the point of view of abuse control. That is the case, for instance, where an undertaking with a dominant market position secures far-reaching rights of data access and use so that users can avail themselves of certain of that undertaking's services. Google, for instance, in a case concerning a possible breach of section 19a (2) sentence 1 no. 4 (a) ARC made a commitment vis-à-vis the Federal Cartel Office to give users sufficient options so that they could refuse to give consent to data processing.[89] Specifically, among other things Google committed to no longer apply data processing conditions which gave Google the option of combining personal data originating from a service falling under the commitments it had entered into with personal data from other Google services.[90] In 2022 the European Commission obtained commitments from Amazon which stopped it from using data from third-party retailers to optimise its own online retail business.[91] Privacy breaches can in principle also be prevented in the context of abuse control if they constitute an abuse of a dominant market position.[92] The Federal Cartel Office's decision in a case against Facebook's parent company, Meta, serves as an example.[93] In that case, the Federal Cartel Office held that Facebook/Meta was a dominant undertaking in the social media market in relation to private users in Germany and that it abusively exploited this position by making the use of Facebook dependent on whether the personal data collected

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87 European Commission, Commission sends Statement of Objections to Google over abusive practices in online advertising technology, press release, 14 June 2023.

88 Federal Government, Draft Act to Amend the Act against Restraints of Competition and other Acts (Entwurf eines Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen und anderer Gesetze), Bundestag Printed Paper 20/6824. 16 May 2023, p. 27.

89 See chapter II para. 206 ff.

90 Federal Cartel Office, B7-70/21, Google Datenverarbeitung, loc. cit., see footnote 49, para. 62.

91 European Commission, C(2022) 9442 final, 20.12.2022, Amazon Marketplace (AT.40462) and Amazon Buy Box (AT.40703). See section 3.4.3 below.

92 For more details, see Barth, J., Datenschutzrechtsverstöße als kartellrechtlicher Konditionenmissbrauch: der Fall Facebook vor dem Bundeskartellamt, Baden-Baden, 2020.

93 Federal Cartel Office, B6-22/16, 6 February 2019, Facebook (Meta).

when a person uses the undertaking's own and third-party services without effective consent being combined with the Facebook account data and then processed.[94]

33. Second, an agreement concerning the grant of data access can represent a violation of the ban on cartels under section 1 ARC and Article 101 TFEU.[95] Paragraph 366 ff. of the European Commission's Horizontal Guidelines[96] provide guidance on how to assess, against the backdrop of Article 101 TFEU, horizontal cooperation which in particular comprises the sharing of data. Data sharing may, for instance, be problematical where the sharing of (sensitive) business information, for instance about pricing, artificially increases transparency between competitors, facilitates the coordination of those undertakings' conduct, resulting in restrictions of competition (para. 377 Horizontal Guidelines). The application of Article 101 TFEU is also not restricted where the undertakings concerned retain margins of discretion following regulatory decisions (para. 372 Horizontal Guidelines).

34. Moreover, being compelled to grant data access may affect constitutionally guaranteed rights and may, in certain circumstances, not be allowed, for example where an undertaking's freedom of economic activity is affected. Where the executive issues orders at the national level, for instance in abuse procedures, and drafts legislation, account must be taken of the freedom to choose a profession under Article 12 Basic Law (Grundgesetz, GG[97]) and, subsidiarily, the general freedom of action under Article 2 (1) Basic Law. In the case of actions of the EU, attention must in particular be paid to the fundamental rights set out in Articles 15 and 16 of the Charter of Fundamental Rights of the European Union (CFR)[98]. The freedom to own property under Article 14 Basic Law and Article 17 CFR are, by contrast, likely to be less relevant in this regulatory context. To what extent data can actually enjoy absolute protection in the sense of "data ownership" is to a large extent likely to be left to the legislature's decision-making.[99] It has on occasion been recognised that "data ownership" can be seen as protected by fundamental rights, but only in relation to specific rights (e.g. customer base and business relations in the context of an established and operating business enterprise, copyright-protected and other intellectual property right-protected interests).[100] Where data

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94 Regarding the Federal Cartel Office's decision, see Monopolies Commission, Biennial Report XXIII: Competition 2020, 2020, para. 341. Regarding the ECJ's decision in this case, see chapter II para. 217.

95 Regarding the permissibility, under competition, law of data collaboration through data pooling, see Schäfer, Datenkooperation durch Datenpooling, loc. cit., see footnote 79, p. 239 ff.

96 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements, loc. cit., see footnote 78.

97 Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 19 December 2022 Federal Law Gazette I of 23 December 2022 p. 2478.

98 Charter of Fundamental Rights of the European Union OJ C 326 of 26 October 2012, p. 391.

99 Haustein, B., Möglichkeiten und Grenzen von Dateneigentum, Baden-Baden, 2021, p. 125. Whether the DA actually grants users absolute rights and thus, ultimately, rights similar to property rights, is a matter which is much discussed, and rightly rejected, in the literature: Schmidt-Kessel, Heraus- und Weitergabe von IoT-Gerätedaten, loc. cit., see footnote 27, p. 78.

100 Haustein, B., Möglichkeiten und Grenzen von Dateneigentum, loc. cit., see footnote 99, p. 125–126.

are professional and commercial secrets, they are encompassed by the Union's guarantee of ownership and freedom to choose a profession as well as the freedom to choose a profession under Article 12 Basic Law and the freedom of ownership under Article 14 Basic Law, even though the German Federal Constitutional Court has so far left the latter open.[101]

35. The fundamental right to determine the use of one's personal information under Article 2 (1) Basic Law in conjunction with Article 1 (1) Basic Law and, at the EU level, Article 16 TFEU and Article 8 CFR are more important in relation to data access. As regards access to personal data, account must always be taken of data protection law and, in particular, of the GDPR. Accordingly, provisions on data access regularly emphasise the fact that data protection law remains unaffected and prevails (e.g. Article 1(5) DA and Article 1(3) DMA).[102] Refusal to grant data access may, in a specific case, thus have to be regarded as objectively justified in the context of abuse control, for instance where there is a risk of privacy breaches.[103]

2.5 Interim conclusion

36. A claim for data access can be established on the basis of the requirements of general competition law, especially in the context of abuse and merger control. In addition, some very specific rules on data access have been established in some economic sectors, for example in relation to digital platforms. Over and above these specific rules on data access, the European data strategy has for some years now applied a cross-sectoral approach to data access. The aim of the DGA, created in this framework, is to promote the voluntary sharing of data; the DA introduces cross-sectoral rules on data access for connected products and related services and sets a framework regarding the provision of data and interoperability. Sometimes these legal bases overlap, although in some respects they should also be regarded as complementary. For that reason it is often not readily apparent which statutory norm applies. In principle, the more specific norm generally prevails. The provisions of general competition law (Articles 19 and 20 ARC, Articles 101 and 102 TFEU) can be regarded as the most general. Rules which regulate explicit rights of access to data and details in relation thereto can be regarded as more specific even though they do not focus on a specific business sector (e.g. DA[104]). Statutory norms which likewise specifically regulate data access as such and which relate to individual business sectors are even more specific, for example sector-specific provisions on digital platforms (section 19a ARC and DMA).[105] Further, there are numerous

[101] Gurlit, E., in: Säcker, F. J./Körber, T. (eds.), TKG, TTDSG, Kommentar, 4th ed. 2023, section 216 Telecommunications Act (TKG), margin no. 11.

[102] Regarding the relationship between the DA and data protection law, see, for instance, Wiedemann et al., Bereitstellung von Daten nach dem Data Act - offene Fragen und verbleibende Probleme, loc. cit., see footnote 18, p. 157 ff.

[103] Berlin Regional Court, 16 O 49/23 Kart, Ride-Hailing-Apps, loc. cit., see footnote 59, para. 78.

[104] See the rule on speciality in Article 44 DA.

[105] See section 2.2 above.

other statutory norms which deal with access to data (e.g. concerning local public transport[106] and energy providers[107]), although reference can only be made to these here in passing. Primacy of law can, however, not only result from the principle of speciality but also from the hierarchy of norms and, in particular, from the primacy of Union law over national law. In addition, the relevant laws generally explicitly require that general rules remain unaffected, and thus be subsidiary.

37. As a result, general competition law at least remains subsidiary. However, since it has a very wide scope of application and includes hardly any explicit rules on data access, it is quite difficult to subsume matters relating to data access under it. That is why sections 4 and 5 will be used to outline two assessment schemes with practical guidance in order to facilitate the use of a systematic approach. However, before addressing these schemes, section 3 first looks at key economic concepts around data access which are relevant to merger control and abuse control in equal measure.

3 The economics of data and data access

38. The reason why particular attention should be paid to data and data access in the context of merger and abuse control is that there are various characteristics which distinguish data from other goods, meaning that questions around access to data are more specific than questions around access to other resources. This section first addresses the specific economic characteristics of data (see section 3.1), after which the main ways of configuring data access will be presented (see section 3.2), following which light will be shed on how data (access) and market power interact (see section 3.3) and, finally, based on this, important aspects will be described to which attention must be paid when looking at data access from an economic perspective (see section 3.4).

3.1 Economic characteristics of data

39. What the digitalisation of all areas of life have in common is that that data are recorded, stored, analysed and, possibly, commercially exploited. The term “data” is defined differently in different research disciplines.[108] Often, “data” are equated with “information”. However, although the two terms are related, they are not equivalent.[109] Data are information carriers capable of replicating any type of information, and they enable the processing, storage and

[106] See section 3a of the Act on the Carriage of Persons (Personenbeförderungsgesetz, PBefG), in the version promulgated on 8 August 1990, Federal Law Gazette I p. 1690, last amended by Article 7 Section 4 of the Act of 11 April 2024, Federal Law Gazette I Nr. 119 of 16 April 2024.

[107] See Article 20(a) of Directive 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU (recast), OJ L 158, 14 June 2019, p. 125 regarding smart metering systems which accurately measure actual energy consumption and are to be capable of providing final customers with information on actual time of use.

[108] The same applies to the term “information”.

[109] Floridi, L., 2010, Information: A Very Short Introduction, Oxford University Press.

transmission of information. For the purposes of this chapter, "data" – that is the object of access – are defined as machine-readable, digital information with meaning.[110]

40. Data which are available in digital format have various economic characteristics. They can be important input factors for business models, for example ad-financed or subscription-based business models. Data can be used any number of times and for various purposes either simultaneously or at different times, without additional costs arising. Using data can thus be attributed the economic characteristic of "nonrivalry".[111] Another characteristic is that actors can be excluded from using them. By holding data and thus having the related possibility of keeping that a secret, undertakings can make use of their de facto control over data and thus derive a competitive advantage over their competitors. It is only in exceptional cases that a data holder will have a property right, for example an intellectual property right or a patent. Where such an undertaking has sufficient control over data, this will enable it to have exclusive control over the data, which can be used as the basis for its own value creation and creates investment and innovation incentives.

41. Other special characteristics of data are their heterogeneity and context-dependency. Data on personal income will have entirely different potential uses than a person's location data, for example. As regards targeted advertising, data on search behaviour can only in some cases be substituted by concrete data on actual buying behaviour.[112] This shows that different types of data are often complementary.[113] The collection, combination and recombination of various data can produce an additional effect and thus potential new opportunities for value creation.[114]

42. Data also have special characteristics in terms of their timeliness. Their value may decrease over time at varying rates. Weather data are very relevant when they relate to the here and now, for example; historical weather data are less valuable. Up-to-date income data, for example relating to the last three months, are significantly more valuable than those relating to many years ago. And yet, depending on an undertaking's business model, historical

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[110] Data can be categorised as follows, for instance: a) by the manner of data collection – a distinction can be drawn between machine-generated data and user-generated data, as well as between data to which access is voluntarily given, observed data and derived data; b) by the reference date of the coded information – a distinction can thus be drawn between personal data, data referring to business secrets, company data and factual data; c) by timeliness, i.e. real-time, almost real-time, historical data; d) aggregated depending on processing objective, e.g. the user level, corporate level or market level; e) by data format, i.e. structured, semi-structured and unstructured data.

[111] Jones, C.I./Tonetti, C., 2020, "Nonrivalry and the Economics of Data", American Economic Review, 110(9), p. 2819–2858.

[112] They represent different points in time in the buying process.

[113] On account of the complementary nature of different data sets, mergers which create the opportunity to conflate databases are a very attractive option. This was evidenced, for instance, when, Microsoft bought LinkedIn for 26.2bn US dollars in 2016, http://news.microsoft.com/2016/06/13/microsoft-to-acquire-linkedin/#sm.000cssj9f18xif3lyzs2658617kl0, retrieved 19 April 2024.

[114] Ritala, P./Karhu, K., 2023, "Capturing value from data complementarities: A multi-level framework", in Cennamo, C./Dagnino, G.B./Zhu, F. (eds.), Research Handbook on Digital Strategy, p. 273–288, Edward Elgar Publishing, 2023.

data may also be of considerable value. In most cases, though, their value will rapidly decline.[115] This also means that very large volumes of data may become worthless after only a very short period of time.

43. Third-party digital data are an important element in various business models, in particular in digital markets, and they are a special commodity because they do not have any direct, concrete economic value. The economic value of data is context-dependent and is a combination of the information in a data point and its purpose. It is thus difficult to determine the economic significance of individual data sets. Market monitoring in the course of which data are collected or traded suggest that they are of high economic value. Valuable economic data include those about sales, location or marketing and specific undertakings' business data.[116] Value-creating factors include how up to date the data are, precision/data processing stage, completeness, coherence and accessibility.[117] The number of data sets can also play an important role:[118] The larger the number of individuals or firms recorded, for instance, the greater the value of the data pool (i.e. the totality of all available data sets) tends to be.[119] That means that more data sets with specific characteristics may be more valuable than fewer data sets with the same characteristics. However, more data are not necessarily more valuable than fewer data.

44. Another relevant factor is that different undertakings' ability to draw the relevant information, patterns, structures and trends from data and thus, ultimately, key insights for their own services/products/content may differ.[120] Data-based business models typically only have low variable costs for the collection, storage and use of data. By contrast, the fixed costs for infrastructure which is capable of dealing with large volumes of data are comparatively high. Only some of these fixed costs can be transformed into variable costs, for example by using suitable cloud computing services, which generally charge a flat fee depending on storage and computing capacity, among other things. A combination of low variable costs and

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[115] Feijóo, C./Gómez-Barroso, J.-L./Aggarwal, p. 2016, "Economics of big data", in: Handbook on the Economics of the Internet, Ch. 25, Edward Elgar.

[116] Azcoitia, S.A./Iordanou, C./Laoutaris, N., 2021, "What is the price of data? A measurement study of commercial data marketplaces", https://arxiv.org/abs/2111.04427, retrieved 19 April 2024, p. 8; Tang, L. C./ Zhao, Y./ Austin, S./Darlington, M./Culley, S., 2008, "A characteristic based information evaluation model", Proceedings of the 2nd ACM workshop on Information credibility on the web, p. 89–92, retrieved 19 April 2024, p. 91.

[117] Wang, R.Y./Strong, D.M., 1996, "Beyond Accuracy: What Data Quality Means to Data Consumers", Journal of Management Information Systems 12(4), p. 5–33, retrieved 19 April 2024; Cichy C./Rass S., 2019, "An Overview of Data Quality Frameworks", IEEE Access 7: 24634–24648, retrieved 19 April 2024.

[118] Azcoitia, S.A./Iordanou, C./Laoutaris, N., 2023, "Understanding the Price of Data in Commercial Data Marketplaces", IEEE 39th International Conference on Data Engineering (ICDE), p. 3718–3728, retrieved 19 April 2024, p. 3726.

[119] The additional value generated by an additional data point is generally degressive, i.e. there is a decreasing marginal gain. When a data pool reaches a certain size, additional data no longer contribute any relevant additional value. However, this is often only the case for extremely large data pools.

[120] Dhar, V., 2013, "Data Science and Prediction", Communications of the ACM, 56(12), p. 64–73; Schepp, N.-P./Wambach, A., 2016, "On Big Data and its Relevance for Market Power Assessment", Journal of European Competition Law & Practice, 7(2), p. 120–124.

high fixed costs leads to decreasing average costs and thus encourages the emergence of concentrated markets with fewer competitors.

45. Data also play a special role in relation to markets. A new market emerges where there is both supply and demand. Multilateral contacts between that supply and that demand then generally lead to market equilibrium, for example in the shape of a market price. The basic prerequisite is that rights of ownership and disposition have been unequivocally defined. Where data are a byproduct – for instance when supply and demand match in a digital market – the question arises of who has the rights of disposal of the data. According to economic theory, it is irrelevant who holds these rights, but they must be assigned.[121] If it is not possible to assign these rights or there are no rights of ownership and disposition, or there is uncertainty about them, this may lead to undertakings being reticent to share data or to trade in data. Thus, no market emerges, and there is market failure.

3.2 Data access regimes

46. It is not only the data themselves which are an important factor when it comes to an undertaking's data being made accessible to other undertakings: The technical configuration of that access and the data transmission are important, too. Probably the simplest configuration is an email, for instance one containing data in an Excel table which a data access provider sends to a data access recipient. As soon as the email has to be sent to a large number of recipients, the volume of data is large or the data have to be frequently updated, that will no longer be a viable option. Data will then usually be made available by the data access provider and used by the data access recipient via protocols and interfaces, usually application programming interfaces (APIs). How these protocols and interfaces are configured determines how accessible the data are. Control over these protocols and interfaces is thus a key factor when it comes to having de facto control over data.

47. In most cases, it is the data access provider which will have that control. The provider will thus decide which data are accessible to whom and in what format. While data portability[122] involves the extraction of a (personal) data set from service A and its implementation in service B, thus representing a one-off, unidirectional data transfer, interoperability enables data to be transferred from service A to service B across systems, applications or components on a continuous, bidirectional basis.[123] Data portability is thus a static concept and interoperability a dynamic concept of data transmission. There are other forms of data access. A "data trust", for example, can deliver a platform on which data access providers make data available and data access recipients can call up either the data or analyses of those data. In this model, data access providers relinquish control to the data trustee, which can, in turn, grant different actors data access of varying scope. Collaborative models are equally as

[121] Coase, R., 1960, "The Problem of Social Cost, Journal of Law and Economics, 3, p. 1–44.

[122] Data portability helps end users retain control over their data. However, there are currently no technical regulations which obligate service providers to each use the same, uniform data formats and processing protocols (standards).

[123] Gasser, U./Palfrey J., 2007, "Breaking Down Digital Barriers – When and How ICT Interoperability Drives Innovation", Berkman Klein Center for Internet & Society Research Publication No. 2007-8, Harvard University.

relevant. In such models, several actors agree on how an interface is to be configured, for example via a standard or a statutory norm. That way, so-called "data pools" enable data access platforms on to/from which many actors can upload/download data.

3.3 Data (access) as the basis of market power

48. In many markets data have become so important that in certain circumstances an undertaking can achieve or maintain market power due to data.[124] For instance, data exclusivity can be the result of an innovation or can even be a private resource which needs to be protected, for example where property rights in the data exist. Further, economies of scale and scope, a lack of switching/multi-homing, and lock-in effects may promote the emergence of an undertaking with a dominant market position. Data can then become a decisive factor of effective competition, meaning that a lack of data access represents an entry barrier and leads to dependencies for third-party undertakings. This, in turn, reduces a market's contestability and can, ultimately, lead to market failure.

49. Bringing together data from various sources can enable the creation of a special data pool and, in combination with de facto control over an exclusive data source, the emergence of a dominant market position. A minimum optimal volume of data which is the prerequisite for a viable business model can also represent a considerable barrier if it is particularly high, for example for AI-based business models. Finally, data (access) in markets which have strong direct and indirect network effects which make it very difficult to contest a market position will be a source of market power because they reinforce those network effects. Undertakings can make use of two types of feedback loops:[125] Providers with a large user base can use a user feedback loop to collect even more data, for example in order to develop better algorithms to improve the quality of their service and thus attract new users. Providers can use a monetisation feedback loop to analyse the collected user data and monetise them, for instance through targeted advertising, which will release new funding for investments which enable service quality improvements, which in turn attracts even more (data-generating) users. Market power can be created using this spiral of interactions, leading to significant differences in quality, making it very difficult for new undertakings to hold their own against more established competitors. These differences in quality can be so considerable that the resulting quality gap between competing services becomes very obvious to users, meaning more and more of them decide to use the "better", established service, as a result of which the market reaches a tipping point, which can lead to a monopoly.

3.4 Relevance of data access in a competitive context

50. The special characteristics of data (see section 3.1), the various data access regimes (see section 3.2) and the specific interaction between data (access) and market power (see section 3.3) mean there are various aspects which need to be understood in order to be able

[124] Schepp, N.-P./Wambach, A., 2016, "On Big Data and its Relevance for Market Power Assessment", Journal of European Competition Law & Practice, 7(2), p. 120–124.

[125] Prüfer, J./Schottmüller, C., 2021, "Competing with Big Data", Journal of Industrial Economics, 69(4), p. 967–1008.

to appreciate the relevance of data access to competition case-by-case. Based on the above, a distinction will be drawn in the following sections between heterogeneous and homogeneous data access scenarios, between data access where the data serve as an input factor in value creation and those where the data serve as a source of information about market structures, and between data access that increases and reduces competitive intensity.

3.4.1 Heterogeneous vs. homogeneous data access scenarios

51. A distinction needs to be drawn between two types of data access involving several undertakings: First, heterogeneous scenarios, in which the undertakings each have clear, assigned roles as either data provider or data recipient.[126] Second, homogeneous scenarios, in which undertakings record or at least could record similar data and grant each other access to these data to leverage economies of scale in relation to the value of data sets or the costs of recording them.

52. An example of a heterogenous access scenario is when an undertaking publishes a data sheet for a technical product it manufactures. The data sheet contains information such as product specifications and effectively forms part of the product. The producer passes the data sheet on to retailers, which in turn pass them on to end users. Neither the retailer nor the end user could themselves create a data sheet of comparable authenticity if the producer were to refuse to release it. Such heterogeneous access scenarios are at a minimum an inevitable element of every commercial transaction. Basic information such as product and supply data must be passed on to end users. Moreover, in heterogeneous access scenarios the data themselves may even be the primary object of the commercial transaction if an undertaking obtains access to certain data from another undertaking.

53. Homogeneous access scenarios still tend to be the exception. Possible examples are data pools into which two or more undertakings put similar data they each accumulate. This may be necessary in the case of, for instance, a data pool which needs to be sufficiently large in order to be able to train AI-based systems. Undertakings which accumulate similar data are, however, often direct competitors, which is why it is doubtful whether such cooperations often arise. On the one hand, an undertaking wishes to minimise the risk that their competitor will create competitive advantages using the data it makes available.[127] On the other hand, as explained in section 2.4, attention must also be paid to risks to competition. There is a danger that the sharing of data may be prohibited under section 1 ARC and/or Article 101 TFEU (prohibition of agreements restricting competition).

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[126] These may, for instance, constitute vertical relations within the meaning of section 20 (1a) ARC. For details on this rule, see paras. 23–24 above.

[127] Krämer, Stüdlein, Zierke (2021) show that even though undertakings may be in competition they will, to a certain extent, still be willing to share data. Direct bilateral relations are more profitable than data pools. Krämer, J., Stüdlein, N., Zierke, O., Data as a Public Good: Experimental Insights on the Optimal Design of B2B Data Sharing Platforms, 2021, SSRN 3970821. For a description of further obstacles to data sharing between firms, see Fassnacht, M.; Benz, C.; Heinz, D.; Leimstoll, J.; Satzger, G., Barriers to Data Sharing among Private Sector Organizations, 2023, Proceedings of the Hawaii International Conference on Systems Sciences (HICSS-56).

3.4.2 Data as an input for value creation

54. Data access in both homogeneous and heterogeneous scenarios can have a considerable influence on undertakings' competitiveness in a market. Where data made available are incorporated into an undertaking's products or services, data access can be significant, even essential. Where an undertaking can draw the required data from several sources, it will generally not come up against any problems. If it loses access to one provider's data, for example due to failed price negotiations, it can switch to another – possibly cheaper – one. However, where the access provider has exclusive disposal of suitable data it also has negotiating power, which can potentially be used abusively vis-à-vis data recipients.[128] In that respect data are no different from any other input factor which an undertaking obtains from third-party undertakings. Here, too, scenarios in which undertakings are highly dependent on a specific supplier or service provider can be problematic.

55. Data in particular differ from other input factors which can be incorporated into an undertaking's value creation because they are often a "byproduct" of the undertaking's business. The volume of data which a particular undertaking accumulates is generally proportional to the size of that undertaking: The bigger the undertaking, the more transactions, for example purchases, it is generally involved in. This applies both to undertakings which are comparatively large in a specific market and to corporations which are involved in many transactions across markets. In addition, corporations operating across several markets may have points of contact with the same customers in different markets. If such corporations combine data from different markets, those data can, for example, achieve a higher degree of detail or a lower error rate, i.e. higher quality. The fact that big undertakings tend to have more and higher quality data means they also tend to be less dependent on data access. Rather, the bigger they get, the more attractive they become as the providers of data access. That especially applies to corporations which operate in the digital space as intermediaries between stakeholders on different sides of the market and which have high market shares in their particular field and are thus involved in a large number of transactions. Examples include digital marketplaces (Amazon Marketplace), search engines (Google), app sales platforms (Apple App Store, Google Play Store) and social networks (Facebook, LinkedIn). They can draw on especially rich data pools thanks to the many transactions they are involved in and, as a result, can provide access to an especially rich data source which is often unparalleled in terms of scope and quality. If there is no competing offer of data access and the data from that access option can be used by undertakings as a significant input factor for products and services, then this can lead to competition problems. These are essentially the same as those which arise in traditional markets. An access provider with a dominant market position can restrict data access by charging high prices in order to achieve high returns. By restricting access in the relevant markets, an access provider can also have an advantage over competitors in relation to either its own business activities or those of affiliated undertakings. A topical example of a large corporation which is using its dominant position in this way is

[128] See section 2.3.1 above.

Deutsche Bahn AG.[129] Although it does not operate exclusively in digital markets, Deutsche Bahn AG is not only dominant in several markets but also has access to exclusive data on events occurring in its rail infrastructure. According to the Federal Cartel Office's decision, which was confirmed by Düsseldorf Higher Regional Court in temporary relief proceedings,[130] Deutsche Bahn AG exploited its position and unlawfully refused access under appropriate conditions to forecasting data on domestic rail passenger transport.[131]

3.4.3 Data access as a source of information for market activities

56. Data can not only serve as an input factor for a product or service but can also contain information about individual market players or a market as a whole. In that sense, having access to data can enable undertakings to coordinate their activities, for instance.[132] Where that is the case, the data transmitted via the access point contain information which leads to a change in the conduct of that undertaking with which they were shared. For instance, when a producer announces as part of its regular data sharing with retailers that it is making output adjustments, these retailers can adapt their sales activities, for example by means of more prominent or less prominent product placement. Conversely, data which retailers pass on to producers can help them plan demand-oriented output adjustments.

57. Such data are now more often being generated in corporations which have both big market shares in specific markets and to some extent operate across markets. They have a comprehensive overview of activities in one or more sectors. This in particular applies to digital platforms which act as intermediaries in transactions. Amazon, for example, has a dominant position in the German market when it comes to online marketplace services for commercial retailers.[133] When they use Amazon's digital marketplace, online retailers inevitably share sales data, and Amazon itself operates as an online retailer in the same market and, in that capacity, is in competition with other online retailers.[134] According to the European Commission, Amazon used non-public data from retailers in its marketplace to

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[129] The Monopolies Commission looked in detail at the issue of data access in the railway sector in its 2023 Sector Report Railways. Monopolies Commission, 9th Sector Report Railways (2023), Time to GO: Finally quality effective in competition!, Baden-Baden, para. 117 ff. See also, in this regard, para. 22 ff. and chapter II para 202.

[130] Düsseldorf Higher Regional Court, Kart 9/23 (V), VI-Kart 9/23 (V), 8 March 2024, Mobilitätsdienstleistungen (Mobility Services).

[131] In its decision of 26 June 2023, the Federal Cartel Office held that Deutsche Bahn had unlawfully denied competing providers of integrated mobility services continuous access to forecasting data relating to domestic passenger rail transport, which was to their disadvantage. Federal Cartel Office, Integrierte Mobilitätsdienstleistungen, Prognosedaten des Schienenpersonenverkehrs, B9-144-18, para. 11. See also chapter II para 202.

[132] This may be problematical in the context of a ban on cartels, see section 2.4 above.

[133] Federal Court of Justice, Federal Court of Justice confirms Amazon's paramount significance for competition across markets, Press release 097/2024, 2024, https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/EN/2024/2024097.html?nn=17683472, retrieved 24 April 2024.

[134] Regarding possible limits to being granted data access, see section 2.4 above.

boost its own online retail business.[135] More specifically, by using these data, Amazon was able to focus on the biggest-selling products in various product categories than other retailers were.[136] In the course of its investigation, the European Commission obtained commitments from Amazon in 2022, including that Amazon would no longer use the data concerned to optimise its own business activities as an online retailer.[137]

3.4.4 Data access and intensity of competition

58. Undertakings may, for example, be motivated to use data access to obtain data for the purposes of cost-reducing process optimisation and to make quality improvements and demand-oriented product adjustments. However, it is also conceivable that, by using such data, end users may be discriminated more effectively when it comes to pricing, they are to receive more targeted advertising or are to be encouraged to make more frequent purchases through more effective nudging.[138] Another intention for data sharing may also be better coordination with partner undertakings.

59. Just as the range of possible scenarios in which data available via a data access can be used is broad, the effect on competition between undertakings is diverse, too. One key aspect is the effect a larger volume or a higher quality of available data has on the intensity of competition. Competitive intensity can be described as the degree to which an undertaking starts efforts to lure customers away from a competitor. Based on this definition, it is not clear in each case whether competitive intensity increases or decreases where some or all of the undertakings in a market have access to additional data.

60. Generally speaking, competitive intensity increases where an undertaking uses such additional data to lure customers away from its competitors. [139] How it does that depends on the manner in which the data are used. If the data are, for instance, suited to reducing the costs of process optimisation, an undertaking can win new customers by lowering its prices. If

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[135] European Commission, Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices, 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077, retrieved 27 February 2024.

[136] European Commission, Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices, 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077, retrieved 27 February 2024.

[137] European Commission, Kartellrecht: Kommission akzeptiert Verpflichtungsangebote von Amazon, 2022, https://germany.representation.ec.europa.eu/news/kartellrecht-kommission-akzeptiert-verpflichtungsangebote-von-amazon-2022-12-20_de (German only), retrieved 27 February 2024.

[138] Nudging is used as a means to shape the conditions under which (purchase) decisions are taken so that the desired decision is taken more frequently. Thaler, R., Sunstein, C, NUDGE: Improving Decisions About Health, Wealth, and Happiness, Penguin Books, London, UK, 2009. An example of a very effective nudging method is when a specific version of a product is presented as the standard. Hummel, D., & Maedche, A., How effective is nudging? A quantitative review on the effect sizes and limits of empirical nudging studies. Journal of Behavioral and Experimental Economics (80), 2019, 47–58.

[139] de Cornière, A., Taylor, G, Data and competition: A simple framework, 2023, https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2023/wp_tse_1404.pdf, retrieved 4 March 2024, p. 7–8.

the data are used to improve quality, this will also attract more new customers. The undertaking then generates additional income from these new customers.

61. However, another possible scenario is one in which an undertaking primarily uses data from a particular data access to achieve more profit per customer. Where an undertaking places targeted ads in its online shop based on detailed consumer data, for instance, this will probably lead to an increase in sales and thus turnover per customer.[140] However, some of its previous customers may regard such targeted ads as intrusive and thus migrate to a competitor.[141] If the undertaking accepts that it will lose some customers to its competitors, the result will be a reduction in competitive intensity.[142] The increase in turnover per customer compensates for the lost customers. Similar effects can arise when data are used for the purpose of price discrimination.[143] Additional or higher-quality data about market activities can also sometimes reduce competitive intensity, for example when undertakings' approaching production surpluses in markets with fluctuating demand can be better forecasted and thus seasonal price wars avoided.

4 Data access in merger control

62. As explained in section 2, some very specific rules on data access have already been introduced in some sectors. Nevertheless, it is especially those provisions relating to merger control which continue to apply. Since they have a very wide scope of application and contain hardly any specific rules on data access, it is quite difficult to accurately assess the relevance of any data access granted. In this section the Monopolies Commission outlines a scheme aiming at making it easier for competition authorities to apply a systematic approach when assessing proposed mergers. This assessment scheme should be regarded as an initial basis which needs to be refined in practice.

63. Even though each merger has to be examined on a case-by-case basis, it is recommended to examine in each case which data the merging parties have or could have at their disposal, how any changes in their availability will influence the parties' competitive intensity and whether the merger will have an influence on whether and, if so, how these data will be made available to other undertakings. The assessment scheme outlined here is a three-step process: In a first step the data accesses which are to be examined are identified (see section 4.1); in a second step an assessment is done of whether changes to those accesses will have an effect

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[140] de Cornière, A., Taylor, G, Data and competition: A simple framework, 2023, https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2023/wp_tse_1404.pdf, retrieved 4 March 2024, p. 13 ff.

[141] Van Doorn, J., Hoekstra, J. C., Customization of online advertising: The role of intrusiveness, Marketing Letters (24), 2013, 339–351.

[142] de Cornière, A., Taylor, G, Data and competition: A simple framework, 2023, https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2023/wp_tse_1404.pdf, retrieved 4 March 2024, p. 7–8.

[143] de Cornière, A., Taylor, G, Data and competition: A simple framework, 2023, https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2023/wp_tse_1404.pdf, retrieved 4 March 2024, p. 12–13. A special theoretical case of price discrimination in which online platforms hike up prices for data-based, targeted advertising in niche markets in order to reduce the number of providers in those markets and to skim off the remaining providers' monopoly incomes is described in Prat, A., Valletti, T., Attention oligopoly, American Economic Journal: Microeconomics, 14(3), 2022, 530–557.

on the competitive situation (see section 4.2); and, in a last step, the nature of the effect on competition is identified (see section 4.3).

4.1 Identify the merging parties' existing and potential data accesses

64. One of the biggest challenges when investigating data accesses in the context of merger control is to identify which of the data the undertakings involved in the merger accumulate are of relevance to the competitive situation. This is comparatively simple when it comes to those data which undertakings are already making available to each other or to third-party undertakings. In such cases the task is to assess what impact the merger will have on the general availability of data in the relevant markets. It is already quite challenging to examine those data which have previously been recorded by some or all of the undertakings involved in the merger but which have not yet been made available to third parties.[144] It is even more difficult, though, to examine those data which have not yet been recorded by one or all of the merging parties but which could potentially be recorded and made available to others. Because data are often a "byproduct" of an undertaking's core business, it is not possible to draw any conclusion as to whether they are irrelevant based on their previously non-existent commercial exploitation. The potential alone that data may be recorded and made available can already influence the competitive situation, i.e. competition for the market.

65. The merger between Facebook and WhatsApp in 2014 is a prominent example.[145] At that time, WhatsApp did not record any demographic data relating to its users, nor did it sell any data to third-party undertakings.[146] Facebook did, by contrast, record demographic data relating to the users of its social networking platform and made them available to advertisers to serve "targeted" advertisements.[147] The European Commission investigated and approved the merger. It did not, however, investigate in any detail whether, at that point in time, WhatsApp would potentially have been in a position to record data similar to the ones Facebook was recording and to make them available to advertisers to serve "targeted" advertisements.[148] Although the European Commission held that there was already a significant overlap between the users of WhatsApp and those of the social networking platform Facebook,[149] it did not draw the conclusion that the existence of WhatsApp as a separate undertaking and potential new channel for targeted, data-based advertising could be of any relevance. There is much evidence suggesting that, by acquiring WhatsApp, Facebook bought a potential competitor which, like Facebook, have been able to serve targeted online advertising on the basis of demographic data. This example shows how important it is for competition authorities to not only include existing data accesses when examining mergers but also to take into account those data which are being recorded by the

[144] Modrall, J., Big Data and Merger Control in the EU, Journal of European Competition Law & Practice, 9(9), 2018, 569–578, p. 577.

[145] European Commission, Facebook/WhatsApp, Case M.7217.

[146] European Commission, Facebook/WhatsApp, C(2014) 7239 final, para. 71.

[147] European Commission, Facebook/WhatsApp, C(2014) 7239 final, para. 70.

[148] European Commission, Facebook/WhatsApp, C(2014) 7239 final, para. 72.

[149] European Commission, Facebook/WhatsApp, C(2014) 7239 final, para. 140.

merging parties but – at the point at which the merger occurs – are not (yet) being passed on to third parties as well as to look at those which the parties could record.

66. When examining a merger it is thus recommended that (1) those data accesses are identified which some or all of the merging parties make available at the time of the merger. This includes both data accesses which the merging parties grant each other (i.e. internal accesses) and those which are granted to third parties which are not part of the merger (i.e. external accesses).

67. Moreover, (2) both customer and supplier groups should be identified on whom data are recorded in the individual merging parties, even if they have not, up to that point, been passed on to others. It is important to examine whether these data can be used for commercial purposes by external parties in the context of data access. One indication that this is the case could be that there are undertakings which are not involved in the merger which sell such data. If that is the case, there is a market of which account must be taken when examining the planned merger. However, it is also possible that there has, up to that point, been no market for certain data although the undertakings have an economic interest in acquiring them.[150] As already mentioned in paragraph 43, there are various factors that indicate a high commercial value, including the number of data sets; the fact that the data relate to sales, location or marketing; that they contain the business data of specific undertakings; that the data are particularly up to date; that they are updated daily; and that they are largely free of errors and structured in an accessible format. Statutory norms or strategic concerns,[151] for instance, can be reasons why they have so far not been commercially exploited. When investigating such cases, account must be taken of the fact that mergers will make it easier to access data within the ensuing entity. In that sense, mergers are a way of gaining access to data.[152] This can lead to the creation – in particular in the case of mergers across value creation stages and markets – of competitive advantages vis-à-vis third-party undertakings which continue not to have access to comparable data at the upstream or downstream stage of the value chain or in neighbouring markets. That is why account must also be taken of those data which will probably be shared across value creation stages and markets within the new entity created by the merger.[153]

68. Finally, it is recommended that (3) account should also be taken of those data which could potentially be recorded by the merging parties at reasonable effort. It makes sense to also examine whether these data can be commercially exploited in the context of data access. There is one specific indicator which can be used to investigate whether there are any

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[150] See also, in that regard, Schmidt, S. A., Zugang zu Daten nach europäischem Kartellrecht, Tübingen 2020, p. 401 ff.

[151] For example privacy concerns. For an overview of the legal limits of data access, see section 2.4 above.

[152] Lasserre, B., Mundt, A., Competition Law and Big Data: The Enforcers' View, Antitrust & Public Policies, 4(1), 2017, p. 92.

[153] That is also the conclusion drawn in European Commission, Non-Price Competition: EU Merger Control Framework and Case Practice, Competition Policy Brief No 1/2024, 2024, https://content.mlex.com/Attachments/2024-04-17_E18GB8EI0AT4A4R9%2fApril+2024+_merger_policy_brief_non-price_merger-control_pharma.pdf, retrieved 17 April 2024, p. 12.

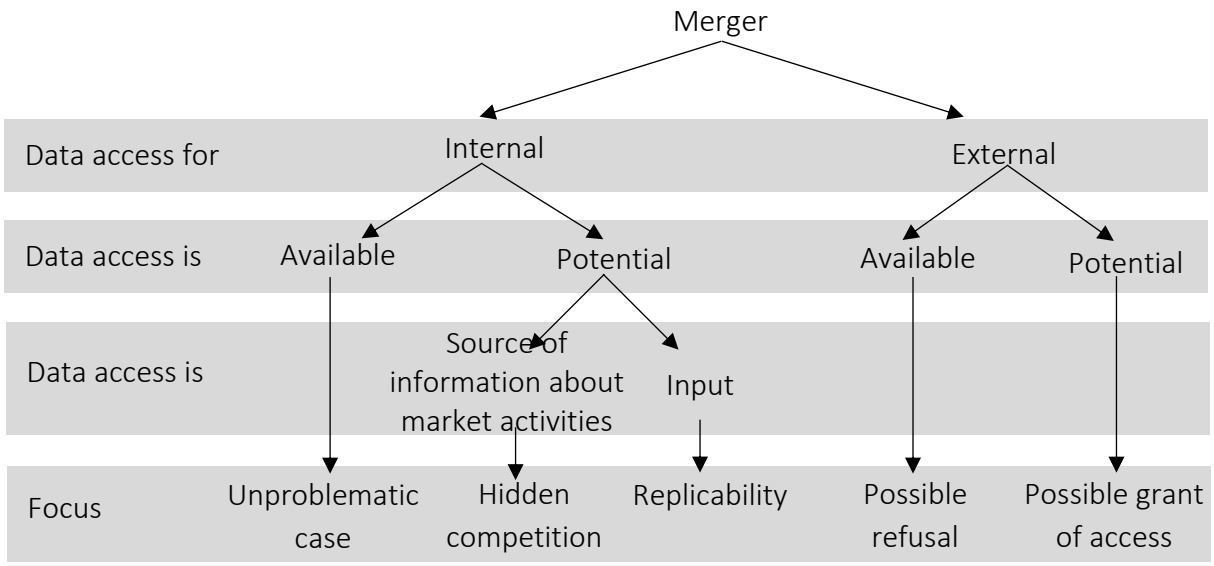
undertakings which are not involved in a merger which already sell such data. However, it is possible in this case, too, that data are not yet being sold due to certain obstacles and that the merger will provide an exclusive opportunity to gain access to these data and achieve data-driven competitive advantages vis-à-vis those undertakings which will continue not to have access to comparable data.

69. Overall, identifying potential data sources is a demanding task for competition authorities. It is above all third-party undertakings which can help authorities overcome this challenge by helping to identify data whose accessibility could be of relevance to the merger control proceedings. When consulting market participants, particular weight should thus in future be attached to the issue of data access. The merging parties' customer and supplier groups could be a first port of call, too. Where there are third-party undertakings whose customer or supplier groups are largely identical or whose customer or supplier groups can be identified in the merging parties' data pool, this suggests there is a commercial interest in having access to data.

4.2 Assess expected changes to competition due to data accesses

70. Once those of the merging parties' existing and potential data accesses which are to be investigated have been identified, the next step is to assess, in relation to each of these accesses, to what extent significant changes are to be expected on account of the merger which are of relevance to the structure of individual markets. Figure IV.1 illustrates various situations and what the focus of the assessment should then be in each situation. It is recommended that the first question should always be whether any significant change is to be expected. The question of whether a significant change will result in a significant impediment to competition should, by contrast, be considered as a separate step (see 4.3).

Figure IV.1: Identifying mergers with an effect on competition



Source: Monopolies Commission

71. First, it is useful when examining a merger to draw a clear distinction between data accesses involving the merging parties (internal) and data access agreements with third-party undertakings (external). In reality, it will frequently be the case that – technically speaking – the same data access will be both internal and external. Nevertheless, even in such cases the granting of internal access should be considered separately to the external access.

72. Figure IV.1 already makes it clear that if the merging parties already had access to data prior to the merger then this is not to be regarded as problematic. If this access is also granted under the same conditions following the merger, then there will be no merger-specific changes which can have an effect on competition. For instance, this may be the case if the data concerned were already made available to the other party free of charge prior to the merger. The devil is in the detail, though. Key characteristics such as the costs of data access or the level of detail of the data are generally expected to change following the merger. The examination can then no longer be based on the assumption that the data access already existed in this form prior to the merger. If that is the case, the examination of the merger will have to be based on the assumption that it is in fact a new access which would potentially be realised between the parties as part of the merger (i.e. internal).

73. Those internal accesses which are potentially granted as a result of the merger must be examined with a different focus in mind, depending on whether the data concerned would be used as input or would provide information about market activities.[154] As Figure IV.1 shows, data about market activities should above all be examined in terms of whether the merging parties' shared data pool is so broad that it could jeopardise the hidden competition in relation to the remaining competitors in individual markets.[155] The merging parties may possibly together have a comprehensive overview of one or more markets on which they operate.[156] When, for example, a manufacturer and a retailer join forces, both generally operate in the wholesale market. Both merging parties accumulate data about that market as a "byproduct". This may include price data, for example. If the merging parties share these data, then they may gain a more comprehensive overview of the competing manufacturers' sales prices and the competing retailers' purchase prices.[157] This overview can have a significant influence on both the merging parties' conduct and third-party undertakings' conduct vis-à-vis the merging parties. If the merging parties are able to respond more quickly to their competitors' price

[154] For the distinction between "market structure data" and "data as input", see section 3.4.1 above.

[155] This is also the conclusion drawn in European Commission, Non-Price Competition: EU Merger Control Framework and Case Practice, Competition Policy Brief No 1/2024, 2024, https://content.mlex.com/Attachments/2024-04-17_E18GB8EI0AT4A4R9%2fApril+2024+_merger_policy_brief_non-price_merger-control_pharma.pdf, retrieved 17 April 2024, p. 12.

[156] If the undertakings remaining in the market following a merger can monitor each other to a sufficient degree, then one of three criteria is fulfilled under which the ECJ considers collective market dominance to be likely. The other criteria – the existence of some form of deterrent mechanism which serves disciplinary purposes and the non-existence of market players which are not involved in the coordination and whose reactions jeopardise the results expected from the coordination – should be examined separately. See para. 82.

[157] Official Journal of the European Union, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2008/C 265/07, 2008, para. 78.

reductions or product innovations, for example, then their competitors' incentive to realise price reductions and production innovations drops. However, the potential influence should not only be examined in the case of homogeneous data scenarios if both parties can (potentially), as in the example described in the above, contribute similar data to the merger.[158] It is also important to examine heterogeneous access scenarios, especially where an undertaking with a dominant market position buys an undertaking in an upstream or downstream market and subsequently operates at that upstream or downstream stage in the value creation process.[159]

74. As Figure IV.1 shows, the focus of any examination should be a different one if there is a possibility that the merging parties will share data following the merger which will contribute to the provision of services or the manufacturing of products. It should be clarified, in regard to such potential internal data accesses, whether easier data sharing following the merger leads to significant competitive advantages which cannot be replicated by third-party undertakings. If this is the case in one or more markets, then the merger is expected to have an effect on competition. This can be the case in a homogeneous access scenario, for instance, if the merging parties together achieve a minimum optimal volume of data which is necessary to be able to use AI-based algorithms. Competitors will possibly not be big enough to be able to generate the same minimum optimal volume. In heterogeneous access scenarios, the fact that the data become available to some of the merging parties may possibly lead to improvements in product quality and to a clear advantage over competing products.[160]

75. As regards external data accesses, the examination should in particular focus on whether the merging parties will then have strategic reasons for changing the data access granted to other undertakings. It would need to be examined whether existing data accesses would then possibly no longer be granted following the merger.[161] This may be the case in homogeneous access scenarios if the merging parties themselves already generate sufficient data sets for certain applications and are thus no longer reliant on cooperating with other undertakings. In heterogenous access scenarios, this will above all be the case where other undertakings which are in competition with the parties to the merger benefit from the existing access. In all cases, the merger is only expected to have a competitive influence if the data access granted by the

[158] An example of a homogeneous access scenario whose relevance to competition was to be expected is the merger between WhatsApp and Facebook referred to in the above. Further examples include the mergers between Google and DoubleClick and between Apple and Shazam.

[159] An example of a heterogeneous access scenario whose relevance to competition was to be expected is the merger between Meta and Kustomer. The merger gave Meta access to Kustomer's customer relationship management (CRM) data, which at least potentially also include user data on the users of X (formerly Twitter), which is in competition with Meta in the field of B2C communications. European Commission, Meta (formerly Facebook)/Kustomer, C(2022) 409 final, 2022, paras. 48 and 260–261.

[160] When Google bought Fitbit a debate arose about the extent to which Google could use Fitbit's data to improve its own services in the corporation's other business segments. Spangnolo, G., et al., Google/Fitbit will monetise health data and harm consumers, 2020, https://cepr.org/voxeu/columns/googlefitbit-will-monetise-health-data-and-harm-consumers, retrieved 3 April 2024.

[161] There could be compartmentalisation of the market. Official Journal of the European Union, Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, 2008/C 265/07, 2008, para. 29 ff.

merging parties cannot be substituted, or only to a limited extent. Otherwise, it must be assumed that external undertakings will switch to another data provider without suffering any disadvantages.

76. However, it is also possible that the merger will lead to more or higher quality data being made available to external undertakings. For example, combining the merging parties' data may create data sets which are of interest to certain third-party undertakings. In this case, too, account should be taken of their substitutability. Where there are several comparable data accesses before the undertakings merge, the merger will generally have little competitive influence and does not require further examination.

77. In sum, it is clear at this stage, too, what huge challenges the issue of data access poses in the context of merger control. An assessment needs to be done as to whether the merging parties are able to use the data they generate in competition with others in such a way that they can influence competition overall. In view of the numerous theoretical scenarios, consulting market participants will also have a significant role to play when it comes to obtaining specific information and being able to identify what effect a possible merger will have on competition.

4.3 Determine the nature of the relevant data accesses' competitive influence

78. Once those data accesses have been identified whose expected adjustments in the context of the merger will likely have a competitive influence, the last step is to determine whether that influence will represent a significant impediment to effective competition within the meaning of Article 2(2) of the EC Merger Regulation 139/2004[162] and section 36 ARC.

79. Where the focus of the examination is on data which are used as input for products or services, the nature of the competitive influence needs to be clarified. As explained in section 3.4.4, more or higher quality data which are available to an undertaking can either increase or decrease the competitive intensity. Generally speaking, greater availability of data will increase competitive intensity because the merging parties will utilise the easier access to data to improve their products and services, for instance.[163] In many cases, such an intensification of competition ought to be desirable and lead to lower prices, for example. In the case of data which serve as input and increase competitive intensity, it will thus generally be positive from the competition perspective if undertakings obtain access to more data overall and negative if undertakings obtain access to fewer data overall.

80. However, it should be noted that in exceptional cases the market may reach a tipping point if only certain specific undertakings obtain access to significantly more or higher quality data. It is possible that the merging parties will benefit from data access but that the majority of the competing undertakings will not. These competitors can then not achieve comparable

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[162] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24, 29 January 2004, p. 1.

[163] This is in line with the outcome of the model in de Cornière, A., Taylor, G., Data-Driven Mergers. Management Science, forthcoming, 2024, https://doi.org/10.1287/mnsc.2023.04104, retrieved 18 April 2024, p. 4.

improvements or the like. Where data access leads to a very large competitive advantage, competitors may no longer be able to hold their own in the market.[164] There would then be no short-term price advantages for customers, possibly in the long run, due to there being a monopoly in the market. In such cases, the merger would have to be denied unless remedies such as suitable ancillary provisions are available.[165]

81. In a few cases which need to be considered separately, an undertaking's increased use of data leads to its revenue per customer increasing but to its products or services becoming less attractive to customers overall.[166] The availability of more data leads to a drop in the competitive pressure exerted by this undertaking, for example because, as described in section 3.4.4, some of its previous customers find the targeted advertising which has been personalised on the basis of these data to be too intrusive. Data access which was not granted prior to the merger but which will likely be granted after the merger would, thus, lead to a decrease in competitive intensity. This generally corresponds to a worsening of the competitive situation in the market in question. The merger can then lead to a slackening of price competition and an increase in prices.[167] On the other hand, a data access which is no longer available following the merger would then have to be regarded as positive.

82. Nevertheless, less competitive intensity should not always be regarded as negative. Where the lower competitive pressure following a merger is exerted by a dominant undertaking, a long-term positive effect may be exerted on the market structure because smaller competitors gain more market share. For example, at least some of the providers of messenger services competing with WhatsApp gained market shares in the end consumer market when Facebook announced that it would also be using WhatsApp data for its other services.[168] Even though this did not lead to WhatsApp losing its dominant market position in the long term, a positive effect on the market structure might be possible in other cases. Along

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[164] Such a case is described in the model in Chen, Z., Choe, C., Cong, J., Matsushima, N., Data-driven mergers and personalization, RAND Journal of Economics, 53(1), 2022, 3-31, p. 14–15.

[165] Pursuant to Article 2(1)(b) EC Merger Regulation, account is only to be taken of the development of technical and economic progress when making an appraisal of concentrations if it is to the consumers' advantage and does not form an obstacle to competition. However, there would be an obstacle to competition in the case of an impending monopoly. Regarding the application of Article 2(1)(b) EC Merger Regulation, see also Körber, in: Immenga/Mestmäker, Wettbewerbsrecht, Vol. 3, 6th ed., München 2020, Article 2 EC Merger Regulation, margin no. 353.

[166] See section 3.4.4 above, para. 61.

[167] Esteves, R. B., & Vasconcelos, H. (2015), Price discrimination under customer recognition and mergers. Journal of Economics & Management Strategy, 24(3), 523–549, p. 539 use a theoretical approach to describe a case in which an undertaking created by a merger is able to better identify those consumers who are not prepared to switch to one of its competitors. That undertaking may then be able to use the information to increase its prices for those consumers. Here, too, consumers will suffer disadvantages, but the competitive pressure on the undertaking's competitors may possibly not change.

[168] Golem.de, Facebook. WhatsApp stellt Nutzern ein Ultimatum, 2021, https://www.golem.de/news/facebook-whatsapp-stellt-nutzern-ein-ultimatum-2101-153215.html, retrieved 11 April 2024; Golem.de, Weg von WhatsApp. Signal verfünffacht Nutzerzahl in kürzester Zeit, 2021, https://www.golem.de/news/weg-von-whatsapp-signal-verfuenfacht-nutzer-in-kuerzester-zeit-2101-153403.html, retrieved 11 April 2024.

with the short-term effect on competitive intensity, account must thus also be taken of the medium-term effect on market structure.

83. Analysing the data relating to market activities is easier in the sense that in the majority of cases a negative effect is to be expected.[169] A more comprehensive overview of market activities can lead to individual market dominance, collective market dominance or unilateral effects below the threshold of market dominance. The matter which needs to be addressed from an economic perspective is to what extent the market participants remaining in the market following the merger are likely to tacitly coordinate prices, quality etc.[170] The ECJ has developed criteria to be applied in the case of collective market dominance. According to the ECJ, collective market dominance is probable if the undertakings remaining in the market are able to monitor each other to a sufficient degree, if there is some form of credible deterrent mechanism for disciplinary purposes and the reactions of uninvolved market players do not jeopardise the results expected from the coordination.[171] Sufficient monitoring between the undertakings remaining in the market may become possible on account of the changed availability of market data. That increases the probability that the first of the three criteria is fulfilled. Similarly, better monitoring based on market data can also lead to the emergence of individual market dominance. Where the entity created by a merger can sufficiently monitor the remaining competitors so as to be able to discipline them using a deterrent mechanism in the case of deviant conduct, it could be assumed that this undertaking has individual market dominance. Finally, it is also possible that additionally available market data will give rise to unilateral effects below the threshold of market dominance. An undertaking's role as "an important source of competition"[172] may, for instance, be called into question if, following a merger, a competitor has market data which enable it to respond more swiftly to discounts or product innovations, for example. Such discounts or product innovations may possibly only make sense for an undertaking which is an important source of competition if the entity created by the merger does not respond too quickly to market activities by running its own discount campaigns and launching its own product innovations on the basis of data made available to it. In all the above-mentioned cases, there may be a significant impediment to competition, meaning that the merger would have to be denied unless remedies such as suitable ancillary provisions were available.

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[169] Efficiency defences are a theoretical possibility, for example market data can be used to serve niches which it would otherwise not be possible to identify. In practice, merging parties are likely to find it hard to plausibly demonstrate to the competition authorities, prior to the merger, the existence of such niches, which they can only identify following the merger.

[170] Lasserre, B., Mundt, A., Competition Law and Big Data: The Enforcers' View, Antitrust & Public Policies, 4(1), 2017, p. 91–92.

[171] ECJ, Case C-413/06, 10 July 2008, Bertelsmann und Sony Corporation of America/Impala, ECLI:EU:C:2008:392, para. 123.

[172] Official Journal of the European Union, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5–16, para. 28.

4.4 Interim conclusion

84. Taking account of the competitive influence of data accesses in the context of merger control proceedings will become increasingly more important the more significant data become for undertakings going forward. Examining such cases is a complex process. The Monopolies Commission therefore recommends a three-step process.

85. As a first step it should be established, for each merging party, which data it has at its disposal which could be commercially exploited by other parties to the merger or external undertakings. That includes data to which access is already being granted, those data which are being recorded but to which no access has previously been granted and those data which could potentially be recorded and to which access could potentially be granted.

86. As a second step it should be determined, for each of the identified (potential) data accesses, whether changes are to be expected due to the merger which will have an influence on the competitive situation. Data accesses which the merging parties were already granting each other prior to the merger are not expected to have any influence. Data access which has not been granted prior to the merger and data access granted to third-party undertakings may, by contrast, lead to changes which have a competitive influence.

87. As a third step it should be examined whether the expected changes will have a negative or positive influence on the competitive situation. It should be examined whether, following the merger, data which relate to market activities will allow the remaining undertakings to coordinate prices or quality. The increased availability of data which serve as input for services or products can either increase or decrease competitive pressure. An increase in competitive pressure is generally to be regarded as positive and a decrease as negative. Those cases in which the competitive pressure from a dominant undertaking is reduced are exceptions to this rule. In such cases, reduced competitive pressure can create room for competition.

88. The assessment scheme which the Monopolies Commission has developed is intended to serve as an initial basis for competition authorities, which should then successively supplement it with their experience applying it in practice.

5 Data access in abuse control

89. Assessing when a refusal to grant access to data or the data access itself is to be regarded as an abuse of dominance is also a huge challenge in the context of abuse control. For that reason this section likewise outlines a possible assessment scheme which provides orientation for practitioners so as to make it easier to apply a systematic approach to abuse control.

5.1 Claims for data access under the law on abuse control

90. The 10th Amendment to the ARC established two new claims for data access in section 19 (2) no. 4 and section 20 (1a) ARC.[173] Even though these amendments to some extent only serve the purpose of clarification, that is to emphasise an existing claim for data access, they nevertheless reflect the increased relevance of data access in the context of abuse

[173] See section 2.3.1 above.

control. Abuse of dominance exists where the conduct of dominant/powerful undertakings places other undertakings or even consumers at an inappropriate disadvantage and countervails efforts to maintain undistorted competition (Article 102 TFEU, sections 19 and 20 ARC).

91. Markets which enable the collection of data are referred to as "primary data markets". They should be distinguished from "secondary data markets", in which collected data are traded. Primary data markets can have a tendency to become concentrated due to economies of scale and scope as well as network and lock-in effects, making it difficult for third-party undertakings to enter the market. There are currently only a few secondary data markets.[174] Abuse control law provides the case to conduct a data access-specific investigation where there is a concentrated primary data market[175] and where there are no secondary data markets, that is no alternative data source is available.[176]

92. High requirements are often made of abuse proceedings under competition law, for example as regards the relevant constituent elements and to some extent also as regards proof. For instance, in the case of an abuse of prices or conditions (Article 102 sentence 2 (a) TFEU and section 19 (1) and (2) no. 3 ARC), impeding competitors' market access/innovation behaviour (Article 102 sentence 2 (b) TFEU and section 19 (1) and (2) nos. 1 and 2 ARC) or in the case of discrimination/essential facilities (Article 102 sentence 2 (c) TFEU and section 19 (1) and (2) nos. 1, 3 and 4 ARC), there is both data exclusivity and a concentrated primary data market and thus market dominance. Below the threshold of market dominance, in the case of relative market power (section 20 (1) and (1a) ARC), the necessary conditions are a bilateral power imbalance and data dependence. In addition, competition law imposes special rules on undertakings of paramount significance for competition across markets (section 19a (1) ARC). De facto control over data of relevance to competition can be an indication that an undertaking holds such a position and opens up particular potential for abuse. As a result, such undertakings may be prohibited from refusing the interoperability of products or services or data portability (section 19a (2) no. 5 ARC).

93. Especially when it comes to digital markets abuse control has various deficits in terms of enforcement, such as long procedures and the lack (as yet) of guidelines on interpreting the conditions under which data access is to be granted. Challenges may also arise when examining a possible claim for data access, for example when it comes to determining remuneration despite the lack of comparative markets or the technical configuration of a particular data access. This section therefore describes a systematic and targeted approach which can be adopted in abuse control to assess whether there is a need for data access. Cases

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[174] From an economic perspective, data, being goods in a market, can be regarded as remuneration for using a service and as a resource (e.g. to enable innovations).

[175] It may be the case that there is not only a market for data but that, depending on the context, business model and purpose for which the data are used, there may be very different markets and sub-markets for data. Data markets and upstream/downstream markets may differ on the basis of factors such as content, value-creation stage (i.e. precursor/end product), level of detail/granularity, up-to-dateness, scope, availability and purpose.

[176] In those cases in which it is not possible to take the actual market situation as the point of reference, a distinction will possibly have to be drawn between hypothetical data markets, although it will be based on assumptions regarding the alleged market structure.

of abusive exclusionary and exploitative conduct in which data access may be a suitable remedy will be examined (see 5.2). After this, section 5.3 proposes a scheme with relevant criteria for examining potential claims for data access. A conclusion then follows in 5.4.

5.2 Abusive exclusionary and exploitative conduct with relevance for data access

94. The refusal of access to data (in the sense of a refusal to do business) may be anticompetitive if the data are an "essential facility" for the activities of the undertaking requesting access. This is the case where the refusal prevents an undertaking from operating in an upstream or downstream market.[177] The ECJ has set high barriers with regards to access to essential facilities.[178] According to the ECJ's judgment in the Bronner case, an undertaking may demand access to a facility if refusal of access by the established operator relates to a product which is indispensable for carrying on the business, in particular if such refusal prevents the appearance of a new product for which there is a potential consumer demand, that it is not justified by objective considerations and it is likely to exclude all competition in the secondary market. Further, the ECJ held in this case that a product or service is only indispensable if there are no alternative products or services and there are technical, legal or economic barriers capable of making it impossible for any other undertaking wishing to begin operating in the downstream market or making it inappropriately difficult to develop products or services.[179] These requirements are only met[180] where proof is given that the data in the possession of the established undertaking are truly unique and competitors have no possibility of using these data.

95. Apart from the case where the data are an essential facility, the refusal of data access can also be regarded as anticompetitive if it is discriminatory.[181] Vertical integration may entail discriminatory access to strategic information which distorts competition. Marketplace operators which are retailers (also known as a "dual role") can, for instance, gain access to information about competitors (selling products/services in that market) and about consumer behaviour. Conversely, such a marketplace operator could also restrict access to information which competitors in that market have about the transactions it is engaged in. Such

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[177] Motta, M., 2023, "Self-preferencing and foreclosure in digital markets: Theories of harm for abuse cases", International Journal of Industrial Organization, 90, Article 102974. The same applies where there is not yet a downstream market.

[178] ECJ, Case C-7/97, Bronner, loc. cit., see footnote 72, para. 41.

[179] Ibid., para. 41 ff. The essential facility doctrine requires at least one upstream input market and a downstream output market (end consumer market). In cases in which the refusal of data access would lead to a monopoly in a horizontal, neighbouring market for complementary products/services for users of a main product or a main service, three markets may even be relevant: 1) The market for the main service; 2) the market for the input (data) required for the complementary service; and 3) the market for the complementary product itself. The necessary condition is dominance in the input market.

[180] The ECJ judgment in the Bronner case did not concern data or data access.

[181] See also the Federal Cartel Office's case against Deutsche Bahn as described in section 2.3.1 above and Federal Cartel Office, B9-144/19, Deutsche Bahn, loc. cit., see footnote 54.

transmission and restriction of information can make the operator of an integrated platform disproportionately more competitive than others in that market.[182]

96. Data collected in a specific market can also be used by an undertaking to expand or increase its market power in another market in an anticompetitive manner, that is by means of the transfer/expansion of dominance. An undertaking may adopt tying practices, for instance. That is the case where an undertaking possesses a valuable data pool and links access to that data pool to the use of its own data analysis services. In certain circumstances, such tying practices can lead to an increase in efficiency, but they can also lead to a restriction of competition by favouring the undertaking which is in possession of the data set over its competitors in the data analysis market. Practices which restrict competition may, however, also exist where a dominant undertaking refuses to grant its competitors access to data by concluding exclusivity agreements or it denies them the opportunity to obtain similar data. Exclusivity agreements can lock out competitors if they are concluded by dominant undertakings.[183]

97. Data can also be used by means of price differentiation. By collecting data about its customers an undertaking can obtain better information about those customers' buying habits and can then better assess their willingness to pay for certain goods or services. If the undertaking is in a dominant position, it may use this information to set different prices – at different times or for different goods – for different groups of consumers. Price differentiation can help the undertaking to set its prices in line with consumers' individual willingness to pay a certain price so that it can obtain the largest share of the consumer surplus. Unequal treatment in terms of prices may be justified or potentially abusive, for example where personal (user) data are used to personalise a product or service,[184] or where data are used for behaviour-based discrimination using algorithms.[185]

98. Restrictions of the right to privacy can also be the subject of abuse control, for instance where a dominant undertaking collects data in a manner which is clearly in breach of data protection law and where there is a strong correlation between that data collection and the undertaking's market position.[186] Excessive terms and conditions ("abusive conditions") which are imposed on consumers in return for using a service or buying a product can, for example, be examined on the basis of data protection provisions which serve as a standard for assessing exploitative conduct, especially where consumers do not read the different undertakings'

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[182] Zhu, F./Liu, Q., 2018, "Competing with complementors: An empirical look at Amazon.com". Strategic Management Journal, 39(10), p. 2618–2642.

[183] Motta, M., 2023, "Self-preferencing and foreclosure in digital markets: Theories of harm for abuse cases", International Journal of Industrial Organization, 90, Article 102974; Schaefer, M./Sapi, G., 2023, "Complementarities in learning from data: Insights from general search", Information Economics and Policy, 65, Article 101063.

[184] Esteves, R-B./Carballo-Cruz, 2023, "Can data openness unlock competition when an incumbent has exclusive data access for personalized pricing?", Information Economics and Policy, 64, Article 101046.

[185] Ezrachi, A./Stucke, M.E., 2016, "Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy", Cambridge, MA and London, England: Harvard University Press.

[186] ECJ, Case *C-252/21, 4 July 2023,* Meta Platforms.

terms and conditions and privacy notices. An imbalance between performance and consideration, for instance, based on an inappropriate disadvantage under the law of general terms and conditions or a breach of data protection law may thus make it necessary to apply the comparative market concept to be able to assess the extent of discrimination. Where exclusive data access goes hand in hand with excessive prices, this can also constitute an abusive practice ("unfair pricing"). However, in the context of abuse proceedings the search for a comparable market or an approximation to the hypothetical competitive price based on complex cost-based price comparisons or the setting of benchmark prices can necessitate the time-consuming determination of the value of the data based on externalities.

5.3 Proposed assessment scheme for abuse proceedings

99. As the different types of abuse relating to data access described in the above indicate, each potential abuse of dominance must be examined on a case-by-case basis. From an economic perspective, however, the key question when it comes to examining a potential need for data access in the context of abuse proceedings should always be the following: *"Is there a special data access through which an undertaking with a dominant market position can avoid competitive pressure?"* First, different types of abusive conduct and theories of harm need to be examined;[187] second, key criteria relating to the need for data access need to be systematically investigated. Table IV.1 therefore sets out a six-step scheme which can be useful for establishing a claim for data access as part of abuse proceedings. The various steps will then be explained.

[187] OECD, 2020, Abuse of dominance in digital markets, p. 24–25.

Table IV.1: Proposed scheme for assessing potential claims for data access

Step	Focus	Criteria
1	Initial situation	• Price/innovation competition • Competition with data/for data • Concentration in primary data market/existence of secondary data market
2	Context-specific factors	• Purpose of data collection • Significance of personal data • Relevance of the data within the business model • Undertakings' big data capabilities • Function/capability of algorithms/technology • Data pool's suitability for the trade in data
3	Effects on market structure and competitive process	• Data-driven network effects, economies of scale/scope • Switching/multihoming behaviour • Recipient's share of data generation/contribution to value creation • Inter-source data pooling and data complementarities • Ability to catch up a data advantage • Ability to replicate and substitute the data • Level of exclusivity of data access • Uniqueness of the desired data • Standard-setting for data access/processing/formats • Level of dependence on data access for innovation • Change in behaviour in relation to data access • Interrelationship between accumulation of data and market dominance • Entry barrier/market tipping
4	Consideration of interests and decision on claim for data access	• Role of ownership rights, trade and business secrets, data protection, intellectual property rights, contractual agreements vs. investment/innovation incentives vs. protection of competitive process/residual competition • Where claim for data access exists: Definition of data
5	Adequate remuneration for data access	• Determination of the data value: Comparative market concept/cost-setting
6	Configuration of data access regime	• Data portability • Interoperability • FRAND data access • Data trust

100. Step 1 – Initial situation: First it is necessary to understand the competitive situation, that is whether the market in question is primarily characterised by static price competition or dynamic innovation competition, and whether the competition is "with data" or "for data". Second, it is necessary to examine whether there is a concentrated primary data market and whether there are any secondary data markets, that is alternative sources of data access.

101. Step 2 – Context-specific factors: Once the competitive framework has been established, the next step is to clarify why the data are being collected by asking the following questions: How significant are personal data? How relevant are the desired data in the context of the business model? What, if anything, do the data contribute to value creation? Further, an assessment needs to be done of the undertakings' ability to handle big data, that is, where relevant, the ability to derive relevant information, patterns, structures or trends from large volumes of (near) real-time data. The functioning and capability of the algorithms and technology employed and whether the data pool is suitable for the trade in data also needs to be assessed in this context.

102. Step 3 – Effects on market structure and competitive process: Once the context has been established, a number of economic questions arise. It is important to examine whether there are any data-driven network effects (feedback loops) and economies of scale and scope, and whether there is any switching and mulihoming behaviour. It should also be investigated whether the data access recipient is involved in data generation and contributes to value creation. Any potential inter-source data pooling in combination with with data complementarities as well as the ability to catch up any "data advantage" should also be examined. It should likewise be investigated whether the desired data can be replicated or (approximately) substituted and what the level of exclusivity of the data access and the degree of uniqueness of the data is. A dominant undertaking could also engage in (de facto) standard-setting in order to restrict data access (e.g. in relation to interfaces, protocols and data formats) and data processing, which should thus be investigated. In this context, the undertakings' innovative pressure and dependence on data access should be assessed overall in relation to competitiveness. It is possible that the dominant undertaking might also change its behaviour in relation to data access (e.g. during the proceedings), and that change in behaviour needs to be recorded and categorised. Finally, the relationship between the accumulation of data and market dominance should be determined, and whether the data pool can raise an entry barrier and lead to market tipping should be assessed.

103. Step 4 – Consideration of interests and decision on claim for data access: When insights have been gained as regards the relevant economic dependencies and effects, the data holder's and the recipient's interests then need to be weighed up against each other. This consideration of interests is always caught in the tension between 1) the role of ownership rights, trade and business secrets, data protection, intellectual property rights and contractual agreements about third-party rights of access, use or exploitation, 2) investment and innovation incentives and 3) protecting the competitive process or residual competition. Should the result of this weighing up of interests indicate that a claim for data access exists, the data which are to be made available need to be defined.

104. Step 5 – Adequate remuneration: Once the decision has been taken on the grant of data access, another question which arises in the case of abusive exclusionary conduct is that regarding adequate remuneration for the data access.[188] The comparative market concept can be applied and/or costs calculated when determining that remuneration. To that end, the costs of the data collection and of making them available (lower limit) should be recorded. However, in specific cases new approaches – which will have to be addressed in the context of future research – may be necessary.

105. Step 6 – Configuration of data access regime: In a final step, the technical configuration of the data access needs to be clarified.[189] Otherwise, there is a risk that the undertaking required to grant data access will create technical barriers, for instance in relation to interfaces and protocols. Various different data access configurations are possible: 1) static data portability enabling the one-off, unidirectional transfer of data; 2) dynamic interoperability enabling the continuous, bidirectional transfer of data; 3) the agreement of fair, appropriate and non-discriminatory access conditions (FRAND); and 4) a data trust providing data access of different types of scope to different stakeholders.

5.4 Interim conclusion

106. Each potential instance of abuse of dominance needs to be investigated on a case-by-case basis. The same applies to the possible need for data access. The key question in such cases should always be whether any special data access exists which a dominant undertaking can use to avoid competitive pressure. The Monopolies Commission therefore recommends that the competition authorities base their decision on a potential claim for data access within the context of abuse control under competition law on the scheme proposed in the above. The initial situation, context-specific factors, effects on market structure and competitive process, consideration of interests, determination of remuneration for data access in the case of abusive exclusionary conduct and the configuration of the data access regime help to systematically investigate the relevant criteria to establish the possible need for data access.[190] The scheme provides a basis which competition authorities may continue to develop in practice.

6 Overall conclusion

107. Digital data are growing in significance across society as a whole and for undertakings in particular. Access to data has become an important competitive factor in various markets. Besides existing statutory provisions such as those under general competition law, some specific legislation has thus been put in place in relation to data access both at the national and EU level. It includes the Data Governance Act, which aims to promote the voluntary sharing of data between undertakings, and the Data Act, which creates rules on data access

[188] This step is not necessary in the case of abusive exploitative conduct.

[189] Graef, I./Prüfer, J., 2021, "Governance of Data Sharing: A Law and Economics Proposal", Research Policy, 50(9), Article 104330.

[190] Nevertheless, in some cases practical problems and the need to weigh up interests remain – for instance when determining adequate remuneration – which deserve to be addressed in the context of further research.

across sectors for connected products. Then there are special statutory norms which regulate data access in individual sectors, including sector-specific rules relating to digital platforms (section 19a ARC and DMA).

108. Despite the existence of tried and tested general and new specific statutory norms, there is a risk that competition authorities will overlook or incorrectly assess the significance of data access when applying these norms in individual cases. Data have a number of specific characteristics which distinguish them from other goods. Based on these characteristics the Monopolies Commission has developed two special assessment schemes – one for merger control proceedings and one for abuse control proceedings – which are intended to serve as an initial basis which the competition authorities should continue developing in practice.

109. As regards merger proceedings, the Monopolies Commission recommends (1) determining, for each of the merging parties, which data are relevant to competition, namely those data to which third parties are already granted access, those to which third parties have previously not been granted access although they are already being recorded, and those to which access could be granted if they were recorded. As a next step the Monopolies Commissions recommends (2) clarifying, for each of the identified (potential) data accesses, whether the merger is expected to lead to any changes which will have a significant effect on the competitive situation. Finally, the Monopolies Commission recommends (3) examining whether the expected changes will have a negative or positive effect on the competitive situation. Data which serve as input for services or products could either increase or decrease the intensity of competition. For instance, data relating to market activities could be used by the undertakings for the anticompetitive coordination of prices or quality.

110. As regards abuse proceedings, the key question, in the opinion of the Monopolies Commission, should be whether any specific data access exists which a dominant undertaking can use to avoid competitive pressure. It thus recommends a six-step scheme for assessing the relevant criteria: (1) analysis of the initial situation; (2) identification of context-specific factors; (3) assessment of the effects on market structure and the competitive process; (4) consideration of interests when deciding on claims for data access; (5) determination of adequate remuneration; and (6) specification of the technical configuration of the data access.