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COMPETITION, PRIVACY, AND JUSTIFICATIONS: INVOKING PRIVACY TO JUSTIFY ABUSIVE CONDUCT UNDER ARTICLE 102 TFEU

Abstract

This article aims to delineate the extent to which potentially anticompetitive behaviour that simultaneously improve user privacy are cognizable as efficiencies or objective justifications within the context of unilateral conduct cases in European competition law. After mapping the existing literature, it moves on to discuss whether the decisional guidance of the European Commission, as well as the case-law of the Union Courts, allow the invocation of privacy as proper grounds to mount a defense against abusive practices. In order to concretise the theoretical discussions, the article focuses on two recent and highly relevant developments: Apple's App-Tracking Transparency initiative, and Google's unveiling of the Privacy Sandbox. It finds that the state of the law pertaining to the second stage of an abuse case is underdeveloped and needs clarification. Nevertheless, considering the recent developments surrounding European competition law in general, and the digital transformation in particular, both efficiencies and objective justifications are likely to find room for application in the digital economy. On the one hand, efficiencies must be evaluated within the context of substantive symmetry, legal coherence, and economic considerations in a manner that caters to consumer choice. On the other hand, one must approach objective justifications with nuance, lest they give rise to unintended consequences resulting from recent judicial and legislative developments. Overall, it is apparent that the case-law provides valuable insights as to the implementation of efficiency arguments and objective justifications in a privacy context. However, the concepts are nonetheless in need of further analysis, in the absence of which their successful invocation remains rather unlikely. In that regard, the article concludes by highlighting points of potential contention in the future.

JEL CLASSIFICATION : K21, L4, L5

SUMMARY

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1 Introduction

Antitrust has become cool again.¹ With digitalization insinuating itself into virtually all aspects of our lives, incumbents have started to adapt their *modus operandi* to the digital world, and brand-new undertakings the business models of which have been designed entirely in the light of the new economy have emerged. With such dramatic change naturally came a large body of high-level inquiries, governmental reports, examinations, and scholarly research, culminating in a number of reform proposals ranging from an overhaul of existing competition laws to standalone ex-ante regimes.² As digitalization became omnipresent, undertakings, the activities of which are based on collecting and analyzing consumer data with the aim to provide constantly improving products and services, begun dominating markets. A *corpus* of commentary highlights that the pervasive collection of consumer data may bring about phenomena such as data-driven feedback loops and extreme returns to scale; giving rise to potentially problematic situations such as entrenched market power and market tipping.³ Relatedly, the amalgamation of consumer data – sometimes without regard for prior user consent – increased the importance accorded to data protection and privacy, leading to the adoption of the General Data Protection Regulation in the EU, with the e-Privacy Regulation in the legislative pipeline.⁴ Subsequent to these developments, many concepts have entered the literature, including novel theories of harm⁵ and innovative ways to define relevant product and geographical markets.⁶ However, there has been a relative lack of analysis concerning arguments around which acts of undertakings capable of restricting competition are nevertheless justified.

Most of the existing work on justifications focuses on the long-term debate surrounding the application of Article 101 (3) TFEU, or efficiencies arising out of a business transaction, such as a merger.⁷ By comparison, analyses under Article 102 are neglected. Such lack of interest may relate to the relative scarcity of abuse of dominance

¹ Michael Weiner, 'Antitrust Is Cool Again' (2018) New York Law Journal. Although competition law in the European Union represents a wider set of concepts than antitrust, for the purposes of this Article, both terms will be used interchangeably, unless explicitly specified otherwise.

² Jacques Cremer, Yves-Alexandre de Montjoye and Heike Schweitzer, 'Competition policy for the digital era' (2019) <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

³ Ben Holles de Peyer, 'EU Merger Control and Big Data' (2017) 13 (4) Journal of Competition Law & Economics 767.

⁴ Magdalena Kedzior, 'GDPR and beyond – a year of changes in data protection landscape of the European Union' (2019) 19 ERA Forum 505.

⁵ A few examples of which may be found in Daniele Condorelli & Jorge Padilla, 'Data-Driven Envelopment with Privacy-Policy Tying' (2021) <https://www.condorelli.science/PEPPT.pdf>.

⁶ Inge Graef, 'Market Definition and Market Power in Data: The Case of Online Platforms' (2015) 38 World Competition 473.

⁷ See, e.g., Lars-Hendrik Röller, 'Efficiencies in EU Merger Control' in Philip Lowe & Mel Marquis (eds), *European Competition Law Annual 2010* (Hart 2013).

cases, whose conclusion hinged on justifications of otherwise anticompetitive conduct. However, the issue is rather likely to occupy the center stage in antitrust discussions soon. Platforms, the main actors of the digital economy, exercise power on their ecosystems that go beyond mere dominance, acting as regulators of a private origin.⁸ Such extent of power over complementors and users may represent a competition problem.⁹ At the same time, some undertakings may rely on countervailing arguments, such as user privacy and security, to justify behaviour that may be established as anticompetitive. In fact, the harbingers of this phenomenon can already be seen. Recently, Apple successfully argued against Epic Games that a prohibition on payments concluded outside of its App Store is justified to secure user privacy.¹⁰ The issue is not only confined to the US either. For instance, the UK's Competition and Markets Authority, in its recently released final report on mobile ecosystems, sought to repudiate similar claims made by Apple and Google.¹¹

Within this scope, the present article aims to determine whether potentially anti-competitive practices that concomitantly increase user privacy are suitable of being asserted as justifications in European Union competition law. To construct a robust response to that question, three further sub-questions are examined. Firstly, the Article examines the state-of-play regarding the relationship between privacy and competition in Europe in general, seeking for clues on emerging trends to note in this space. Secondly, the focus turns to instances where undertakings under scrutiny put forward arguments to escape liability, such as efficiency defenses and objective justifications. The outcomes of this doctrinal analysis feed into two normative inquiries, whereby privacy considerations are evaluated regarding their capability to act as grounds for justifying otherwise abusive conduct, either as efficiencies or objective justifications. To concretise the arguments, the Article makes references to two ongoing, high-level investigations in Europe: Apple's App-Tracking Transparency Initiative, and Google's Privacy Sandbox project. These developments are briefly investigated after theoretical examinations to shed light into their practicalities, from the viewpoint of privacy, competition, and justifications. As a result, the Article aspires to delineate the legal contours applicable to this underexplored and underutilised area of European competition law.

⁸ Cremer, de Montjoye and Schweitzer (n 2).

⁹ Stefan Larsson, 'Putting trust into antitrust? Competition policy and data-driven platforms' (2021) 36 (4) *European Journal of Communication* 391.

¹⁰ Mike Swift, 'For Apple and everyone else, worlds of antitrust and privacy are converging, lawyers say' (*MLex Regulatory Insight*, 7 April 2022) <https://content.mlex.com/#/content/1370675?referrer=search_linkclick>.

¹¹ Dimitrios Katsifis, 'The CMA Final Report on the Mobile Ecosystems market study: a repudiation of Apple's narrative over privacy and safety as justifications for the status quo' (*The Platform Law Blog*, 14 June 2022) <<https://theplatformlaw.blog/2022/06/14/the-cma-final-report-on-the-mobile-ecosystems-market-study-a-repudiation-of-apples-narrative-over-privacy-and-safety-as-justifications-for-the-status-quo/>> accessed 26 July 2022.

Lastly, by virtue of the aforementioned analyses, the Article provides informed insights on whether the primary goals of competition law, namely the protection of competition and consumer welfare, can be reconciled with privacy concerns.

The proposed inquiry contributes to an ongoing and lively debate. By highlighting the emerging tensions between the two realms, the Article contributes to a developing area of research in transatlantic studies of competition law. The analysis is also timely and necessary. As the Commission actively pursues a number of data-related competition inquiries, it is likely that discussions of privacy-related justifications will surface.¹² Moreover, as the upcoming Digital Markets Act is rather stingy with regard to counter-vailing defenses, it is all the more crucial to carefully demarcate the boundaries of justifications, such as efficiency arguments, in order to provide businesses with the opportunity to continue engaging in ambivalent (or even beneficial) conduct – a prime necessity to prevent the chilling of innovative activities.¹³

The remainder of the Article adopts the following structure. Paragraph 2 engages in a literature review that analyses a large body of studies conducted on both sides of the Atlantic. This paragraph constructs an overview of the prevailing scholarship on privacy and competition by building upon the findings of similar categorization work conducted by several scholars.¹⁴ Amid divisions in the literature, we recognise that a nuanced school of thought is in development. The identifying attribute of this “third way” of understanding the relationship between privacy and competition is the focus on the complexity surrounding such interactions. In contribution to this emerging literature, Paragraph 3 sets out to diagnose whether the protection of user privacy constitutes cognizable efficiencies or qualifies as a factor capable of justifying otherwise anticompetitive conduct in EU competition law. We tackle the question through the lens of the decisional practice of the European Commission, as well as the case-law of Union Courts that deal with efficiency defenses and objective justifications.¹⁵ Throughout the Article, we refer to recent controversies in Europe surrounding Google’s Privacy Sandbox and Apple’s App Tracking Transparency initiatives to concretise the problem. In

¹² ‘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’ (European Commission Press Release, 10 November 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077> accessed 29 December 2021.

¹³ Aurelien Portuese, ‘The DMA and the EU’s French Presidency: The Road to Precaution and Tensions’ (2021) 29 Competition Forum.

¹⁴ For instance, see Erika Douglas, ‘Monopolization Remedies and Data Privacy’ (2020) 24 (2) Virginia Journal of Law and Technology 1; Marija Stojanovic, ‘Can competition law protect consumers in cases of a dominant company breach of data protection rules?’ (2020) 16 (2-3) European Competition Journal 531.

¹⁵ While distinct concepts, the Article refers to insights from Article 101 TFEU as well as merger control where appropriate, as these areas form a coherent whole in European competition enforcement. See Ginevra Bruzzone, ‘The effect-based approach after *Intel*: A law and economics perspective’ in Pier Luigi Parcu, Giorgio Monti and Marco Botta (eds), *Economic Analysis in EU Competition Policy* (Elgar 2021).

Paragraph 4, a brief conclusion outlines the findings of the Article and summarises the main points discussed.

2 Privacy and competition: integration, separation, and the third way

This paragraph explores previous work on the interaction between privacy and competition law. We compartmentalise scholarly views into three groups: integrationists, separatists, and a new, third group that adopts a view of privacy and competition as concepts potentially in conflict. After the literature is mapped, several gaps are exposed that relate to tensions between privacy and competition, which we scrutinise in the subsequent paragraph.

2.1 Integrationists

As understood by most authorities worldwide, competition law serves the protection of consumer welfare via ensuring a competitive process in a market economy.¹⁶ Accordingly, the precise delineation of the term “consumer welfare” is capable of determining the metrics on which competition law may legitimately exert control on undertakings. The integrationist strand of the literature may be best summarised as adopting a broad definition of consumer welfare. This definition encompasses privacy considerations as a component of consumer welfare, often as an extension of competition on product/service quality. Thus, integrationist scholars view antitrust as a tool to also achieve privacy-oriented goals. Borrowing from international investment law, their approach can be likened to umbrella clauses, whereby business conduct compromising user privacy may be elevated to also constitute competition law breaches, not by virtue of privacy requiring a special treatment per se, but because reductions in privacy are capable of resulting in deteriorations in quality, and ultimately, consumer harm.¹⁷

The integrationists arguably constitute the most diverse section of the literature, incorporating scholars from either side of the Atlantic, as well as a few enforcers, such as Germany’s Bundeskartellamt. It is possible to categorise the scholars subscribing to the integrationist school of thought into three sub-groups. The first sub-group often underlines the intersections between privacy and competition, without venturing further into a deeper analysis of such an interaction. For instance, Gorecka argues that privacy, data

¹⁶ Case C-377/20, *Servizio Elettrico Nazionale and Others* [2021], Opinion of AG Rantos, para 44; Frederic Marty, ‘Is Consumer Welfare Obsolete? A European Union Competition Perspective’ (2021) 24 (47) *Prolegomenos* 55.

¹⁷ This analogy does not purport to set out a sort of hierarchy between norms protecting privacy and competition, although it is worthy of note to consider that the rules protecting competition enjoy the status of primary law in the European Union.

protection, and competition could “...possibly intersect with each other and keep balanced during an assessment of anticompetitive misconducts”.¹⁸ Witt highlights the developing trend on both the US and in Europe to consider privacy considerations in antitrust analyses, but leaves the conclusion somewhat indeterminate.¹⁹ While Mehra maps three possible scenarios arising as a result of the increasing relevance of privacy for competition, the analysis does not delve into a substantive examination of how exactly privacy is to be incorporated in competition assessments.²⁰

Going a step further, some authors suggest that European competition law can even aid the weaknesses inherent in regulations designed to further privacy.²¹ In this second group of (mostly European) integrationist scholars, the argument frequently used is that, upon a holistic reading of the Treaties, an understanding of European competition law as a “lonely portfolio” becomes inappropriate.²² In other words, privacy, data protection, consumer protection, and competition law regimes of the EU exist in a relationship akin to “family ties”, with data protection measures capable of acting as an internal yardstick to guide the application of competition rules to non-price elements of suspicious conduct.²³ Adherents defend that cooperation between policies relating to privacy and competition may minimise consumer harm and orient the market towards privacy-enhancing products and services.²⁴ However, it is notable that an unstructured enforcement practice with insufficient cooperation between authorities, arguably denoting the prevailing situation in Europe, is liable to create a “regulatory dilemma” with a number of alternative regimes to tackle perceived problems pertaining to privacy and

¹⁸ Arletta Gorecka, ‘Defining Privacy in the Competition Law Sphere’ (2021), available at <<https://spark.stir.ac.uk/wp-content/uploads/2021/10/A-Gorecka-final.pdf>> accessed 26 July 2022.

¹⁹ Anne Witt, ‘Data, Privacy and Competition Law’ (2021) Graz Law Working Paper No. 24-2021 available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3989241> accessed 26 July 2022.

²⁰ Salil K. Mehra, ‘Data Privacy and Antitrust in Comparative Perspective’ (2020) 53 Cornell Int’l L.J. 133.

²¹ Bert-Jaap Koops, ‘The trouble with European data protection law’ (2014) 4 (4) International Data Privacy Law 250. This group of integrationists can be likened to what Dunne labels “competition law functioning as means of course-correction for another regulatory regime”; see Paragraph 3.2. below.

²² Louise O’Callaghan, ‘The Intersection Between Data Protection and Competition Law: How to Incorporate Data Protection, as a Non-Economic Objective, into EU Competition Analysis’ (2018) 21 Trinity College Law Review 109.

²³ Francisco Costa-Cabral and Orla Lynskey, ‘Family Ties: The Intersection Between Data Protection and Competition in EU Law’ (2017) 54 Common Market Law Review 11; Anuradha Bhattacharya, ‘Do Privacy and Competition Concerns Go Hand in Hand?’ (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3792169> accessed 6 July 2022.

²⁴ ‘Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy’ (EDPS Preliminary Opinion, 2014) <https://edps.europa.eu/sites/default/files/publication/14-03-26_competition_law_big_data_en.pdf> accessed 26 July 2022.

competition.²⁵ Such “unity in diversity” on the part of Member State authorities unavoidably triggers legal uncertainty.²⁶

A third and last group within the broader integrationist school represents a somewhat inverted relationship between privacy and competition. In particular, these commentators argue that there is a feedback loop between competition and privacy in digital markets, whereby the lack of competition is directly responsible for the prevalence of privacy-invasive practices, which in turn perpetuate market power. As a potential solution, they propose concrete interventions where competition enforcement can act as a tool to remedy market circumstances presenting “infracompetitive privacy”.²⁷ In other words, these scholars assert that pervasive data collection leads to consumer harm, economic inequality, and market failures, and call for the introduction of competition enforcement to directly alleviate such concerns.²⁸ Whereas some authors delineate specific theories of harm within this context²⁹, others focus on a particular firm (such as Facebook) to outline how undertakings can both utilise and undermine privacy competition.³⁰ Overall, these scholars belong under the overarching umbrella of integrationists, as they acknowledge the potential of competition enforcement in tackling privacy-related harms, but nevertheless constitute their own sub-group since they advocate for a more concrete, upfront, almost micro-level engagement between privacy and competition.

2.2 Separatists

As opposed to integrationists, separatists adhere to a strict delineation between the boundaries of privacy and competition law. These scholars often subscribe to the price-centric analysis of competition that has long dominated antitrust enforcement.³¹ As is the case with integrationists, the separatist school of thought can also be divided into

²⁵ Marco Botta and Klaus Wiedemann, ‘The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey’ (2019) 64 (3) The Antitrust Bulletin 428.

²⁶ European competition enforcers adhere to the “unity in diversity” motto throughout the digital economy. For an example within the context of software application stores, see Friso Bostoen, ‘The French judgment on Google’s Play Store: a shift towards platform exploitation?’ (*CoRe Blog*, 1 April 2022) <https://www.lexxion.eu/en/coreblogpost/french-judgment-google-play-store/>.

²⁷ Gregory Day & Abbey Stemler, ‘Infracompetitive Privacy’ (2019) 105 Iowa L. Rev. 61.

²⁸ Nathan Newman, ‘The Costs of Lost Privacy: Consumer Harm and Rising Economic Inequality in the Age of Google’ (2014) 40 (2) William Mitchell Law Review 849.

²⁹ Katharine Kemp, ‘Concealed data practices and competition law: why privacy matters’ (2020) 16 European Competition Journal 628.

³⁰ Dina Srinivasan, ‘The Antitrust Case Against Facebook: A Monopolist’s Journey Towards Pervasive Surveillance in Spite of Consumers’ Preference for Privacy’ (2019) 16 Berkeley Business Law Journal 39.

³¹ Joseph Brodley, ‘The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress’ (1987) 62 N.Y.U. L. Rev. 1020.

further sub-groups: those viewing the privacy-competition relationship as indeterminate due to equivocal perceptions of privacy among consumers, and those pointing towards institutional constraints. An aura of pessimism pervades both sub-groups as the scholars see the introduction of privacy into competition law as a rather negative development.³²

Even though most separatist commentators acknowledge the role of privacy as a potential arm of competition on product/service quality, such scenarios are often accompanied by reservations, describing the incorporation of privacy into competition assessments as being either largely theoretical³³, or difficult to operationalise and administer due to inherent difficulties in quantification.³⁴ This is primarily the result of a lack of systematic correlations between diminished privacy and market power.³⁵ Indeed, separatist commentators highlight the mismatch between stated and demonstrated consumer behaviour (“privacy paradox”) as well as the heterogeneous, subjective, and multidimensional nature of quality competition. In short, unlike lower prices, it is unclear whether consumers uniformly prefer products that keep their online activity discreet.³⁶

Moreover, according to separatists, the protection of privacy should remain within the remit of other laws and institutions, such as data protection regulations (e.g. GDPR) in the EU.³⁷ For instance, Colangelo and Maggiolino observe that concerns relating to invasive data accumulation practices by large technology companies are best addressed not through antitrust laws, but via regulatory intervention.³⁸ In a similar vein, Lypalo criticises attempts by the Bundeskartellamt to widen the scope of antitrust law in its controversial Facebook investigation and argues that privacy and data collection matters should be left to the upcoming Digital Markets Act, where the legislature can ensure higher levels of legal certainty.³⁹ Others equate using abuse of dominance rules

³² Geoffrey Manne and Dirk Auer, ‘Antitrust Dystopia and Antitrust Nostalgia: Alarmist Theories of Harm in Digital Markets and Their Origins’ (2021) 28 Geo. Mason L. Rev. 1281.

³³ Darren Tucker, ‘The Proper Role of Privacy in Merger Review’ (2015) 2 CPI Antitrust Chronicle.

³⁴ Geoffrey Manne and Ben Sperry, ‘The Problems and Perils of Bootstrapping Privacy and Data Protection into an Antitrust Framework’ (2015) 2 CPI Antitrust Chronicle.

³⁵ James Cooper and John Yun, ‘Antitrust & Privacy: It’s Complicated’ (2022) George Mason Law & Economics Research Paper No. 21-14.

³⁶ Michael Katz, ‘Multisided Platforms, Big Data, and a Little Antitrust Policy’ (2019) 54 Review of Industrial Organization 695.

³⁷ Carl Shapiro, ‘Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets’ (2019) 33 (3) Journal of Economic Perspectives 69; Maureen Ohlhausen and Alexander Okuliar, ‘Competition, Consumer Protection, and the Right [Approach] to Privacy’ (2015) 80 Antitrust Law Journal 121.

³⁸ Giuseppe Colangelo and Mariateresa Maggiolino, ‘Data accumulation and the privacy-antitrust interface: insights from the Facebook case’ (2018) 8 International Data Privacy Law 224.

³⁹ Dzhuliia Lypalo, ‘Can Competition Protect Privacy? An Analysis Based on the German Facebook Case’ (2021) 44 World Competition 169.

as a vehicle to condemn data-related practices as an abuse of competition law itself.⁴⁰ Overall, most commentators in this group express that inserting privacy considerations into antitrust will open the Pandora's Box and transform competition authorities into auxiliary data protection authorities, a task they are ill-equipped to perform.⁴¹ For these scholars, privacy constitutes too important an issue to be left at the hands of antitrust enforcers.⁴²

2.3 The emergence of the “third way”

It is apparent that the literature on the relationship between privacy and competition is expansive, with conflicting views and heated debates still ongoing. As identified, the avenues of inquiry are often shaped by the question of whether it is necessary and feasible to incorporate privacy into competition law assessments. Whereas separatists are wary of institutional limits, subjectivity, and the ensuing legal uncertainty such an endeavor would bring, integrationists assert that the issue is broader and pervasive in a way that requires an all-hands-on-deck approach that also includes antitrust.

One aspect unifying the separatist and integrationist approaches is the endeavor to evade complex scenarios. In what may be dubbed a form of complexity denialism, separatists deliberately try to oust privacy considerations from the purview of competition law.⁴³ This simplified approach no longer seems acceptable.⁴⁴ On the other hand, scholars advocating for a more integrated treatment of privacy and competition often fall prey to tunnel-visioning. Typically, integrationist scholars focus on scenarios that present linear relationships between privacy and competition. In such inquiries, strengthening one dimension (e.g., competition) leads to commensurate improvements in the other (e.g., privacy). In other words, often, scholars prescribe more competition as a remedy for undesirably inferior levels of consumer privacy.⁴⁵ For instance, it is argued that tech giants such as Facebook and Google are able to denigrate user privacy precisely because they have market power, so the solution lies at the injection of more

⁴⁰ Roger van den Bergh and Franziska Weber, ‘The German Facebook Saga: Abuse of Dominance or Abuse of Competition Law?’ (2021) 44 *World Competition* 29.

⁴¹ Torsten Körber, ‘Is Knowledge (Market) Power?’ (2018) SSRN <https://www.ssrn.com/abstract=3112232> accessed 2 April 2022.

⁴² Alfonso Lamadrid, ‘Big Data, Privacy and Competition Law: Do Competition Authorities Know How To Do It?’ (*Competition Policy International*, 17 January 2017) <<https://www.competitionpolicyinternational.com/big-data-privacy-and-competition-law-do-competition-authorities-know-how-to-do-it/>> accessed 2 April 2022.

⁴³ Nicolas Petit & Thibault Schrepel, ‘Complexity-Minded Antitrust’ (2022), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4050536> accessed 3 April 2022.

⁴⁴ Frank Pasquale, ‘Privacy, Antitrust, and Power’ (2013) 20 *Geo. Mason L. Rev.* 1009.

⁴⁵ For example, see Colangelo and Maggolino (n 38); Day and Stemler (n 27).

competition into the market.⁴⁶ However, the dimensions of interaction between privacy and competition also materialise in conflicting terms. Competition and privacy can exist in tension, where an increase in one may result in a reduction of the other.⁴⁷ At this point, a more nuanced approach to the topic can be seen emerging in the scholarship. We classify the harbingers of such an approach as belonging to a “third way” of the debate on privacy and competition.

Third way scholars focus on the tensions between privacy and competition, embodied in taxonomies that highlight complex scenarios in which the concepts interact.⁴⁸ The hallmark of these analyses is the acknowledgement that striving to reach the objectives of privacy and competition in an uninformed, piecemeal fashion may lead to perverse outcomes.⁴⁹ For instance, Carugati develops an analytical framework to identify settings where privacy and competition present a dilemma, where they work against each other.⁵⁰ Similarly, Douglas paints diverging scenarios in which privacy and antitrust may work at cross-purposes, in the sense that trying to achieve the goals of one may jeopardise the attainment of those belonging to the other.⁵¹ Kerber and Zolna opt for framing this problem in economic terms, as the issues of privacy and competition in digital markets mark the presence of not one, but two market failures, namely informational asymmetries and market power.⁵² They argue that trying to remedy the former may produce counterintuitive outcomes with regards to the latter, or vice versa.⁵³ Elsewhere, Majcher and Robertson conduct an overarching analysis to delineate the contours, through which EU competition law can reconcile the occasionally divergent objectives sought by the two fields.⁵⁴ In a recent book, Stucke discusses the

⁴⁶ Jaron Lanier, *Ten Arguments for Deleting Your Social Media Accounts Right Now* (Henry Holt and Co. 2018).

⁴⁷ Similarities can be drawn with Buchanan’s ideas on monopolies, competition, and externalities, where more competition may reduce overall welfare due to higher amounts of negative externalities. See, James Buchanan, ‘External diseconomies, corrective taxes, and market structure’ (1969) 59 *American Economic Review* 174.

⁴⁸ Some antitrust enforcers also fall under this category. See Australian Competition and Consumers Commission, ‘Digital Platform Services Inquiry’ (2022) Discussion Paper For Interim Report No. 5.

⁴⁹ Jan Kramer & Daniel Schnurr, ‘Big Data and Digital Markets Contestability: Theory of Harm and Data Access Remedies’ (2021) *Journal of Competition Law & Economics* (advance article).

⁵⁰ Christophe Carugati, ‘The Antitrust Privacy Dilemma’ (2021) SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3968829 accessed 4 April 2022.

⁵¹ Barbara Douglas, ‘The New Antitrust/Data Privacy Law Interface’ (2021) 130 *The Yale Law Journal Forum* 647; Cooper and Yun (n 35).

⁵² Wolfgang Kerber & Karsten Zolna, ‘The German Facebook case: the law and economics of the relationship between competition and data protection law’ (2022) *European Journal of Law and Economics* (advance article).

⁵³ *Ibid* 8.

⁵⁴ Klaudia Majcher and Viktoria Robertson, ‘Doctrinal Challenges for a Privacy-Friendly and Green EU Competition Law’ (2021) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3778107> accessed 26 July 2022.

sometimes inverse relationship between privacy and competition in the US.⁵⁵ Lastly, Kira, Sinha, and Srinivasan acknowledge and briefly address the potential tensions between privacy and competition, but without going into detail.⁵⁶

Two contemporary examples should suffice to concretise the findings of these few studies. Even though the below explanations risk oversimplification, they should present the arguments undergirding the privacy-competition dilemma in a palpable manner.⁵⁷ The examples involve two of the largest companies the world has ever seen, Apple and Google, and they both broadly relate to online advertising services. In recent years, both Apple and Google have taken actions to reorient their services towards ensuring greater consumer privacy.⁵⁸ These efforts arguably culminated in the introduction of the App-Tracking Transparency (“ATT”) with the iOS 14.5 update for Apple, and the Privacy Sandbox initiative for Google.

ATT essentially enables users to choose whether they want their online activity to be tracked by the apps they use. Simply put, whenever a user loads an application for the first time, they are presented with a one-time question, where they are requested to express whether they want the app to collect their data across other applications. This is not a new phenomenon, as Apple has been gradually limiting the collection of third-party data across websites and mobile applications. The true novelty brought about by ATT was Apple’s decision to render the default consumer choice in cross-app data collection as “opted-out”. In earlier versions of the iOS, consumers had to navigate through various steps in the settings section of their devices to find and turn off cross-app tracking, which was automatically opted-in for them by default. With ATT, iOS presents consumers with a prompt when they boot an application for the first time, asking whether

⁵⁵ Maurice Stucke, *Breaking Away: How to Regain Control Over Our Data, Privacy, and Autonomy* (OUP 2022).

⁵⁶ Beatriz Kira, Vikram Sinha, & Sharmadha Srinivasan, ‘Regulating digital ecosystems: bridging the gap between competition policy and data protection’ (2021) 30 *Industrial & Corporate Change* 1337.

⁵⁷ Carugati (n 50). For a detailed, technical analysis of Apple’s iOS 14.5 updates and its effects on competition, see Alba Ribera Martinez, ‘Trading Off the Orchard for an Apple: the iOS 14.5 Privacy Update’ (2022) 13 *Journal of European Competition Law & Practice* 200. For a detailed, technical analysis of Google’s Privacy Sandbox initiatives, see Damien Geradin, Dimitrios Katsifis and Theano Karanikioti, ‘Google as a *de facto* regulator: analysing the Privacy Sandbox from an antitrust perspective’ (2021) 17 *European Competition Journal* 617.

⁵⁸ Antony Ha, ‘Apple defends new ad-tracking prevention measures in Safari’ (*TechCrunch*, 16 September 2017) <[https://blog.chromium.org/2022/03/what-to-expect-from-ps-testing.html](https://techcrunch.com/2017/09/15/apple-defends-new-ad-tracking-prevention-measures-in-safari/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLnNvbS88guce_referrer_sig=AQAAACJHEOUzBdbgOV96MDbycf1YZwU1AxpibSRBek4odBvKQh-LxcYDj77NF3LpeHFch9JvM-cJbagU6HEDj9FwVzQazq8ZWvOu0EnlkKRfzUQeL9F5vXBEYoGbdIgrbWr-CISsNMD67PX9PJAKtp9zfkfVAMGRkbcphVvYi8SO3V9OY>” accessed 4 April 2022; ‘What to Expect from Privacy Sandbox Testing’ (<i>Chromium Blog</i>, 31 March 2022) < accessed 4 April 2022.

they grant the app the authorization to track their activities.⁵⁹ In simple terms, Apple purports to give consumers greater control over their privacy by making it easier for them to choose whether they wish to opt-in to cross-app tracking. This move on behalf of Apple to remedy the market failure of information asymmetries seems to be working. Although numbers vary, approximately 85% of users ask apps not to track their activities across other apps.⁶⁰ While this is a welcome development in terms of privacy, it also comes with significant antitrust risks. Indeed, Apple's unilateral decision to switch the default from opt-out to opt-in for tracking resulted in an uproar in some EU member states. In Germany, a number of publishers filed a complaint with Bundeskartellamt, arguing that Apple's conduct equates to an abuse of dominance by excluding rivals in online advertising.⁶¹ As a result, the German authority has recently initiated an inquiry against Apple on the basis of ATT.⁶² In France, the Autorité de la Concurrence opened an investigation against Apple.⁶³ The authority was motivated also by allegations of self-preferencing, on the basis that ATT does not apply to Apple's own advertising business. Indeed, some commentators argued that Apple advantages its own ad network; after all, Apple's ad revenues started increasing after the introduction of ATT.⁶⁴ Conversely, undertakings that rely on personalised ads, and hence, cross-app tracking, have recently seen their financials plummet. A notable example is Facebook, which experienced the record daily loss in market capitalization for a US firm.⁶⁵ Further, the reduction in ad revenue may lead to a proliferation of paid apps, which have to go through Apple's in-app payments system, incurring a fee in the process.⁶⁶ More broadly, since ATT renders

⁵⁹ 'What Is App Tracking Transparency (ATT) and How Does It Affect Mobile Marketing?' (*Vungle Blog*, 26 May 2021) <<https://vungle.com/blog/app-tracking-transparency-att/>> accessed 26 July 2022.

⁶⁰ Alex Bauer, 'ATT opt-in rates: the picture so far and the ugly truth behind why the numbers vary so widely' (*AdExchanger*, 10 May 2021) <<https://www.adexchanger.com/data-driven-thinking/att-opt-in-rates-the-picture-so-far-and-the-ugly-truth-behind-why-the-numbers-vary-so-widely/>> accessed 26 July 2022.

⁶¹ Sam Shead, 'Apple hit with German antitrust complaint as it prepares to roll out new iPhone software' (*CNBC News*, 26 April 2021) <<https://www.cnn.com/2021/04/26/ios-14point5-apple-iphone-software-leads-to-german-antitrust-complaint.html>> accessed 26 July 2022.

⁶² Bundeskartellamt, 'Bundeskartellamt reviews Apple's tracking rules for third-party apps' (14 June 2022) <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/14_06_2022_Apple.html?nn=3591568> accessed 26 July 2022.

⁶³ Alex Barker, 'Apple hit with antitrust complaint in France over privacy controls' (*Financial Times*, 28 October 2020).

⁶⁴ Benjamin Seufert, 'ATT advantages Apple's ad network. Here's how to fix that.' (*MobileDevMemo*, 1 November 2021) <<https://mobiledevmemo.com/att-advantages-apples-ad-network-heres-how-to-fix-that/>> accessed 26 July 2022.

⁶⁵ 'Facebook owner Meta sees biggest ever stock market loss' (*BBC*, 4 February 2022) <<https://www.bbc.com/news/business-60255088#:~:text=Facebook's%20owner%20Meta%20Platform%20saw,loss%20for%20a%20US%20firm>> accessed 26 July 2022.

⁶⁶ Reinhold Kesler, 'The Impact of Apple's App-Tracking Transparency on App Monetization' (14 April 2022) <https://www.dropbox.com/s/miom2cdoub8241w/ATT_Paper_Kesler.pdf?dl=0> accessed 26 July 2022.

first-party data (data acquired via the business itself and not from other apps or websites via cookies) extremely valuable, there are concerns that it will transform the web into a series of “content fortresses” or “walled-gardens”, with higher levels of concentration and consolidation.⁶⁷ Traces of this trend can already be seen, with established firms like Uber, Disney, and Walgreens striving to create their own, integrated, cross-platform ad businesses.⁶⁸ Hence, there seems to be plausible concerns that Apple is using privacy as a pretext to self-preference its own ad business.⁶⁹

Google’s conduct also met fierce opposition by regulators, not least the UK’s CMA and the European Commission.⁷⁰ Essentially, the objectives sought by Google are largely in alignment with those of Apple. Google wishes to eliminate third-party cookies on its browser, Chrome. Cookies basically enable websites to track users (with their consent) across the web, aiding in the construction of detailed consumer profiles online. Accordingly, cookies form the backbone of the current online targeted advertising industry.⁷¹ Such advances in ad technology to phase-out the cookie are welcome from a user privacy standpoint, since less cross-website tracking is viewed favorably from a privacy perspective.⁷² However, eliminating cookies would also uproot the revenue streams of the vast majority of modern internet, with wide-reaching ramifications. Since most websites and apps are funded by ads (that render them “free”), obliterating the means to monetise may result in a subscription-dominated web, with consumers paying actual money to use the internet. Alternatively, third-party websites that do not already rely on Google may be forced to contract with it in order to maintain their ad-funded business models. This is because, similarly to Apple’s ATT, Privacy Sandbox does not ban the collection and use of first-party data for targeted advertising. Since Google has access to vast amounts of first-party data through various sources (e.g., YouTube, Gmail, Google Maps), it would become a lucrative source for ad personalization. Furthermore,

⁶⁷ Eric Benjamin Seufert, ‘The profound, unintended consequence of ATT: content fortresses’ (*MobileDevMemo*, 15 February 2021) <<https://mobiledevmemo.com/the-profound-unintended-consequence-of-att-content-fortresses/>> accessed 26 July 2022.

⁶⁸ Megan duBois, ‘Disney+ Will Introduce an Ad-Supported Subscription In Late 2022’ (*Forbes*, 4 March 2022) <<https://www.forbes.com/sites/megandubois/2022/03/04/disney-will-introduce-an-ad-supported-subscription-in-late-2022/?sh=4837b23a5bf6>> accessed 26 July 2022.

⁶⁹ Rory Van Loo, ‘Privacy Pretexts’ (2022) Cornell L. Rev. (forthcoming), available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4048919> accessed 26 July 2022.

⁷⁰ Dimitrios Katsifis, ‘CMA opens investigation into Google’s Privacy Sandbox browser changes’ (*The Platform Law Blog*, 8 January 2021) <https://theplatformlaw.blog/2021/01/08/cma-opens-investigation-into-googles-privacy-sandbox-browser-changes/> accessed 4 April 2022.

⁷¹ The online ad industry totaled in USD 350 billion in 2020 and is set to surpass traditional advertising channels in terms of spending. Alex Barker, ‘Digital ad market set to eclipse traditional media for first time’ (*Financial Times*, 23 June 2020) <<https://www.ft.com/content/d8aaf886-d1f0-40fb-abff-2945629b68c0>> accessed 26 July 2022.

⁷² Maryam Mehrnezhad, Kovila Coopamootoo and Ehsan Toreini, ‘How Can and Would People Protect from Online Tracking?’ (2022) 1 *Proceedings on Privacy Enhancing Technologies* 105.

Google may indeed have incentives to “close off” and reserve for itself completely the search advertising market, which arguably constitutes a superior form of online advertising.⁷³ The extension of the Privacy Sandbox to smartphones using the Android OS further exacerbates the problem.⁷⁴ Given these reasons as well as the fact that it already controls nearly half of advertising revenue in the United States, together with a not-so-spectacular track record in front of competition authorities, Google’s decision to completely destroy the cookie raised more than a few eyebrows.⁷⁵ As a result, the UK’s Competition and Markets Authority decided to investigate the initiative. In cooperation with the Information Commissioner’s Office, the local data protection regulator, the CMA wishes to help consumers reap the benefits of enhanced privacy whilst protecting against undue restrictions of competition.⁷⁶ The European Commission is pursuing its own investigation as well.⁷⁷

The aforementioned developments attracted little investigation in the scholarship. Of the few examples available, Sokol and Zhu confront the ATT updates in defending that Apple is abusing privacy arguments to restrict competition, from a US perspective.⁷⁸ On this side of the Atlantic, Geradin et al. focus on the technical nature of the Privacy Sandbox, whereas Hoppner & Westerhoff, as well as Martinez, analyse Apple’s ATT initiative.⁷⁹

Thus becomes apparent an underexplored area. Whereas the presented issues largely relate to abuses of dominance, and in particular, the justification of abusive conduct, it is unfortunate that no academic study establishes the core insights of European decisional practice and case-law on efficiencies and objective justifications with a view

⁷³ Ben Thompson, ‘Digital Advertising in 2022’ (*Stratechery*, 8 February 2022) <<https://stratechery.com/2022/digital-advertising-in-2022/>> accessed 27 July 2022.

⁷⁴ Dimitrios Katsifis, ‘Google announces Privacy Sandbox on Android’ (*The Platform Law Blog*, 16 February 2022) <<https://theplatformlaw.blog/2022/02/16/google-announces-privacy-sandbox-on-android/>> accessed 27 July 2022.

⁷⁵ Erin Thomson, ‘Will the DMA trigger competition in the Digital Advertising Market?’ (2022) 34 Competition Forum; Dimitrios Katsifis, ‘How tech platforms act as private regulators of privacy’ (*The Platform Law Blog*, 26 October 2020) <<https://theplatformlaw.blog/2020/10/26/how-tech-platforms-act-as-private-regulators-of-privacy/>> accessed 27 July 2022.

⁷⁶ ‘CMA to investigate Google’s Privacy Sandbox browser changes’ (Competition and Markets Authority Press Release, 8 January 2021) <<https://www.gov.uk/government/news/cma-to-investigate-google-s-privacy-sandbox-browser-changes>> accessed 27 July 2022.

⁷⁷ ‘Antitrust: Commission opens investigation into possible anticompetitive conduct by Google in the online advertising technology sector’ (European Commission Press Release, 22 June 2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3143> accessed 27 July 2022.

⁷⁸ Daniel Sokol and Feng Zhu, ‘Harming Competition and Consumers under the Guise of Protecting Privacy: An Analysis of Apple’s iOS 14 Policy Updates’ (2021) USC Law Legal Studies Paper No. 21-27.

⁷⁹ Thomas Hoppner and Philip Westerhoff, ‘Privacy by Default, Abuse by Design: EU Competition Concerns About Apple’s New App Tracking Policy’ (2021) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3853981> accessed 27 July 2022; Geradin, Katsifis and Karanikioti (n 57); Martinez (n 57).

of applying them to the debate. As will be highlighted further below, the few existing studies expressly focus on the first stage of an Article 102 analysis, namely the establishment of the theory of harm, but not the second stage where potential justifications are raised.⁸⁰ Building on the work of third way scholars briefly summarised above, the remaining paragraphs of the Article will discuss whether privacy arguments can be mobilised to justify allegedly anticompetitive conduct. In so doing, we wish to ascertain whether the recent developments initiated by large technology companies indeed correspond to “privacy-washing”, or if they can actually be allowed to go through in European competition law.⁸¹ At the end of our analysis, we will return to ATT and the Privacy Sandbox.

3 Privacy versus competition: invoking privacy to justify restrictions of competition?

As modern economies become increasingly complex, it becomes inevitable to try to simplify intricate phenomena into workable constructs. However, complexity of the economy should not serve as a pretext to advance reductionism in competition law. This holds true in the case of privacy as well. A qualified integration of privacy into competition assessments is required to dissect the intricacies of the digital economy.⁸² One particular extension of this line of thought relates to justifications. It is well established that the application of Article 102 in EU competition law proceeds in a bifurcated manner, similar to that of Article 101, in the sense that the establishment of an abuse is distinct from potential justifications.⁸³ Accordingly, unilateral conduct that falls under the prohibition in Article 102 may nevertheless be objectively justified or deemed adequately efficient.⁸⁴ However, it is unclear whether privacy should play a role in this exercise.

To provide an answer to that question, this paragraph will conduct a sequential, three-pronged analysis. The first part briefly sets out the general approach to privacy in European competition law from the viewpoints of the Commission and the Union Courts. The second and third parts respectively deal with privacy considerations as ef-

⁸⁰ See generally Paragraph 3.

⁸¹ Ulrich Aivodji et al., ‘Privacy and AI Ethics – Understanding the convergences and tensions for the responsible development of machine learning’ (2021), available at <https://sebastiangambs.openum.ca/files/sites/82/2021/11/OPC_final.pdf> accessed 27 July 2022.

⁸² See Paragraph 2.3.

⁸³ Opinion of AG Rantos (n 16); Ben Smulders, ‘The bifurcated approach and its practical impact on the establishment of harm to competition’ in Damien Gerard, Massimo Merola and Bernd Meyring (eds), *The Notion of Restriction of Competition* (Bruylant 2017).

⁸⁴ Case C-549/10, *Tomra and others* [2012].

ficiencies and objective justifications. These initiate the discussion by a doctrinal analysis of the relevant case-law, followed by an examination of the findings within the context of the privacy-competition relationship.

3.1 *Quo vadis, Europa?* European competition law and the privacy-competition debate

The European approach to privacy within the context of competition represents an evolution from a strictly separatist attitude towards what may be dubbed qualified integration. In a similar vein to integrationist scholars, it is visible that the European Commission is gradually opening the doors to considering privacy in competition law assessments.⁸⁵ To date, the Commission have mostly dealt with privacy and competition within the context of merger control. Starting with *Google/DoubleClick*, the Commission adopted a separatist attitude, acknowledging that its decision exists within the confines of European competition law, and without prejudice to the rules concerning privacy and data protection.⁸⁶ Next, in *Facebook/WhatsApp*, the Commission implicitly recognised that privacy is a metric of competition, as developments in privacy and security technology were characterised as important factors for product improvement.⁸⁷ It also noted that after Facebook announced the acquisition, a considerable number of users switched to Telegram, which differentiated on privacy grounds.⁸⁸ To be fair, the Commission expressly stated that any privacy-related concerns belong under data protection rules, and not competition rules. However, in the face of explicit references to product differentiation and competition based on privacy, this acknowledgement should be interpreted as referring to standalone privacy concerns stemming from the transaction.⁸⁹ To the extent that privacy considerations come affixed to an overarching competitive concern, it seems that the Commission is willing to assess them. This position was further solidified in *Microsoft/LinkedIn*, where the Commission explicitly pronounced privacy as a cognizable metric of competition in digital markets.⁹⁰ The enforcer took issue with the possibility that the concentration may lead to the marginalization of competitors with services offering better protection of user privacy, leading to reduced consumer choice.⁹¹

As can be observed, the Commission started its journey as a strict separatist, and slowly started to flirt with the idea that, under certain market circumstances, like those

⁸⁵ Giovanni Pitruzzella, 'Big Data and Antitrust Enforcement' (2017) 1 Italian Antitrust Review 77.

⁸⁶ Case COMP/M.4731, *Google/DoubleClick* [2008].

⁸⁷ Case COMP/M.7217, *Facebook/WhatsApp* [2014].

⁸⁸ *ibid* 24.

⁸⁹ *ibid* 31.

⁹⁰ Case COMP/M.8124, *Microsoft/LinkedIn* [2016].

⁹¹ *ibid* 76.

prevalent in consumer communication services, privacy may be regarded as a competitive metric. This places the Commission at the outer edge of separatists, closing in on an integrationist attitude. This position was confirmed in a rather controversial transaction that involved the acquisition of Fitbit, a supplier of wearables that had access to sensitive health data, by Google.⁹² Several submissions by third parties denigrated the acquisition, urging the Commission to opt for a blocking decision. At the heart of these arguments was the concern that Google would get its hands on sensitive consumer data, to the detriment of user privacy. In response, the Commission started by acknowledging that the existence of dedicated regulations, such as the e-Privacy Directive and the GDPR, does not preclude the assessment of potential data-related competition concerns.⁹³ However, on substance, the Commission concluded that in the wearables market, privacy was not a dimension of competition. Other concerns that strictly related to consumer privacy, such as Google's ability to acquire data more easily compared to the counterfactual, were dismissed as being suitable for resolution via specific regulations. Part of the motivation behind this conclusion, as explained by the Commission's Chief Economist, was the remaining consumer choice in the market: if consumers would become unhappy with Fitbit's collection and use of their data after the transaction, they had options to switch to.⁹⁴

Whereas the reluctance to further integrate privacy into competition assessments has been met with harsh criticism, with some commentators accusing the Commission of adhering to 'antitrust orthodoxy', the landscape may be changing.⁹⁵ Recent developments may generate challenges that eventually force the Commission to adopt a quasi-polycentric approach to competition enforcement, with privacy considerations being taken into account.⁹⁶ Three developments are worthy of highlight as of today. Firstly, the recently approved Digital Markets Act ("DMA") includes, under Article 5 (a), an obligation on gatekeepers not to combine and cross-use user data gathered across the gatekeeper's services. In concrete terms, the provision envisages a soft-structural relief in the form of data-silos. For instance, under such a rule, Google would be barred from combining data it gathered via YouTube with those from Google Search.⁹⁷ As high-

⁹² Case COMP/9660, *Google/FitBit* [2020].

⁹³ *Ibid* 93.

⁹⁴ Pierre Regibeau, 'Why I agree with the Google-Fitbit decision' (*VoxEU.org*, 13 March 2021) <<https://voxeu.org/article/why-i-agree-google-fitbit-decision>> accessed 27 July 2022.

⁹⁵ Cristina Caffarra, Gregory Crawford, & Johnny Ryan, 'The antitrust orthodoxy is blind to real data harms' (*VoxEU.org*, 22 April 2021) <<https://voxeu.org/content/antitrust-orthodoxy-blind-real-data-harms>> accessed 27 July 2022.

⁹⁶ Ioannis Lianos, 'Polycentric competition law' (2018) 71 *Current Legal Problems* 161.

⁹⁷ European Parliament, 'Amendments adopted by the European Parliament on 15 December 2021 on the proposal for a Digital Markets Act' COM(2020)0842.

lighted by the corresponding Recital 36, this provision seeks to ensure that the contestability objective of the DMA is respected by preventing the erection of entry barriers. However, the prohibition is without prejudice to user consent. If a user gives consent, gatekeepers are free to resume combinations of data they accumulated. In a legislative measure akin to sector-specific competition law, this is a curious situation.⁹⁸ The inclusion of user consent as the sole factor capable of justifying data combinations evokes the feeling that the Commission designed the provision to act as a privacy remedy as much as a competition remedy.⁹⁹ Secondly, in a recent market inquiry concerned with competition in consumer Internet of Things, the Commission explicitly recognised that undertakings may use privacy protection claims to justify “locking-up” certain data for themselves.¹⁰⁰ Such a direct acknowledgement may be construed as increasing levels of interest, on part of the Commission, in the potential tensions between competition and privacy. Lastly, as iterated earlier, the Commission is pursuing an investigation against Google’s Privacy Sandbox initiative.¹⁰¹ This will be the first instance where the European enforcer will have to deal with potential contradictions between privacy and competition, since in the event the Commission viably establishes a theory of harm, Google is likely to invoke privacy considerations as a justification.¹⁰² The outcome of this case will help determine whether the aforementioned developments espoused by the Commission are, in reality, steps towards a reorientation of European competition law.¹⁰³

As with the European Commission, the Court of Justice also experienced gradual shifts with its approach to privacy and competition. At first glance, it may seem appropriate to place the Court of Justice within the separatist group. After all, in its well-cited *Asnef-Equifax* judgment, the Court ruled that concerns relating to data protection, as such, are outside the purview of competition laws.¹⁰⁴ Less well-known is the *Piau* judgment, where the Court came up with a similar conclusion.¹⁰⁵ In that case, which took place within the context of sports-related activities, Mr. Piau essentially complained that FIFA rules stipulating the transmission of an agreement signed between a player and an agent to the relevant national football association contravened his right to privacy. The argument followed that FIFA was able to commit such a breach of personal

⁹⁸ Nicolas Petit, ‘The Proposed Digital Markets Act (DMA): A Legal and Policy Review’ (2021) 12 *Journal of European Competition Law & Practice* 529.

⁹⁹ Kerber (n 52) 27.

¹⁰⁰ Commission, ‘Final report – sector inquiry into consumer Internet of Things’ (Staff Working Document) COM(2022) 19 final.

¹⁰¹ See (n 77) and accompanying text.

¹⁰² Geradin, Katsifis and Karanikioti (n 57).

¹⁰³ Ioannis Lianos, ‘Reorienting competition law’ (2022) 10 *Journal of Antitrust Enforcement* 1.

¹⁰⁴ Case C-238/05, *Asnef-Equifax* [2006].

¹⁰⁵ Case T-193/02, *Piau* [2005].

privacy due to its dominant position. In its judgment affirming the Commission decision, the Court of First Instance asserted that pleas related to privacy are “arguments [...] which are not related to competition law...”. These judgments may be viewed as pronouncing the Court’s unfavorable position toward privacy concerns in competition. Upon closer inspection, though, it is apparent that a distinction should be made. It is true that not all privacy considerations merit antitrust scrutiny.¹⁰⁶ Standalone privacy concerns with no overarching competitive relevance may find their solutions easier via dedicated rules on data protection. However, this does not mean that the rulings ban the incorporation of privacy considerations in competition law assessments outright.¹⁰⁷ Instead, the judgments should be interpreted as disallowing competition law interventions for purely data protection and privacy-oriented motivations.¹⁰⁸ As some scholars have also pointed out, one should analyse the interaction between privacy and competition on a case-by-case basis¹⁰⁹, taking into account the specific economic, factual, and legal context.¹¹⁰ Accordingly, it should be possible for European competition law to factor in privacy considerations into competition law analyses insofar as privacy is attached to an upstream theory of competitive harm.¹¹¹ In particular, the Court’s choice of words in *Asnef-Equifax* to exclude data protection concerns, *as such*, from the scope of competition rules seems to hold promise.¹¹² Such a conclusion places the Court at roughly the same position as the Commission. However, future developments, especially if the Court encounters a question or an appeal regarding the challenges facing the Commission as outlined above, are likely to yield greater clarity. Of primary importance in this regard is the preliminary ruling procedure, currently pending before the Court, pertaining to the Facebook case in Germany.¹¹³ This ruling is likely to help clarify the contours of the privacy-competition relationship in Europe.

After setting out the general position of the Commission as well as the Union Courts vis-à-vis privacy in competition law assessments, the next two paragraphs now turn to

¹⁰⁶ Francisco Costa-Cabral, ‘The preliminary opinion of the European data protection supervisor and the discretion of the European Commission in enforcing competition law’ (2016) 23 Maastricht Journal of European and Comparative Law 495.

¹⁰⁷ See Witt (n 19); Botta and Wiedemann (n 25).

¹⁰⁸ This argument feeds into the debate on whether breaches of other regulatory norms (such as GDPR rules) by dominant undertakings should lead to a finding of abuse. See Paragraph 3.2. below.

¹⁰⁹ Eliana Garces and Daniel Fanaras, ‘Antitrust, Privacy, and Digital Platforms’ Use of Big Data’ (2018) 28 Journal of the Antitrust, UCL, and Privacy Section of the California Lawyers Committee 23.

¹¹⁰ The importance of context in European competition law is growing by the day. See, e.g., Case C-525/16, *MEO* [2018], para 31.

¹¹¹ Stojanovic (n 14); Miriam Buiten, ‘Regulating Data Giants: Between Competition Law and Data Protection Law’ in Mathis & Tor (eds), *New Developments in Competition Law and Economics* (Springer 2019).

¹¹² Aymeric de Moncuit, ‘In which ways should privacy concerns serve as an element of the competition assessment’ (2018) <https://ec.europa.eu/competition/information/digitisation_2018/contributions/aymeric_de_moncuit.pdf> accessed 27 July 2022.

¹¹³ Case C-252/21, *Meta Platforms and Others* (Conditions générales d’utilisation d’un réseau social).

the issue of justifications. By focusing on the second stage of an Article 102 analysis, we will highlight whether undertakings can rely on improvements in user privacy to escape liability.

3.2 Privacy as efficiencies

As well-known, efficiency defenses rely on positive competitive effects of a practice, be it an agreement or unilateral behaviour, with the potential to exonerate conduct otherwise harmful to competition.¹¹⁴ Throughout the evolution of European competition law, the Court has been called upon to adjudicate matters relating to efficiency arguments. One of the first instances where a claim that an undertaking abused its dominance was met with an efficiency justification was *Tetra Pak*.¹¹⁵ The case concerned an alleged leveraging of dominance from one market (market for aseptic machines and cartons used for packaging liquids, where Tetra Pak possessed market power) to another, non-dominated market (non-aseptic machines and cartons). Requiring that its customers exclusively purchase and use cartons and machinery together, both manufactured by Tetra Pak, the latter effectively tied the sale of machines and cartons intended for packaging liquid foods. In a bid to escape liability, Tetra Pak argued that the tying arrangement resulted in efficiency gains, as the machinery and cartons acquired from different providers cannot be utilised together, lest the viability of the entire system be compromised.¹¹⁶ Tetra Pak also argued that its conduct was justified in light of security and public health concerns. In its decision, while the Court addressed the security and public health arguments, it evaded the question on efficiencies. The Court only considered that, although recourse to efficiency arguments may be justified in a competitive market, it cannot be relied upon where the presence of a dominant undertaking already weakens competition.¹¹⁷

The Court further qualified the route that attributes special responsibilities on dominant undertakings when it revisited efficiency claims in *Irish Sugar*.¹¹⁸ Accordingly, the Court acknowledged that, in principle, even dominant undertakings may legitimately protect their interests. However, measures taken to further such aims must, at the very least, stand on “criteria of economic efficiency” and be “consistent with the interests of

¹¹⁴ Anna-Lena Baur, ‘Analysing the Commission’s Guidance on Enforcement Priorities in Applying Article 102 TFEU — An Efficiency Defence for Abusive Behaviour of Dominant Undertakings?’ (2012) 19 *Maas-tricht Journal of European and Comparative Law* 1.

¹¹⁵ Case T-83/91 *Tetra Pak* [1994] II-00755. Since the Court of Justice essentially upheld the judgment of the Court of First Instance on appeal, only the first decision is examined here.

¹¹⁶ *Tetra Pak* (n 115), paras 82-85.

¹¹⁷ Case 85-76, *Hoffmann – La Roche & Co. AG* [1979].

¹¹⁸ Case T-228/97, *Irish Sugar* [1999].

consumers".¹¹⁹ Reaffirming its stance, the Court elaborated further in *British Airways* by expressing that the limits of dominant undertakings' efforts to protect their commercial interests are demarcated by the strengthening of their market position.¹²⁰ In other words, the Court considered it inappropriate to protect the margin of maneuver accorded to dominant undertakings when such maneuvers led to an abuse by further entrenching a player.

One of the most contentious cases brought before the Court, in which efficiency arguments also featured liberally, was *Microsoft*.¹²¹ The case dealt with the refusal by Microsoft to supply information relating to application programming interfaces ("APIs") to competitors, as well as tying its operating system Windows with Windows Media Player, the latter being installed on the PC by default. After an abuse was established, Microsoft asserted that its conduct was nevertheless justified thanks to efficiencies. In particular, Microsoft argued that consumers benefitted from a smooth and streamlined Windows experience through faster and efficient connections, reduced risks of confusion, and time-saving properties by virtue of an "out-of-the-box" media player.¹²² In rejecting these arguments, the Court makes two implicit but noteworthy observations. Firstly, it appears that an efficiency argument needs to rely on an indispensability criterion, in the sense that the only way through which the efficiencies in question can be achieved should be the impugned conduct.¹²³ In other words, a precondition for accepting efficiency justifications is that such efficiencies should only be attainable via the conduct under scrutiny. Secondly, the Court takes issue not with efficiency gains *per se*, but the fact that the fruits of such efficiencies are reaped by Microsoft. This is illustrated also by the Commission in its original decision, whereby the tying of Media Player via pre-installation was not problematic in itself. What did raise concerns was the sole authority of Microsoft to determine the product that was pre-installed.¹²⁴ Put differently, product improvements resulting from the condemned behaviour failed to override the restrictions in consumer choice. Thus, it seems the Court declared in *Microsoft* that, at least in European competition law, welfare may not always trump choice.¹²⁵

The way efficiency arguments were treated in *Microsoft* evoked a wave of backlash from commentators on either side of the Atlantic. For instance, the burden to demon-

¹¹⁹ *ibid*, para 189.

¹²⁰ Case T-219/99, *British Airways* [2003].

¹²¹ Case T-201/04, *Microsoft Corp.* [2007].

¹²² *ibid*, para 1093.

¹²³ *ibid*, para 1098.

¹²⁴ *ibid*, para 1093. For a related view, see Arianna Andreangeli, 'Tying, technological integration and Article 82 EC: where do we go after the Microsoft case?' in Luca Rubini (ed), *Microsoft on Trial* (Elgar 2010).

¹²⁵ Joshua Wright and Douglas Ginsburg, 'The Goals of Antitrust: Welfare Trumps Choice' (2013) 81 *Fordham L. Rev.* 2405.

strate indispensability for efficiency defenses was deemed excessive, likened to a “Herculean task”.¹²⁶ Elsewhere, scholars like Geradin evaluated efficiencies in a broader manner, scrutinizing the exercise of balancing between ex-ante (preserving the incumbent’s as well as the entrants’ incentives to innovate) and ex-post (protecting the incentives of access-seeking entrants).¹²⁷ Others lamented that the rigid and formalistic approach of the Commission and the Court meant that Europe was unable to take future demand for innovative products into consideration.¹²⁸

The Court returned to the examination of efficiencies in *Post Danmark I*, in which it laid down an analytical framework to assess such claims raised by dominant undertakings.¹²⁹ Accordingly, dominant undertakings may show that the anticompetitive effects emanating from the conduct under inquiry are counterbalanced, or even thwarted, by advantages gained in the affected markets.¹³⁰ In order to be cognizable, however, efficiencies must be demonstrated, with regards to their “...actual existence and their extent...”.¹³¹ Further, there needs to be a causal link between the claimed improvements and the particular conduct. Additionally, and in a manner that confirms the Court’s insistence on consumer choice, claimed efficiencies resulting from the conduct must be necessary and should not lead to the elimination of most competition in the market. This last criterion has been the subject of scholarly criticism for presenting a situation of *probatio diabolica*.¹³² Indeed, it is nigh-impossible to substantially argue that most competition is not evicted from a market in such circumstances, as the exercise of an Article 102 inquiry inherently necessitates a dominant undertaking, by virtue of the existence of which competition in that market has already been weakened.¹³³ This led some commentators to argue that the ruling introduces an efficiency offense rather

¹²⁶ Pierre Larouche, ‘The European Microsoft Case at the Crossroads of Competition Policy and Innovation’ (2009) 75 Antitrust Law Journal 933.

¹²⁷ Damien Geradin, ‘Limiting the Scope of Article 82 EC: What Can the EU Learn from the U.S. Supreme Court’s Judgment in *Trinko* in the Wake of Microsoft, IMS, and Deutsche Telekom?’ (2004) Common Mkt. L. Rev. 1519.

¹²⁸ James Ponsoldt and Christopher David, ‘Comparison between U.S. and E.U. Antitrust Treatment of Tying Claims against Microsoft: When Should the Bundling of Computer Software Be Permitted’ (2007) 27 Nw. J. Int’l L. & Bus. 421.

¹²⁹ Case C-209/10, *Post-Danmark* [2012].

¹³⁰ Efficiencies across markets are also cognizable; see Urs Haegler and Krishna Nandakumar, ‘Efficiencies Under 101 (3) TFEU – did the Commission go far enough in A++?’ (2016) 1 Competition Law & Policy Debate 47.

¹³¹ *ibid*, para 43.

¹³² Gianluca Faella, ‘The Efficient Abuse: Reflections on the EU, Italian and UK Experience’ (2016) 2 Competition Law & Policy Debate 33.

¹³³ Here, the Court’s position ties with the *Tetra Pak* judgment discussed earlier. See (n 115) and accompanying text.

than a defense.¹³⁴ In addition to efficiencies, the Court in *Post Danmark I* highlights another path through which an otherwise anticompetitive behaviour may nevertheless escape liability: instances where the conduct is objectively necessary. This refers to the demarcation between efficiencies and objective justifications, to which the paper returns below.

As the law stands, the latest judicial interpretation of efficiency arguments is located in *Google (Shopping)*.¹³⁵ Indeed, that judgment elaborates on the treatment of efficiencies within the context of alleged abuses of dominance, painting an overall picture by building on the analytical framework first established in *Post Danmark*. In line with *Intel*, the General Court first confirms that the examination under Article 102 TFEU consists of two stages: the establishment of a viable theory of harm, followed by potential justifications, which may materialise either as objective justifications or efficiencies.¹³⁶

After the above clarification, the General Court proceeds to develop the case-law through two avenues. Firstly, the Court explains that efficiency arguments put forward by the undertaking under scrutiny must not be vague, general, or theoretical. Furthermore, when advocating for efficiencies, the undertaking may not only rely on its own commercial interests.¹³⁷ Regarding the former contribution, the Court's approach may be viewed as one of symmetry: as the (actual or potential) anticompetitive effects of a practice need to go beyond purely hypothetical considerations, so too should counter-vailing arguments, such as efficiencies.¹³⁸ As for the latter clarification, the Court seems to follow a strict consumer welfare approach, as established in *Irish Sugar*, in the sense that a dominant undertaking may not legitimately protect its own gains at the expense of consumers. Secondly, the Court develops its case-law in *Microsoft* and creates a system of pseudo-hierarchies when dealing with efficiencies. As iterated earlier, product improvements in *Microsoft* were unable to outweigh the decreases in consumer choice. *Google (Shopping)* confirms and furthers that argument. Indeed, as explained by the Court in paragraphs 566-572, generating efficiency gains by improving user experience could not save Google, as the conduct through which such improvements materialised (i.e., promotions/demotions of rival services) also led to a reduction in the number of comparison-shopping services available for consumers. This conclusion may also be

¹³⁴ Denis F. Waelbroeck, 'The assessment of efficiencies under Article 102 and the Commission's Guidance Paper' in Federico F. Etro and Ioannis I. Kokkoris (eds), *Competition Law and the Enforcement of Article 82* (OUP 2010).

¹³⁵ Case T-612/17, *Google (Shopping)* [2021].

¹³⁶ For clarity, *Intel* largely focused on the first stage of the analysis, whereby the plaintiff/enforcer has the burden to demonstrate a plausible competitive harm, and the defendant gets the chance to argue that its conduct is incapable of creating such impact. See, Case T-286/09 RENV, *Intel Corporation v. Commission* [2022].

¹³⁷ *Google (Shopping)* (n 135), para 553.

¹³⁸ Case C-23/14, *Post Danmark II* [2015], para 65.

read in light of *British Airways*, where the Court stated that efficiencies stemming from an otherwise exclusionary conduct must relate to advantages for the market *and* consumers.¹³⁹ In other words, in an efficiencies argument, the Court looks for improvements on both the market itself, which may be interpreted as entailing the survival of alternative products/services, as well as on the consumers. Again, it is visible that the Court opts for the triumph of user choice over welfare increases, or at the very least, the concomitant existence of the two. Accordingly, in terms of arguing for efficiencies, it may be sufficient to demonstrate increased consumer choice, since the latter also entails gains in consumer welfare. However, the reverse scenario does not hold. A consumer welfare increase (e.g., as in *Microsoft*) in a market may not necessarily lead to more choice, weakening the argument. Such a conclusion affirms the assertion that European competition law is still under the influence of the German ordoliberal tradition. In this sense, competition law acts as a vehicle by which freedom of competition on the market is ensured, with the ultimate aim to foster consumer welfare through maintaining open choices.¹⁴⁰

In light of the presented state-of-play of the Court's case-law, as well as the evolution of the European approach towards the privacy-competition conundrum, would it be appropriate to consider privacy as grounds for efficiency? In particular, is it possible and/or desirable to maintain privacy considerations as cognizable efficiencies under European competition rules?

In our view, the answer should be in the affirmative. As can be inferred from the above discussion, the consideration of data protection and privacy in European competition law assessments materialises in a chronological spectrum. As European antitrust enforcement moves from an attitude of strict separation towards qualified integration, it is likely that the possibility of considering privacy as efficiency arguments will increase. There exist three main reasons leading to that conclusion: symmetry, innovation concerns, and legal coherence. We examine each point briefly, before turning to concrete cases to illustrate our case better.

First, a symmetrical application of the law demands the incorporation of privacy considerations, also as efficiencies, into competition analyses. As briefly illustrated, several commentators have delineated potential theories of harm based on diminished levels of consumer privacy.¹⁴¹ Thus, it would be inappropriate to build liability on factors that

¹³⁹ Case C-95/04 P, *British Airways plc* [2007], para 86.

¹⁴⁰ Peter Behrens, 'The "Consumer Choice" Paradigm in German Ordoliberalism and its Impact upon EU Competition Law' (2014) Europa-Kolleg Hamburg Discussion Paper No. 1/14.

¹⁴¹ Viktoria Roberson, 'Excessive data collection: Privacy considerations and abuse of dominance in the era of big data' (2020) 57 Common Mkt. L. Rev. 161; Cristina Caffarra and Tommaso Valletti, 'Google/Fitbit review: Privacy is a competition issue' (*VoxEU.org*, 4 March 2020) <<https://voxeu.org/content/googlefitbit-review-privacy-competition-issue>> accessed 27 July 2022.

also touch upon privacy while not allowing those under scrutiny to generate counter-arguments based on the same.¹⁴² Concluding otherwise would potentially put the European Commission in a similar situation it faced in *Intel*. In that case, the Commission relied on older, formalistic case-law to determine the illegality of rebates, but also conducted an as-efficient competitor test while not allowing Intel to rebut the findings of the test.¹⁴³

Second, dismissing privacy arguments as efficiency-enhancing factors may represent a myopic understanding of innovation. Players in digital markets interact in complex ways, switching from competition to cooperation and even coopetition.¹⁴⁴ This is especially the case for platforms orchestrating an ecosystem of interdependent modules, capable of exploiting complementarities across users, machines, and sectors through the use of data, software, and networks.¹⁴⁵ Such capabilities may provide platforms with the ability to regulate through code in a Lessigian manner.¹⁴⁶ As regulators of a private origin, platforms often need to manage complex expectations, some of which may materialise as increased levels of user privacy.¹⁴⁷ Thus, alterations in platform practices may be necessary to remedy a market failure, such as informational asymmetries.¹⁴⁸ Alternatively, changes may represent races-to-the-top.¹⁴⁹ Thus, platforms' maneuvers to modify certain aspects of their ecosystems should not be met with inherent suspicion – imposing a principle of *venire contra factum proprium* that assumes all changes are necessarily harmful and does not give the platform operator an opportunity, also on privacy grounds, to justify its potentially efficient conduct, seems premature.¹⁵⁰ Here, the usual criticism raised against the incorporation of a tradition-

¹⁴² Christine Wilson, 'Breaking the Vicious Cycle: Establishing a Gold Standard for Efficiencies' (*Bates White Antitrust Webinar*, 24 June 2020) <https://www.ftc.gov/system/files/documents/public_statements/1577315/wilson_-_bates_white_presentation_06-24-20_-_final.pdf> accessed 27 July 2022.

¹⁴³ Assimakis Komninos, 'Competition Stories: January & February 2022' (*Concurrentialiste Blog*, 11 April 2022) <<https://leconcurrentialiste.com/competition-stories-2022-one/>> accessed 27 July 2022.

¹⁴⁴ Nicolas Petit, *Big Tech and the Digital Economy: The Moligopoly Scenario* (OUP, 2020).

¹⁴⁵ Annabelle Gawer, 'Digital platforms and ecosystems: remarks on the dominant organizational forms of the digital age' (2021) *Innovation, Organization & Management* 1.

¹⁴⁶ Lawrence Lessig, 'Law of the Horse: What Cyberlaw Might Teach' (1999) 113 *Harv. L. Rev.* 501.

¹⁴⁷ European Commission, 'Study on "Support to the observatory for the online platform economy"' (Final Report, 2021) <<https://op.europa.eu/en/publication-detail/-/publication/ee55e580-ac80-11eb-9767-01aa75ed71a1/language-en/format-PDF/source-206332284>> accessed 27 July 2022.

¹⁴⁸ Nicolas Economides and Ioannis Lianos, 'Restrictions on Privacy and Exploitation in the Digital Economy: A Market Failure Perspective' (2021) 17 *Journal of Competition Law & Economics* 765; Pablo Ibanez-Colomo, 'Market failures, transaction costs and Article 101(1) TFEU case-law' (2012) 37 *European Law Review* 541.

¹⁴⁹ See, by analogy, Garces and Fanaras (n 109).

¹⁵⁰ Assimakis Komninos, 'Competition Stories: November & December 2021' (*Concurrentialiste Blog*, 6 January 2022) <<https://leconcurrentialiste.com/competition-stories-nov-dec-2021/>> accessed 27 July 2022.

ally non-economic consideration, such as privacy, into competition assessments is intractability.¹⁵¹ Indeed, some (mostly separatist) commentators attack the notion of privacy in competition since they contend that its malleable and “unscientific” nature may lead to the interpretation of antitrust laws in a dystopic manner.¹⁵² However, as pointed out by several scholars, narrow efficiency attitudes often also reflect inherent ambiguities and may also be under the influence of politics – effectively becoming terms of social sciences and economic ideology themselves rather than scientific and mathematical concepts.¹⁵³ Other critics argue, usually on error-cost analysis grounds, that analyzing such intricate matters does not pass the cost-benefit test.¹⁵⁴ However, considering the rapid propagation and adoption of digital products and services, these issues are likely to keep enforcers busy for the coming years. Moreover, it is also arguable that increasing levels of complexity in modern economies, even in the scenario where economics enjoys technical insularity in antitrust analyses, would cast doubts on the longevity of simplicity in competition law.¹⁵⁵ Thus, abdication of administrative and judicial responsibility in the face of technical complexity invites unpreparedness for the future and should be avoided.¹⁵⁶

Last but not least, incorporating privacy into unilateral conduct cases also seems necessary from a coherence perspective. As emphasised numerous times by Commission officials, the EU is currently going through a twin transition, a green and a digital one.¹⁵⁷ Recently, we have seen examples where competition policy and environmental protection go hand in hand. For instance, in a recent case, the Commission prohibited an agreement between automobile manufacturers that illegally restricted the development of products providing for less-polluting emission systems.¹⁵⁸ However, there have

¹⁵¹ William Baxter, ‘Responding to the Reaction: The Draftsman’s View’ (1983) 71 Cal. L. Rev. 618.

¹⁵² Manne and Auer (n 32).

¹⁵³ For instance, there are ambiguities as to what constitutes economic efficiency, or which types of efficiencies should be considered, within the meaning portrayed by the adherents of the Chicago school. See Brodley (n 31); Albert Foer, ‘On the Inefficiencies of Efficiency as the Single-minded Goal of Antitrust’ (2015) 60 Antitrust Bulletin 103; Ben Van Rompuy, *Economic efficiency: the sole concern of modern antitrust policy? Non-efficiency considerations under Article 101 TFEU* (Kluwer 2012); Eleanor Fox, ‘The Efficiency Paradox’ in Robert Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (OUP 2008).

¹⁵⁴ Alden Abbott, ‘Broad-Based FTC Data-Privacy and Security Rulemaking Would Flunk a Cost-Benefit Test’ (*Truth on the Market Blog*, 13 October 2021) <<https://truthonthemarket.com/2021/10/13/broad-based-ftc-data-privacy-and-security-rulemaking-would-flunk-a-cost-benefit-test/>> accessed 27 July 2022.

¹⁵⁵ Timothy Brennan, ‘Is complexity in antitrust a virtue? The accuracy-simplicity tradeoff’ (2014) 59 Antitrust Bulletin 827.

¹⁵⁶ Frank Pasquale, ‘Paradoxes of Digital Antitrust’ (2013) Harv. J.L. & Tech Occasional Paper Series, July 2013.

¹⁵⁷ Majcher and Robertson (n 54).

¹⁵⁸ Case AT.40178, *Car Emissions* [2021].

also been developments where the objectives of competition and sustainability potentially clash.¹⁵⁹ The most pertinent example in that regard is the promulgation of the new horizontal guidelines, which entails a dedicated paragraph designed to balance the two competing goals.¹⁶⁰ It is commendable that the Commission endeavors to tackle such a complex task, arguably more difficult than the privacy-competition debate, since it also relates to future consumers.¹⁶¹ But it is all the more reason to also start scrutinizing the equivalent debate in terms of privacy and competition.

Considering the foregoing, would Apple's ATT and Google's Privacy Sandbox initiatives satisfy a justification by appealing to efficiency arguments? Before we briefly analyse that question, it is important to remind that the second stage where possible justifications take place is inherently linked to the first stage of the examination where at least the plausibility of anticompetitive impact is established.¹⁶² Whereas the exercise of setting out detailed theories of harm exceeds the scope of this Article, it should suffice to explain that a few commentators highlighted potential issues with both practices. For ATT, Martinez argues that Apple blocking third-party apps from accessing inputs allowing for the personalization of ads may amount to an implicit refusal to supply, as also argued within *Google (Shopping)*.¹⁶³ Sokol and Zhu defend that Apple unreasonably engages in first-line discrimination, what is popularly known as self-preferencing.¹⁶⁴ In brief, they assert that by requiring third-party apps to obtain explicit user consent for tracking across different apps, without applying the same criteria to its own ad business, Apple risks restricting competition. Elsewhere, commentators put forward that Apple hampering personalised advertising ultimately plays into its own hands: by discouraging the use of ad-funded business models, so the theory goes, app developers will eventually turn to subscription-based models, which will have to go through Apple's

¹⁵⁹ Viktoria Robertson, 'Sustainability: A World-First Green Exemption in Austrian Competition Law' (2022) *Journal of European Competition Law & Practice* (advance article).

¹⁶⁰ Nicole Kar and Lauren O'Brien, 'Greening EU competition law: Commission invites comments on draft revised rules on horizontal cooperation' (*Linklaters Insights*, 9 March 2022) <https://www.linklaters.com/en/insights/blogs/linkingcompetition/2022/march/greening-eu-competition-law_commission-invites-comments-on-draft-revised-rules-on-horizontal-coop> accessed 27 July 2022.

¹⁶¹ Roman Inderst and Stefan Thomas, 'Legal Design in Sustainable Antitrust' (2022) available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4058367> accessed 27 July 2022.

¹⁶² Pablo Ibanez-Colomo, 'Capability and likelihood of anticompetitive effects: why the difference exists, and why it matters' (*Chillin' Competition Blog*, 29 January 2021) <<https://chillingcompetition.com/2021/01/29/capability-and-likelihood-of-anticompetitive-effects-why-the-difference-exists-and-why-it-matters/>> accessed 27 July 2022.

¹⁶³ Martinez (n 57).

¹⁶⁴ Sokol and Zhu (n 78). For a similar view, see Brian Chen and Daisuke Wakabayashi, 'You're Still Being Tracked on the Internet, Just in a Different Way' (*The New York Times*, 6 April 2022) <<https://www.nytimes.com/2022/04/06/technology/online-tracking-privacy.html>> accessed 27 July 2022.

30% commission fee.¹⁶⁵ However, the case is not that simple. As iterated, ATT does not ban the collection and use of third-party data or tracking for that matter. In earlier versions, consumers were just as capable of turning off cross-app tracking. It is therefore inappropriate to categorise the update as inherently hampering the use of personalised advertising. In fact, the difference brought about by iOS 14.5 is that consumers are explicitly presented with a choice. If anything, it seems ATT is working towards alleviating a market failure, namely informational asymmetries. Next, contentions that Apple artificially favors its own ad business, and profits from it, are also controversial. As delineated in detail in its responses to a CMA inquiry, Apple's own ad business does not engage in third-party tracking.¹⁶⁶ Therefore, the changes that affect the way in which third party data are being collected do not concern Apple, in the same manner that they do not concern Google collecting data via the apps in its ecosystem, such as YouTube and Google Shopping. Moreover, whereas it is true that Apple saw an increase in its advertising revenue after the introduction of ATT, this is certainly not uniform, as it also saw a decrease in app commissions as a result of ATT.¹⁶⁷ As outlined above, it is true that Apple's move may lead to greater concentration of data in the hands of a few ecosystems, as the latter rely on first-party data and thus not cross-party tracking. However, this is a different issue than self-preferencing understood within the meaning of existing case-law. This mixed picture may be the reason behind the decision of the French Competition Authority not to impose interim measures on Apple due to ATT, but also to continue the investigation to solve the intricacies behind the case.¹⁶⁸ Lastly, some authors also contend that Apple's practices, rather than resulting in improvements, actually degrade user privacy.¹⁶⁹

As regards Google's Privacy Sandbox initiatives, similar theories permeate the literature. In particular, scholars argue that by implementing the changes, Google eliminates the cookie, which constitutes the cornerstone of user tracking across the web. A potential consequence of such a maneuver is the strengthening of the already powerful Chrome browser, to the detriment of often smaller, third party web sites, and with the

¹⁶⁵ Hoppner and Westerhoff (n 79).

¹⁶⁶ 'Mobile Systems Market Study: Apple Response to Interim Report' (2022) <https://assets.publishing.service.gov.uk/media/62277271d3bf7f158779fe39/Apple_11.3.22.pdf> accessed 27 July 2022. Determining what exactly constitutes first- and third-party tracking should be a case-specific inquiry. Recently, the UK's CMA ascertained that the two may not be so different, in line with an opinion obtained from the Information Commissioner's Office. A similar exercise with the help of EDPB should be considered in the EU as well.

¹⁶⁷ Jeffrey Rousseau, 'AppsFlyer: In-app gaming purchase revenue declined 35% globally in 2021' (*GamesIndustry*, 23 February 2022) <<https://www.gamesindustry.biz/articles/2022-02-23-appsflyer-in-app-gaming-purchase-revenue-declined-35-percent-globally-in-2021>> accessed 27 July 2022.

¹⁶⁸ Vincent Giovannini, 'The French Apple competition & privacy case' (*Competition Forum*, 3 May 2021) <<https://competition-forum.com/the-french-apple-competition-privacy-case/>> accessed 27 July 2022.

¹⁶⁹ Hoppner and Westerhoff (n 79).

extension of the initiative to the Android OS, ad-funded third party apps.¹⁷⁰ Of critical importance here is the fact that Google's plans imply the complete obliteration of cookies – unlike ATT, Privacy Sandbox does not provide users with a choice to opt-in if they wish to benefit from personalization.

In light of the above theories of harm, it seems at least possible for ATT to pass muster under a prospective efficiencies assessment. Following the analytical framework in *Post Danmark*, Apple can argue that ATT produces efficiencies via promoting user privacy, as a potential metric of competition on quality. It ultimately falls upon the Commission to determine, as it did in *Microsoft/LinkedIn* and *Google/Fitbit*, whether user privacy plays a role in competition within the online advertising services market, however narrowly or widely defined. The fact that a large chunk of consumers changed their attitudes towards cross-app tracking after the introduction of the ATT may signify that it indeed does.¹⁷¹ These statistics may also be coupled with user surveys and other qualitative indicators to demonstrate, as in the words of *Post Danmark I*, the existence and the extent of claimed efficiencies. That leaves the *probatio diabolica*, that is, the requirement that consumer choice is essentially not constrained. Here, it makes sense to recall that ATT does not prohibit cross-app tracking at all. If consumers derive more benefit from personalised advertising by virtue of cross-app tracking, they are free, and arguably in a better position, to opt for it. The fact that ATT does not eliminate cookies or personalised advertising entirely, but instead shifts the default from automatic tracking to a scenario where tracking is disabled, seems essentially compatible with the consumer choice paradigm, endorsed by the Commission and the Court in *Microsoft*, *Google (Android)*, and *Google (Shopping)*. Whereas some commentators voice legitimate concerns directed at Apple for the design of the choice architecture behind the tracking prompt, that is, the way the consumers are presented with the opt-in screen, that should not outright overrule an efficiency justification.¹⁷² In fact, Apple has already taken concrete steps, after consulting with industry stakeholders, to enable app developers to add prompts providing additional information regarding cross-app tracking.¹⁷³

By contrast, the chances for Google arguing for efficiencies to justify the potential anticompetitive impacts of its Privacy Sandbox initiative seem slim. The problem firstly

¹⁷⁰ Geradin, Katsifis and Karanikioti (n 57).

¹⁷¹ For instance, CMA considered privacy a key metric of competition in digital advertising markets. See Competition and Markets Authority & Information Commissioner's Office, 'Competition and data protection in digital markets: a joint statement between the CMA and the ICO' (2021) <<https://ico.org.uk/media/about-the-ico/documents/2619797/cma-ico-public-statement-20210518.pdf>> accessed 27 July 2022.

¹⁷² Competition and Markets Authority, 'Online Choice Architecture: how digital design can harm competition and consumers' (*CMA Research and Analysis*, 5 April 2022) <<https://www.gov.uk/government/publications/online-choice-architecture-how-digital-design-can-harm-competition-and-consumers>> accessed 27 July 2022.

¹⁷³ Hoppner and Westerhoff (n 79).

materialises in the construction of a theory of harm: unlike Apple's ATT, it is not clear whether Google will stop utilizing *third-party* tracking to inform its own advertising business. This presents a clear danger of first-line discrimination, or self-preferencing, for which Google had already been fined in Europe. Secondly, Privacy Sandbox may fail to satisfy the conditions of the analytical framework as laid down by the Court. In particular, by completely destroying the cookie, Google is likely to reduce consumer choice, especially to the detriment of users valuing personalised ads more. Whereas it is true that Google is preparing to offer alternatives, such as Topics/federated credential management, it is unclear whether these systems provide equivalent levels of personalization. As iterated earlier, as the case-law stands, relying only on product improvements, such as the case may be with Privacy Sandbox increasing user privacy, is insufficient if such improvements come attached to a reduction in consumer choice.

3.3 Privacy as objective justification

As confirmed in *Tomra*, there exists a clear separation between objective justifications on the one hand, and efficiencies on the other, for escaping liability in European competition law. The existence of these avenues through which harmful conduct may be justified highlights the fact that there are no 'per se abuses' in European competition law.¹⁷⁴ According to the Commission's Guidance Paper, objective justifications are factors external to the dominant undertaking, which exonerate the exclusionary conduct falling under the prohibition in Article 102 TFEU.¹⁷⁵ Whereas the Commission only enumerates public health and safety as examples of external factors, an overview of the case-law suggests that there may be other grounds, such as technical difficulties¹⁷⁶, pharmacovigilance¹⁷⁷, passenger safety¹⁷⁸, and capacity constraints.¹⁷⁹ In addition to providing an acceptable ground for justification, case-law requires undertakings to act in an appropriate manner to achieve their objectives (necessity) and without exceeding what is necessary to tackle such aims (proportionality).¹⁸⁰ For instance, in *Romanian*

¹⁷⁴ Eric Gippini-Fournier, 'Resale Price Maintenance in the EU: In Statu Quo Ante Bellum?' in Barry Hawk (ed), *International Antitrust Law and Policy* (Fordham 2009).

¹⁷⁵ After Intel, the importance of the Commission Guidance Paper has arguably increased. See Pablo Ibanez-Colomo, 'The (growing) role of the Guidance Paper on exclusionary abuses in the case-law: the legal and the non-legal' (*Chilling Competition Blog*, 9 February 2022) <<https://chillingcompetition.com/2022/02/09/the-growing-role-of-the-guidance-paper-on-exclusionary-abuses-in-the-case-law-the-legal-and-the-non-legal/>> accessed 27 July 2022.

¹⁷⁶ Case 311/84, *Telemarketing* [1985].

¹⁷⁷ Case T-321/05, *AstraZeneca* [2010], para 694.

¹⁷⁸ Case T-814/17, *Lietuvos gelezinkeliai* [2020], para 146.

¹⁷⁹ Case 98/190/EC, *FAG – Flughafen Frankfurt/Main AG* [1998] IV/34.801, para 74.

¹⁸⁰ Alison Jones, Brenda Sufrin, & Niamh Dunne, *Jones' and Sufrin's EU Competition Law: Text, Cases, and Materials* (OUP 2017).

Power Exchange/OPCOM, the undertaking argued that certain instances of discriminatory treatment to the detriment of foreign electricity vendors were justified as the behaviour in question had the aim to protect against tax mismatches.¹⁸¹ However, the Commission asserted that there were alternative ways to alleviate such mismatch concerns that were overall less restrictive of competition.¹⁸²

Although the formal state-of-play regarding objective justifications in European competition law may be summarised as above, scholars have expressed doubts as to the practical applicability of the notion.¹⁸³ For instance, some commentators, such as Advocate-General Jacobs, have argued that the distinction between the stage where abusive conduct is established, on the one hand, and where it is justified via recourse to objective necessities, on the other, is artificially constructed.¹⁸⁴ Even though this view is less relevant in the light of recent case-law, such as *Intel*, there is little doubt that objective justifications remain rather underutilised – to date, there exists no case whose conclusion relied on objectively justified reasons. Moreover, as highlighted in *Tetra Pak* and *Hilti*, the Court is skeptical of undertakings that claim to serve public policy objectives, such as health and safety.¹⁸⁵ Accordingly, the Court considers private undertakings ill-suited to tackle such aims, which remain within the remit of public authorities and regulators. Hence, it is clear that European competition law does not view what is dubbed “regulatory vigilantism” favorably.¹⁸⁶

The treatment of privacy as an objective justification must be examined within the boundaries of the above analysis. It is likely that undertakings will point towards privacy considerations as possible grounds for justification. Their success, however, is equally unlikely. As iterated earlier, even though the Commission refers only to public health and safety as ‘external factors’, this should not be taken as an exhaustive list. Indeed, the Court in its case-law has recognised several potential grounds for justifying otherwise harmful conduct. Furthermore, due to the enmity towards regulatory vigilantism, declaring public health and safety as the sole grounds through which an objective justification defense can be made risks rendering the concept nugatory. However, since privacy as a distinct field of law already enjoys the presence of dedicated regulators, a similar case of hostility towards undertakings purporting to protect consumer privacy can

¹⁸¹ Case AT.39984, *Romanian Power Exchange/OPCOM* [2014].

¹⁸² *ibid*, paras 198–227.

¹⁸³ Renato Nazini, ‘The wood begun to move: an essay on consumer welfare, evidence and burden of proof in Article 82 cases’ (2006) 4 *European Law Review* 518.

¹⁸⁴ Case C-53/03, *Syfait and Others* [2005], Opinion of AG Jacobs, para 72.

¹⁸⁵ Case T-30/89, *Hilti v Commission* [1991], para 118.

¹⁸⁶ Niamh Dunne, ‘The Role of Regulation in EU Competition Law Assessment’ (2021) LSE Legal Studies Working Paper No. 09/2021 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3871315> accessed 27 July 2022.

be made, in the sense that data protection authorities are better placed to deal with such issues, not private undertakings with profit-seeking motives.

Besides, the invocation of privacy as grounds for objective justification may be problematic due to the relationship between European competition law and sector-specific regulation. Specifically, appeals to privacy to justify otherwise anticompetitive conduct may be viewed as mere compliance with what already exists.¹⁸⁷ As explained by the Court in *AstraZeneca*, compliance (or non-compliance) with other legal rules does not relate to whether a dominant undertaking breached its obligation not to abuse its market position.¹⁸⁸ In other words, violations of other legal rules do not readily imply competition infringements; symmetrically, sole compliance with other strands of law is insufficient to escape liability. Thus, it should not be possible for a dominant undertaking to invoke compliance with privacy and data protection regulations, such as the GDPR, as an objective justification for its anticompetitive behaviour. Such an approach is sensible since, as also explained by the Regional Administrative Tribunal of Lazio, deeming the lawfulness of conduct under separate regulatory regimes as a safe harbour against the reach of competition laws would render the application of the latter almost “inconceivable”.¹⁸⁹

Nevertheless, the latest jurisprudence of the Court blurs the antitrust-regulation picture to a certain degree. For instance, in *Lietuvos gelezinkeliai*, the General Court asserted that legislative measures are capable of influencing (or even determining) the results of the application of a legal test in competition law assessments.¹⁹⁰ Similarly, in *Slovak Telekom*, the Court of Justice acknowledged that “...a regulatory obligation can be relevant for the assessment of abusive conduct...” if the dominant undertaking is subject to sectoral rules.¹⁹¹ Here seems to lie a tension between the cited judgments. On the one hand, *AstraZeneca* considers that an undertaking’s position vis-à-vis a regulatory regime is *irrelevant* for the purposes of Article 102, whereas on the other hand, *Lietuvos gelezinkeliai* and *Slovak Telekom* assert that regulatory requirements are relevant for a competitive assessment. Granted, it may be the case that *AstraZeneca* judgment should be read as the inappropriateness of equating a regulatory breach to a competition law breach. A more reconciliatory reading of the case-law thus signals that the regulatory

¹⁸⁷ Whereas the GDPR is primarily concerned with the protection of personal data, it also entails a number of provisions that touch upon privacy, such as data minimization and privacy by design.

¹⁸⁸ Case C-457/10 P, *AstraZeneca v Commission* [2012], para 132.

¹⁸⁹ Federico Balestra & Lucia Antonazzi, ‘From abuse of dominance to abuse of rights: the last resort tool to apply Article 102 TFEU?’ (*Bird & Bird Insights*, 16 March 2022) <<https://www.twobirds.com/en/insights/2022/italy/from-abuse-of-dominance-to-abuse-of-rights>> accessed 27 July 2022.

¹⁹⁰ Pablo Ibanez-Colomo, ‘GC Judgment in Case T-814/17, Lithuanian Railways – Part I: object and indispensability’ (*Chillin’ Competition Blog*, 1 December 2020) <<https://chillingcompetition.com/2020/12/01/gc-judgment-in-case-t%E2%80%991814-17-lithuanian-railways-part-i-object-and-indispensability/>> accessed 26 March 2022.

¹⁹¹ Case C-165/19 P, *Slovak Telekom* [2021], para 57.

environment forms part of the legal context, in which the allegedly abusive conduct takes place.¹⁹² There exists support for this line of reasoning in the case-law.¹⁹³ However, the fact that the Court directly used the term “irrelevant” when speaking of the connection between the two legal regimes in *AstraZeneca* somewhat contradicts this conclusion. Moreover, the scene is arguably even more ambiguous after *Google (Shopping)*. In that case, the General Court supplemented its finding that Google’s conduct was in fact abusive, as the latter failed to instate a level playing field in breach of net neutrality regulations.¹⁹⁴ It is true that the General Court inserted this argument “for the sake of completeness” so as to solidify its position. Still, it appears that, for a regulatory regime to influence the application of competition law to a dominant undertaking, the latter does not even need to be a subject of that regulation. This argument goes further than what the Court of Justice expressed in *Slovak Telekom* and will probably be clarified on appeal.¹⁹⁵

The above analysis presents significant implications for the role of privacy as an objective justification in competition assessments. Accordingly, if *AstraZeneca* case-law is pertinent, one needs to conclude that Google or Apple should not be able to rely on an argument of compliance (with the GDPR) to exonerate themselves. A symmetrical treatment necessitates that, if a theory of harm cannot be established simply by recourse to violations of other laws, a justification should not be cognizable simply by complying with legal rules. However, if the recent developments in the Court’s case-law are to be followed, it becomes more and more feasible to argue that, since regulatory considerations are relevant for competition law assessments, the Court should also bear them in mind when scrutinizing claims of objective justifications. Clearly, the Facebook saga of the Bundeskartellamt will also shed light on this controversy since the case precisely deals with whether breaches of data protection regulations can be equated to vehicles for abusive conduct.¹⁹⁶

Before closing this paragraph, it is important to focus on a distinct but nevertheless related issue. As established, the case-law formally accepts that an analysis of abuse under Article 102 TFEU consists of two stages. However, in practice, it is often the case

¹⁹² Dunne (n 186).

¹⁹³ Case C-32/11, *Allianz Hungaria* [2013]; Maximilian Volmar and Katharina Helmdach, ‘Protecting consumers and their data through competition law? Rethinking abuse of dominance in light of the Federal Cartel Office’s Facebook investigation’ (2018) 14 European Competition Journal 195; Lianos (n 96).

¹⁹⁴ For a brief analysis, see Friso Bostoen, ‘The General Court’s *Google Shopping* Judgment: Finetuning the Legal Qualifications and Tests for Platform Abuse’ (2022) Journal of European Competition Law & Practice (advance article).

¹⁹⁵ ‘Google launches fresh appeal to overturn \$2.8 bln fine at top EU court’ (*Reuters*, 20 January 2022) <<https://www.reuters.com/technology/google-launches-fresh-appeal-overturn-28-bln-fine-top-eu-court-2022-01-20/>> accessed 26 March 2022.

¹⁹⁶ See *Meta Platforms and Others (Conditions générales d’utilisation d’un réseau social)* (n 113).

that whether a conduct is abusive is determined primarily in the first stage, and the second stage (justifications) is often relegated to what late Justice Scalia would call a “parchment guarantee”.¹⁹⁷ In light of this finding, the first stage of the analysis presents a conducive environment in which dominant undertakings can rebut claims made against them. Here, the undertakings essentially have two options: substantiate that their conduct is overall incapable of presenting anticompetitive effects à la *Intel*¹⁹⁸, or argue that their behaviour is on the whole competition-enhancing. The latter, in turn, may materialise in two shapes. Firstly, conduct may be, as a whole, pro-competitive if its anticompetitive results are attached to a greater, pro-competitive commercial practice, a situation labelled as the ancillary restraints doctrine. Secondly, as in *Wouters*, undertakings may argue that their conduct, while potentially anticompetitive, pursues legitimate and non-economic goals in a proportionate manner. Here, the premises advanced by the *Wouters* line of cases should not be interpreted as interchangeable with objective justifications. Whereas the former enables the Court to examine whether the conduct in question falls, as a whole, outside the scope of the prohibition on abuse of dominance (first stage analysis), objective justifications belong to the second stage of the analysis and exonerate behaviour whose capability to harm competition has already been established.¹⁹⁹

With regards to the implications of the *Wouters* line of cases, there is the possibility to argue that a particular conduct serves a legitimate aim in a proportionate manner and is thus, on the whole, not within the purview of Article 102.²⁰⁰ In *Wouters*, the Court accepted that the restriction of competition resulting from a ban on partnerships be-

¹⁹⁷ Similarly, some authors refer to the second stage as a mere “theoretical possibility”. See Victoria Mertikopoulou, ‘Evolution of the objective justification concept in European competition law and the uncharted waters of efficiency defences’, in Assimakis Komninos, Ekaterina Rousseva, Christopher Brown, Victoria Mertikopoulou, Gianluca Faella and Antonello Schettino, ‘Efficiency defences in abuse of dominance cases’, May 2014, Concurrences N° 2-2014, Art. N° 65382, available at <<https://www.concurrences.com/en/review/issues/no-2-2014/dossier/efficiency-defences-in-abuse-of-dominance-cases-65382>> accessed 27 July 2022.

¹⁹⁸ Pablo Ibanez-Colomo, ‘Anticompetitive Effects in EU Competition Law’ (2021) 17 Journal of Competition Law & Economics 309.

¹⁹⁹ The two concepts are frequently conflated, and confusion is rampant also with regards to Article 101 TFEU. To that end, see Case C-382/12 P, *MasterCard* [2014], paras 89-95; Pablo Ibanez-Colomo, ‘The ISU case and the SuperLeague: on ancillarity, object and burden of proof in the General Court’s judgment (Case T-93/18)’ (*Chillin’ Competition Blog*, 17 May 2021) <<https://chillingcompetition.com/2021/05/17/the-isu-case-and-the-superleague-on-ancillarity-object-and-burden-of-proof-in-the-general-courts-judgment-case-t-93-18/>> accessed 26 March 2022.

²⁰⁰ It must be pointed out that, even though *Wouters* and related case-law focus on Article 101 TFEU, there is nothing in the way of extending their application to Article 102 TFEU as well. See, in that regard, Ben Van Rompuy, ‘The Role of EU Competition Law in Tackling Abuse of Regulatory Power by Sports Associations’ (2015) 22 Maastricht Journal of European and Comparative Law 179.

tween lawyers and accountants, as instated by the Dutch Bar Association, was an inherent part of the pursuit of a legitimate objective (ensuring proper legal practice).²⁰¹ In light of this doctrine, could platforms argue that a restriction of competition, such as disadvantaging some undertakings operating certain (e.g., ad-funded) business models is inherently affixed to the pursuit of an overall legitimate objective (e.g., improving user privacy)?²⁰² As the law stands, that question should be answered in the negative. As commentators have observed, *Wouters* (and related case-law) requires the involvement, at least to a certain degree, of governmental authority in the enactment of the decisions under scrutiny.²⁰³ The undertaking in question should use delegated governmental power to legitimately pursue non-economic objectives. Implicit support for this argument can readily be found in the judgment itself, whereby the Court states, in paragraphs 105-107 that “[t]he Bar of Netherlands was *entitled* to consider that members of the bar might no longer be in a position to advise...”.²⁰⁴ In other words, the Bar of Netherlands was equipped with the power to engage in *prima facie* anticompetitive conduct that nonetheless qualified as “regulatory ancillarity”.²⁰⁵ Accordingly, for Apple and Google to be able to rely on *Wouters* in justifying the consequences of the changes they introduced, they must be vested with regulatory powers. This conclusion can also be viewed as a reflection of the case-law on objective justifications, as private undertakings’ efforts to safeguard public interests were seen suspiciously.²⁰⁶ However, due to recent regulatory developments under the umbrella of the Digital Services Act, it is unclear whether Google for example, as a very large online platform, is to be deemed as equipped with a certain degree of authority.²⁰⁷ In that regard, search engines such as Google Search may be subject to extended rules, for instance acting as takedown agents of illegal content, or enhancing user privacy.²⁰⁸ If similar powers are granted to such platforms in the final version of the Digital Services Act, there may be valid grounds for arguing that the *Wouters* case-law may also find room for application. Such a scenario

²⁰¹ Case C-309/99, *Wouters* [2002] ECR I-1577.

²⁰² The *Wouters* doctrine is invoked as a valid route for accommodating sustainability agreements as well. See Inderst and Thomas (n 161).

²⁰³ Charlotte Janssen and Erik Kloosterhuis, ‘The *Wouters* case-law, special for a different reason?’ (2016) 37 European Competition Law Review 335.

²⁰⁴ Emphasis added.

²⁰⁵ Richard Whish and David Bailey, *Competition Law* (7th edn OUP 2012).

²⁰⁶ Indeed, the Court in *Hilti* explained that “...it is clearly not the task of an undertaking in a dominant position to take steps *on its own initiative* to eliminate products...” (emphasis added). See *Hilti* (n 185) para 118.

²⁰⁷ Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC (2020) <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020PC0825&from=en>> accessed 26 March 2022.

²⁰⁸ Matthew Newman and Nicholas Wallace, ‘Google Search may come under DSA rules to remove search results as EU regulator seeks compromise’ (*MLex Regulatory Insight*, 24 March 2022) <https://content.mlex.com/#/content/1367520?referrer=search_linkclick> accessed 26 March 2022.

would turn Google from a *de facto* privacy regulator to a *de jure* one, and may constitute a potential unintended consequence of the upcoming legislative measures.²⁰⁹

As to the applicability of objective justifications to the concrete cases of ATT and Privacy Sandbox, there seems to be a mixed picture. As iterated earlier, some commentators argue that examples of objective justifications in European competition law are close to non-existent. Combined with the enmity towards regulatory vigilantism, the chances of an appeal to privacy being upheld as an objective justification are slim. This is unfortunate, as the recently approved Digital Markets Act also lacks provisions capable of allowing the undertaking under scrutiny to escape liability. In fact, the Act differentiates itself from traditional competition law by virtue of the theoretical possibility under competition enforcement to bring forward arguments of efficiencies and objective justifications. Strengthening, or at least clarifying further, the application of objective justification claims in the digital economy would thus be a welcome development. One line of inquiry that awaits explanation is the regulatory compliance claim. As discussed above, since regulatory considerations become increasingly relevant for the establishment of a theory of harm under the first prong of Article 102 TFEU, it should also be possible for regulatory compliance to inform the assessment of the second prong. For instance, in the case of ATT, Apple should be able to rely on the fact that it upholds, and probably goes beyond, the requirements of the GDPR vis-à-vis user privacy to enrich potential arguments of objective justification. Here, one can argue that, owing to their special responsibility not to further distort competition in their market, conduct of dominant undertakings that go beyond the stipulations of another regulatory regime should be viewed as inherently suspicious.²¹⁰ However, it is curious to also note that, in the sustainability arena where tensions with competition law are rife, the Commission decided to take enforcement action against companies preventing the emergence of products that go beyond the requirements applicable regulations.²¹¹ This seems to imply, at least implicitly, that it is also important for the Commission to protect initiatives that venture beyond what the law simply stipulates, with potential implications for the assessment of ATT and the Privacy Sandbox in a prospective investigation.

4 Conclusion

This Article has analysed whether European antitrust law, as it stands, allows the invocation of privacy considerations as efficiency arguments or objective justifications by dominant undertakings to escape liability stemming from conduct that otherwise contravenes competition rules. It is apparent that, with the evolving decisional practice of

²⁰⁹ Geradin, Katsifis and Karanikioti (n 57).

²¹⁰ Balestra and Antonazzi (n 189).

²¹¹ See the *Car Emissions* case (n 158).

the Commission, European competition enforcement slowly abandons strict separation of privacy and competition in favor of qualified integration. This line of thinking is also being embraced by the Union Courts as well. Accordingly, as long as privacy considerations are not put forward as standalone arguments, but come affixed to an overarching theory of harm, they can be considered in competition assessments. Specifically, privacy may form an element of abusive behaviour; at the same time, symmetrical application of the law demands that it may also be cognizable as a potential justification, such as through efficiency arguments. Furthermore, privacy is bound to become pertinent also by virtue of the twin transition, through which the EU is travelling at the moment. Recent developments that aspire to tackle the complex relationships between sustainability and competition should also materialise with regard to privacy as well. However, in order to become successful, efficiency arguments need to satisfy the cumulative criteria laid down in the case-law, not least the consumer choice criterion. Accordingly, improvements in product quality, such as the use of privacy-enhancing technologies and practices, are unlikely to exonerate abusive conduct if coupled with reductions in the number of available alternatives for consumers.

In addition to efficiencies, the Article also touched upon the concept of objective justifications in unilateral conduct cases. The analysis of the limited case-law revealed that European competition law is generally suspicious of private undertakings assuming the role of guardians of public policy. However, even though regulatory vigilantism is prohibited, it is not obvious how the existence and breadth of regulatory obligations incumbent upon dominant undertakings influence the legitimacy of private initiatives to endeavor for the greater good. The development of the case-law, coupled with recent regulatory developments at the Union level, may bring about unforeseen consequences that may allow for a more relaxed interpretation of the concept of objective justification in digital markets.

Overall, increasing levels of complexity in the digital economy should induce enforcers to proceed with caution when considering novel additions to the antitrust toolkit, but nevertheless should not serve as a pretext for hostility towards rigorous scrutiny of dominant firm behaviour. In the near future, it is apparent that the tensions between privacy and competition will materialise more frequently. The trick is to ensure that successful firms, having been urged to protect and promote user privacy, are not readily turned upon by means of antitrust enforcement, all the while ensuring that they also do not engage in regulatory gaming. By examining the case of single-firm conduct in European competition law, this Article has contributed to an emerging strand of literature that has only recently started to analyse these intricacies.