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What competition law can do for data privacy (and vice versa)

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ABSTRACT

Attempts to temper big technology firms' outsized influence in online advertising demonstrate a convergence of opinions between experts as to the extent that the activities of such companies impinge on aspects of citizens' lives, ranging from the loss of privacy to instances of exclusionary behaviour by incumbents drawn up to handicap competitors. But cutting back big technology firms' influence through competition law risks inconsistency when different values such as privacy and competition are engaged. This article presents a taxonomy of competition enforcement strategies that can help navigate disputes in online advertising. It reveals that most inconsistencies are the result of an effort in competition policy to divide up separate competition enforcement strategies into mutually exclusive accounts. If these accounts are viewed as complements rather than as substitutes, most inconsistencies disappear. The article offers a shared understanding of competition law and data privacy and seeks to cultivate a more cohesive and nuanced policy debate.

1. Introduction

Debates around big technology firms' outsized influence on the economy and society are often framed as if they belonged to separate realms such as privacy *or* competition law. Those who view privacy and competition not as separate but as overlapping notions tend to be required to trade one set of values off against another. Take as examples the dispute around Facebook's collection of third-party data without users' knowledge and consent,[1] Google's plan to replace third-party cookies in its browser,[2] or Apple's update to its operating system requiring users to assent to being tracked to render it more difficult for other actors to acquire consumers' data.[3] While Facebook's practices have been condemned for violating competition law because they weakened users' privacy, Google and Apple have been accused of breaching competi-

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[1] Bundeskartellamt, Decision of 6 February 2019, B6-22/16; OLG Düsseldorf, Order of 26 August 2019, VI-Kart 1/19 (V); Bundesgerichtshof (June 23, 2020) KVR 69/19 DE:BGH:2020:230620BKVR69.19.0; Federal Trade Commission, 'FTC Sues Facebook for Illegal Monopolization' (2020) Press Release, 9 December 2020.

[2] Chetna Bindra, 'Building a Privacy-First Future for Web Advertising' (2021) Press Release, 25 January 2021; Sam Schechner, 'Google Pursues Plan to Remove Third-Party Cookies' (2021) The Wall Street Journal, 25 January 2021, sec Tech.

[3] Jack Nicas, 'Apple's New Devices Target Markets Led by Smaller Rivals' (2021) The New York Times, 20 April 2021, sec Business; Joanna Stern, 'iOS 14.5: A Guide to Apple's New App-Tracking Controls' (2021) The Wall Street Journal, 26 April 2021, sec Tech.

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tion norms because they intend to bolster users' privacy protections.[4]

Although recent case law provides clear examples of how competition law can engage with privacy in a convergent way, competition policy frequently embraces this perspective because it typically envisions one particular case, and envisioning one single case regularly exempts policymakers from considering a set of different practices together. But the issue is more intricate. Just as scholars of other disciplines belong to different cohorts, competition law commentary also splits into distinct groups. Some emphasize producer sovereignty; others insist on promoting consumers' autonomy.[5] Some maintain that competition law necessitates maximizing consumer welfare; others highlight the maintenance of effective competition;[6] and again others are not even certain whether these objectives may suitably be seen as competition law's primary (or single) goals.[7] Policymakers even diverge with respect to their favoured set of remedies when confronting a particular problem. Some stress the prevention of certain acts from occurring; others presume that the best remedy is deterrence; still others maintain that the principal way to reign in anti-competitive behaviour is through structural measures such as break-ups and divestitures.[8] To be sure, the divergence of opinion is not unique to competition law, and the fact that this divergence has been catalysed by novel issues arising from digital markets does not altogether render the situation different. But the mixture of several characteristic features of digital markets, particularly their propensity to tip in favour of incumbent actors as a result of the cumulative effects of strong economies of scale and scope, network effects, and the characteristics of big data, coupled with a significant asymmetry of information between dominant undertakings and authorities, plausibly exacerbates the problem. Although it is the task of each decision-maker to be procedurally accurate and cautious, and thus to adjudicate on a specific case, authorities and courts are prone to focus on a limited set of facts at hand, rendering exceptionally narrow decisions and imposing tightly delimited remedies that provide little guidance in related contexts.[9]

A central argument in support of this kind of 'minimalism' is that authorities and courts should focus on one single strategy of competition law enforcement precisely because they lack the knowledge that is required to make rules to govern unknown future circumstances in dynamic settings.[10] But decisions taken by authorities and courts nonetheless affect the policies adopted by dominant incumbent actors, thereby shaping the broader legal and economic landscape.[11] For this very reason, authorities with limited knowledge may adopt instead a blend of different enforcement strategies available – *because* they are sometimes ignorant. Although this may at first seem counterintuitive, adopting a blend of different enforcement strategies enables authorities and courts to confront incentives to rule broadly while at the same time working towards greater convergence of different pertinent values such as privacy and competition.

To elucidate this point, the article situates the current discussion about the proper workings of online advertising markets within a common frame – the two main categories emerging from Albert Hirschman's well-known work on exit and voice.[12] Viewed from the perspective of consumers, scholars predominantly worry about providing them with an adequate level of influence on the market. The solutions they propose almost exclusively present consumers with an exit option,

[4] See eg, Attorney General of Texas, 'AG Paxton Files Antitrust Lawsuit Against Facebook' (2020) Press Release, 9 December 2020; Attorney General of Texas, 'AG Paxton Leads Multistate Coalition in Lawsuit Against Google for Anticompetitive Practices and Deceptive Misrepresentations' (2020) Press Release, 16 December 2020; Second Amended Complaint, 'In re: Google Digital Advertising Antitrust Litigation' (2021) Civil Action No.: 1:21-md-03010-PKC, 22 October 2021; Competition and Markets Authority, 'CMA to Investigate Google's "Privacy Sandbox" Browser Changes' (2021) Press Release, 8 January 2021; European Commission, 'Commission Opens Investigation Into Possible Anticompetitive Conduct by Google In The Online Advertising Technology Sector' (2021) Press Release, 22 June 2021; Competition and Markets Authority, 'Google Probed Over Potential Abuse of Dominance in Ad Tech' (2022) Press Release, 26 May 2022; Bundeskartellamt, 'Bundeskartellamt Reviews Apple's Tracking Rules for Third-Party Apps' (2022) Press Release, 14 June 2022; Autorité de la concurrence, 'Meta Makes Commitments to the Autorité de la concurrence' (2022) Press Release, 16 June 2022; Thibault Larger and Laura Kayali, 'Brussels Zeroes In On Google's AdTech Business' (2021) Politico, 19 January 2021; Sebastian Herrera, 'Facebook to Counter Apple Privacy Update With Its Own Prompt' (2021) The Wall Street Journal, 1 February 2021, sec Tech.

[5] Robert H Lande, 'Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged' (1982) 34 Hastings Law Journal, 65; Paul Nihoul, 'Freedom of Choice – The Emergence of a Powerful Concept in European Competition Law' in Paul Nihoul, Nicolas Charbit and Elisa Ramundo (eds), *Choice – A New Standard for Competition Law Analysis?* (Concurrences, 2016), 9–40.

[6] Joshua D Wright and Douglas H Ginsburg, 'The Goals of Antitrust: Welfare Trumps Choice' (2013) 81 Fordham Law Review, 2405; Tim Wu, 'After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice' (2018) Competition Policy International, 7 October 2018; Marshall Steinbaum and Maurice E Stucke, 'The Effective Competition Standard: A New Standard for Antitrust' (2019) 86 University of Chicago Law Review, 595.

[7] See on the various aspects of this discussion Ariel Ezrachi, 'Sponge' (2017) 5 Journal of Antitrust Enforcement, 49; Howard Shelanski, Antitrust and Deregulation (2018) 127 Yale Law Journal, 1922.

[8] George J Stigler, 'The Economic Effects of the Antitrust Laws' (1966) 9 Journal of Law and Economics, 225; Zephyr Teachout, *Break 'Em Up. Recovering Our Freedom From Big Ag, Big Tech, and Big Money* (All Points, 2020).

[9] Stacey L Dogan and Mark A Lemley, 'Antitrust Law and Regulatory Gaming' (2009) 87 Texas Law Review, 685; Mark A Lemley and Robin Feldman, 'Atomistic Antitrust' (2021) UC Hastings Research Paper.

[10] See for a summary of this argument Douglas H Ginsburg, 'Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making' (2010) 33 Harvard Journal of Law and Public Policy, 217.

[11] While excessive case specificity can be observed, authorities also desire to move the law forward in certain directions. This becomes apparent, for instance, in relation to the Google decisions by the European Commission that were not based on established types of abuse but harkened back to general principles of non-discrimination and leveraging, see section 2.2. below.

[12] Albert O Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press, 1970).

that is, an opportunity to switch between different alternative offers, as if no other possibility existed.[13] The image of the perfectly competitive market, for instance, is exit-centred to the extent that sellers are unable to displease their customers because consumers will swiftly shift from one supplier to another if they are dissatisfied with the products and services they receive.[14] And if switching is impossible or unworkable, second-best solutions are supposed to reinstate the consumers' ability to switch.[15]

Switching, however, is not the only option available to consumers seeking influence on the market. In highly concentrated and increasingly personalized marketplaces, consumers can exert an influence over product manufacturers and sellers by helping to administer them.[16] Authorities and courts regularly investigate digital markets on behalf of consumers to ensure their views determine the market's state of quality equilibrium.[17] Admittedly, a large part of the existing doctrine presumes that competition law involves consumers only indirectly because its stated goals reside in curbing dominant undertakings' anti-competitive practices rather than to render consumers more adept at making their own decisions. If competition law involves 'consumers', the law arguably refers to actors who purchase goods and services, not to those who are afflicted by a lack of bargaining power, information asymmetries or trivial collective action problems. What is more, actors who are subject to competition law are required to adhere to established rules and tests that identify various anti-competitive practices, ranging from unlawful agreements to illegal unilateral conduct.[18] This article does not disagree with this account. Rather, it makes the point that framing the issue from the perspective of consumers may help address concerns that commentators in the digital economy regularly ponder over. Placing an emphasis on consumers' vantage points puts authorities and courts in a position to attend to the demand side of the market in which consumers' preferences serve as ends and guides of production rather than emphasizing only the refurbishment of the technological supply side in which producers determine the course of the economy. Significantly, in markets that progressively are characterized by a high degree of concentration, product personalization and segmentation of consumer spending, consumers gradually begin to attend to product attributes such as privacy, rendering quality an essential aspect of competition.[19]

When viewed as constituents of the market, consumers can work to adjust – albeit only indirectly through administrative action – a product manufacturer's policy from within a particular segment rather than simply challenge it from without. For instance, a competition authority can condemn a digital platform's policy to require independent developers to sell their applications exclusively through the platform's app store if taking big cuts off each transaction significantly harms consumers;[20] a court can modify a social media platform's technical architecture to enable users to gain control of the collection, storage and transmission of their personal data;[21] or an authority can hold a dominant search engine liable for its avowed editorial policy when systematic surreptitious deviation from this policy demonstrably thwarts users' behaviour.[22] More pertinently, switching is not the only path of influence for consumers; consumers can also exert an influence in their enduring arguments with producers because they are the market's agents.[23] And while consumer influence as a result of administrative action is increasingly put to use in practice, it is precisely this sort of influence that has mostly been ignored in debates around privacy and competition.

Recognizing agency as a form of consumer influence enables competition policy to resolve a number of seemingly irreconcilable contradictions relating to privacy and competition. Agency combines features of both exit and voice – affording consumers the decision-making authority usually associated with switching and the standing of a segment's members ordinarily linked with integration. Perhaps to a greater degree than anything else, agency affords consumers the authority to

[13] William H Hutt, 'The Concept of Consumers' Sovereignty' (1940) 50 Economic Journal, 66; Thomas B Leary, 'The Significance of Variety in Antitrust Analysis' (2000) 68 Antitrust Law Journal, 1007.

[14] Paul Belleflamme and Martin Peitz, *The Economics of Platforms. Concepts and Strategy* (Cambridge University Press, 2021).

[15] David M Kreps, *A Course in Microeconomic Theory* (Princeton University Press, 1990), 17.

[16] Adrian Kuenzler 'Competition Law as a Catalyst for Collective Market Governance: Gauging the Discursive Benefits of Intensified Administrative Action' (2022) 41 Yearbook of European Law. This is an argument about creating a productive extent of cohesion between market actors and consumers. This article focuses on consumers influencing product manufacturers and sellers to render markets more contestable. The same basic argument can be made with regard to consumers who wish to influence product manufacturers and sellers to safeguard privacy, Adrian Kuenzler, 'On (Some Aspects of) Social Privacy in the Social Media Space' (2022) International Data Privacy Law, 63.

[17] Ibid.

[18] Jonathan Faull and Ali Nikpay, *The EU Law of Competition* (3rd edn, Oxford University Press, 2014), 191, 228–235 (individuals acting as final consumers never constitute an 'undertaking' but competition law is thought to benefit consumers at least indirectly). The term 'consumers' is not used consistently in competition law commentary and may denote 'direct or indirect users' (ie 'customers of the parties [to an agreement] and subsequent buyers') or 'final consumers', see Guidelines on the Application of Article 81(3) of the Treaty, OJ 27 April 2004, C 101/97, para 84.

[19] Ariel Ezrachi and Maurice E Stucke, 'The Curious Case of Competition and Quality' (2015) 3 Journal of Antitrust Enforcement, 227; Maurice E Stucke and Ariel Ezrachi, 'When Competition Fails to Optimize Quality: A Look at Search Engines' (2016) 18 Yale Journal of Law and Technology, 70; Adrian Kuenzler, 'Competition Law Enforcement on Digital Markets – Lessons from Recent EU Case Law' (2019) 7 Journal of Antitrust Enforcement, 249.

[20] Rechtbank Rotterdam, 24 December 2021, ROT 21/4781 en ROT 21/4782; European Commission, 'Statement of Objections to Apple on App Store Rules for Music Streaming Providers' (2021) Press Release, 30 April 2021; see also Apple Inc. v Pepper, 139 S. Ct. 1514 (2019).

[21] Bundesgerichtshof (June 23, 2020) KVR 69/19.

[22] Case AT.39740, *Google Search (Shopping)*, 27 June 2017, C(2017) 4444 final; Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, 10 November 2021.

[23] Amartya Sen, 'Rationality and Social Choice' (1995) 85 American Economic Review, 1; Albert O Hirschman, *Shifting Involvements. Private Interest and Public Action* (Princeton University Press, 1982); see also Regulation (EU) 1/2003 of 16 September 2002 on the Implementation of the Rules Laid Down in Articles 81 and 82 of the Treaty, OJ L 1/1, Article 7(2).

readjust their favoured segments, and so has distinctive implications for online advertising: it puts consumers in a position to integrate data privacy into the market while simultaneously bringing about an increase in market contestability.

The article is divided into two parts. The first Part (2) sets the stage by considering three principal enforcement strategies available: the consumer sovereignty account, the regulatory account and consumer influence through administrative action. As a matter of descriptive illustration, we can discern numerous instances of each enforcement strategy in practice, calling into question the idea that we are required to embrace one single theory to govern all of them. The second Part (3) pinpoints the reasons why heterogeneity is important – why it would be constructive if competition policy debates unequivocally acknowledged the presence of a number of different enforcement strategies working together – and to what extent the operation of digital markets would benefit from this insight. The article concludes with a summary of findings (4).

2. Competition enforcement strategies in practice

Legal doctrine has long nourished a respectable diversity in relation to the goals that competition law promotes.[24] Authorities and courts rehearse these goals as frequently as legal and economic scholarship does.[25] The most patent rift in competition policy debates, however, revolves around the *ways* in which those goals can be attained. In order to establish administrable tests for authorities and courts that are required to assess alleged anti-competitive restraints – and to prevent competition policy from articulating or applying anything akin to cloaked protection of competitors instead of competition – there is some consensus today that competition law must be viewed through the lens of the consumer, even if the approaches placing consumers at the centre of antitrust analysis are not as vocal, pervasive or as dominant as they have been in the past.[26] And ensuring that the market itself caters to consumers' tastes truly and well means that consumers, as the constituents of the market, will neither be better off nor able to meaningfully exercise a choice, if they lack effective avenues of influence.[27] A result of this straightforward observation is that competition law contains no fewer than three distinct accounts that each define the form consumer influence can take. Below is a vastly simplified typology, putting forth a practical way to get a handle on these different notions of consumer influence in practice. The idea is to offer to the reader, in a synoptical exposition, a clearly arranged outline to easily navigate the article's propositions (Table 1).

2.1. *Sovereignty and regulation*

Competition law's principal account is based on sovereignty and switching. By and large, advocates of sovereignty maintain that markets can thrive only if consumers have the ability to choose between different alternative offers (ie, different distinct products and services).[28] Proponents of sovereignty therefore typically envision contestable markets with low prices and high output in which consumers can always switch to readily available alternatives.[29] Even in highly concentrated digital markets, most of the time, there are thought to be alternatives, since competition by other actors is just one click away.[30] If switching nonetheless ends up being impracticable or turns out to be ineffective, competition law requires structural separation to reinstate consumers' choices, and to lessen the adverse effects of dominant incumbent actors on other players.[31]

The sovereignty account's main cognate are regulatory arrangements that aim to preserve consumer switching through mandated portability or interoperability measures. Such measures intend to make it easier for actors to compete, not by engaging authorities or courts ex post, but by resorting to the legislator as the ex ante underwriter of sovereignty and choice.[32] Particularly in data-driven markets, policymakers have put forth proposals to invigorate competition and to overcome the durability of data-driven monopolies by establishing and improving conditions for data portability and switching.[33] While

[24] See sources quoted (n 5–7).

[25] Eleanor M Fox, 'The Efficiency Paradox', in Robert Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on US Antitrust* (Oxford University Press, 2008), 77–88.

[26] George L Priest, 'The Abiding Influence of the Antitrust Paradox: An Essay in Honor of Robert H. Bork' (2008) 31 Harvard Journal of Law and Public Policy, 455; see particularly Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books, 1978); Richard A Posner, Antitrust Law (2nd ed, University of Chicago Press, 2009).

[27] Adrian Kuenzler, *Restoring Consumer Sovereignty. How Markets Manipulate Us and What the Law Can Do About It* (Oxford University Press, 2017).

[28] Neil W Averitt and Robert H Lande, 'Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law' (1998) 10 Loyola Consumer Law Review, 44.

[29] Herbert Hovenkamp, 'Is Antitrust's Consumer Welfare Principle Imperiled?' (2019) 45 Journal of Corporation Law, 65.

[30] Larry Page, 'Competition is One Click Away' (2012) Forbes, 14 October 2012. Whether a dispute concerns dominant search engines such as Google, social networking platforms such as Facebook or dominant app stores akin to the one operated by Apple, consumers can always switch to other places like Bing, Yahoo!, Twitter, LinkedIn, and Google Play Store, or even download their applications from competitors' desktop and mobile operating systems if they are dissatisfied with a manufacturer's offer or disagree with its terms of service.

[31] Elaborate defences are provided by Teachout (n 8); Rory van Loo, 'In Defense of Breakups: Administering a "Radical" Remedy' (2020) 105 Cornell Law Review, 1955; Tim Wu, *The Curse of Bigness. Antitrust in the New Gilded Age* (Columbia Global Reports, 2018).

[32] European Commission, 'A European Strategy for Data', COM(2020) 66 final, 11-20; but note that portability and interoperability can also be mandated by a court, see U.S. v Trans-Missouri Freight Association, 166 U.S. 290 (1897); U.S. v Terminal Railroad Association of St. Louis, 224 U.S. 383 (1912); Associated Press v U.S., 326 U.S. 1 (1945); U.S. v AT&T Co. 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom Maryland v U.S., 460 U.S. 1001 (1983); MCI Communications Corp. v AT&T Co., 708 F.2d 1081 (7th Cir. 1983); U.S. v Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001); Rambus, Inc. v FTC, 522 F.3d 456 (D.C. Cir. 2008); Alaska Airlines, Inc. v United Airlines, Inc., 948 F.2d 536 (9th Cir. 1991).

[33] Specific data portability rights are enshrined in Regulation (EU) 2016/679 of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Move-

Table 1 – Charting different avenues of consumer influence.

	Envisioned Type of Agency	Institutional Organization	Governing Mechanism	Remedies	Scope of Application/Outcomes
Consumer Sovereignty Account	Sovereignty as a matter of fact	(If necessary) ex post intervention by authority or court	Switching	Restoring/improving market contestability by prohibiting anti-competitive conduct	Safeguarding competition as a result of preserving several different alternative offers
Regulatory Account	Legally imposed sovereignty	Ex ante regulation	Switching	Interoperability measures Data portability Structural separation and divestitures*	
Consumer Influence through Administrative Action+	Affiliation and co-dependence	Ex post intervention on behalf of consumers#	Integration	Adjusting terms and conditions of agreement Adjusting a platform's design or its technical architecture Realigning market incentives by way of modifying predominant business models$	Ensuring quality competition High market concentration Switching turns out to be impracticable, unworkable or undesirable Reconciling different pertinent values such as privacy and competition

* Each of these remedies can also be mandated by a court and would then be credited with the consumer sovereignty account.
+ This does not exclude private enforcement actions in some jurisdictions.
# But note that the newly proposed DMA, for instance, contains a number of provisions that not only help to promote switching but that also resort to integration: see Sections 2.2. and 2.3.
$ For additional examples of distinct kinds of remedies falling into this category, see sources quoted in notes 16, 19, 40, 43.

in terms of institutional organization, the sovereignty and regulatory accounts must be seen as antagonistic, they are indeed coined by deep-rooted relations. Although the regulatory account turns to policymaking and legislation to ensure effective avenues of consumer influence, it pictures agency in essentially the same manner as do advocates of sovereignty. The ability of consumers to switch between different options is safeguarded by mandated interoperability or established rights to data portability, and in effect is evidently similar to the de facto ability of consumers to choose between different offers hailed by sovereignty's proponents. Both accounts consider switching to be the foremost mechanism for consumers to steer markets towards the new and the better. With respect to privacy, for instance, an almost uncontested argument is that reinstating the capacity of consumers to move to other places – whether this is achieved by divesting dominant platforms, structurally separating their core services, imposing interoperability or data portability measures – encompasses the main, if not the only, path for other firms to compete in terms of more privacy-protective alternatives.[34] That argument elucidates the leading theory of how competition is supposed to work: as we create conditions for consumers to make independent product choices, incentives to compete emerge, and companies are induced to lower prices, increase output and eventually improve quality and customer satisfaction.[35]

But in concentrated marketplaces, the link between the ability of consumers to switch and the market's outcomes are at times reversed. For instance, where big technology firms such as Google or Facebook dominate the market for advertising space (either because they benefit from superior access to user data to target advertisers or because the number of users renders them a must-have target point for advertisers), these firms will naturally charge higher prices for users' data, offer fewer advertisements or sell a smaller amount of personal information. Here, making advertising markets more contestable – by divesting dominant companies or affording other actors unobstructed access to their accumulated data stock – will induce more firms to compete, which in turn will sell a greater amount of user data at lower prices.[36] Making digital advertising markets more contestable will then diminish the satisfaction of consumers who value privacy. Yet a hands-off approach, by contrast, will also fail to bring better results; it will further entrench big platforms' overwhelming dominance, and will eventually enable them to stifle other firms' abilities (advertisers, small competitors, publishers) to compete on offering more privacy-protective alternatives.[37] The issue is not that in markets such as these the sovereignty

ment of Such Data (General Data Protection Regulation), OJ L 119/1, Article 20; Directive (EU) 2015/2366 of 25 November 2015 on Payment Services in the Internal Market, OJ L 337/35, Articles 66–67; Directive (EU) 2019/944 of 5 June 2019 on Common Rules for the Internal Market for Electricity, OJ L 158/125, Article 23. Regarding data access rights, see Regulation (EU) 2017/1926 of 31 May 2017 on the Provision of EU-Wide Multimodal Travel Information Services, OJ L 272/1, Articles 4–5; Directive (EU) 2019/770 of 20 May 2019 on Certain Aspects Concerning Contracts for the Supply of Digital Content and Digital Services, OJ L 136/1, Article 5.

[34] Sources quoted (n 31).

[35] Hovenkamp (n 29).

[36] Erika M Douglas, 'The New Antitrust/Data Privacy Interface' (2021) 130 Yale Law Journal Forum, 647; Mark A Lemley, 'The Contradictions of Platform Regulation' (2021) 1 Journal of Free Speech, 303.

[37] Ibid.

and regulatory accounts make no sense as a matter of competition law. Both accounts are based on a similar notion of how markets operate – one that highlights sovereignty and switching. They pivot around what Albert Hirschman would have referred to as 'exit' – affording space to consumers to choose between alternatives that are different and detached from what has already been presented.[38] But while the emphasis of the sovereignty and regulatory accounts is on how to best preserve consumer choice between several distinct alternatives, both arrangements inevitably are indifferent towards the outcomes that may ensue in exceptional circumstances. The sovereignty and regulatory accounts represent what competition ordinarily stands for; they are markedly similar in that they highlight the necessity to provide consumers with an opportunity to switch. Their differences are focused on the means that are required to defend – almost mechanically – an exit option, but they fail to produce benign outcomes when a multitude of different values such as privacy and competition are engaged.

2.2. *Consumer influence through administrative action*

Competition authorities and courts that investigate big technology markets have underscored an alternative form of consumer influence. Those authorities progressively give permission to consumers to adjust, by way of administrative action, big technology firms' terms and conditions of agreement, their methods of doing business, and the design of their favoured products.[39] They help to put into effect consumers' points of view where switching would otherwise turn out to be ineffective or unworkable.[40] We may refer to this form of authority as 'voice' and distinguish it from 'exit'.[41] Competition law enforcement that assumes this form stands in stark contradiction to the one espoused by advocates of sovereignty and most proponents of the regulatory account.[42]

Voice affords consumers the capacity to exert authority on the market as faithful affiliates of a segment, not as independent sovereigns.[43] As affiliates and administrators of a segment, consumers have a great amount of sway in shaping the market's outcomes. The sphere in which they exercise authority is not the discrete decision-making space envisioned by advocates of sovereignty and proponents of the regulatory account. Consumers exercise authority from within a segment rather than from without. Their influence resembles that of a member of an organization, not that employed by a disengaged contender pitting themselves against the segment.[44]

Here, consumer influence rests on integration, not on separation, that is, on co-dependence rather than on self-reliance.[45] Consumers do not behave as isolated and detached actors, and the influence they exercise is not entirely their own. Instead, consumers act as constituents of a complex ecosystem of products and services that together make up a segment. Where product manufacturers such as Google or Apple have created a whole array of integrated product offerings, authorities and courts, on behalf of consumers, adjust the platforms' terms and conditions of service – including, at least partly, the platform's method of doing business – by letting users have a say on the design of the walled gardens that those platforms have created. Consumers therefore exercise authority as insiders, not outsiders of a segment. They do not resort to switching; instead, they exert a powerful variety of voice – the authority not just to criticize and protest against a platform's policy but to help calibrate and adjust it.[46] Even though consumers are not acting on their own, they assume the role of an exceptionally significant decision-maker – one that represents a platform's affiliate – while the authority they exercise is that of contender, the authority we associate with integration, not the one we correlate with switching.

It is certainly not unreasonable to object that this avenue is a dubious description of consumer influence in a free market economy. Is the authority of an affiliate a form of influence at all? What is its significance when we contrast it with switching and consumers making decisions on their own? A recent set of case law demonstrates that the consumer's influence as affiliate and contender is fairly significant in concentrated data markets. Even though the consumer's influence as affiliate is distinct from that of the sovereign, it is influence nevertheless. Above all, where big technology platforms' business models are built on the collection, storage and transmission of customer data, such platforms crucially depend on users who at

[38] Hirschman (n 12).

[39] Some commentary insists that the role of competition authorities supersedes the actual influence of consumers in the procedure of such cases and that most cases have been initiated as a result of complaints by competitors, not by consumer grievances. As compelling as this view may be, in the digital economy, authorities and courts progressively give space to the consumer's voice. For instance, while complaints by firms might have been the predominant concern in initiating investigations such as *Facebook* or *Google Search (Shopping)*, the harm that the authorities addressed crucially pertained to quality degradations in markets where there was no price and where consumer switching turned out to be impracticable or ineffective. Here, authorities and courts were called upon to ensure that consumers can attain what they typically achieve through switching – that they have a chance to get their views into the mix of market offers, an opportunity to press their issues on the agenda and to force leading actors to engage. Attending to consumers' views proved particularly useful at the remedy stage in which authorities worked to enable users of the companies' platforms to choose between different privacy settings or forced them to fulfil their role in satisfying consumers' expectations, Kuenzler, 'Competition Law as a Catalyst for Collective Market Governance: Gauging the Discursive Benefits of Intensified Administrative Action' (n 16).

[40] For a sampling of this work, see Adrian Kuenzler, 'Advancing Quality Competition in Big Data Markets' (2019) 15 Journal of Competition Law and Economics, 500.

[41] Hirschman (n 12); Hirschman (n 23).

[42] But see Regulation (EU) 2022/… of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector and Amending Directives 2019/1937 and 2020/1828 (Digital Markets Act) (DMA) (containing provisions that not only help to promote switching but that also resort to integration).

[43] Adrian Kuenzler, 'Direct Consumer Influence – The Missing Strategy to Integrate Data Privacy Preferences into the Market' (2020) 39 Yearbook of European Law, 423; sources quoted (n 16).

[44] Hirschman (n 23).

[45] Sources quoted (n 16).

[46] Bundesgerichtshof (June 23, 2020) KVR 69/19; Case AT.39740, *Google Search (Shopping)*; Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, 10 November 2021.

least partly generate the platform's output. Here, switching by consumers will give rise to a decline in the platform's quality. Such a decline may lead to switching by other consumers, and will cause additional quality deteriorations, and so forth.[47] Integration then does not just complement the sovereignty account; it uncovers an additional set of leverage points that consumers can apply to their objectives. A case in point is the refusal, prior to the German Federal Cartel Office's (FCO) investigation into Facebook's data-gathering practices, by thousands of Facebook users to accept the company's new privacy policy that seemed to bestow ownership on Facebook over any content that users had uploaded to the network.[48] While resistance by consumers on their own could not have forced a decisive policy change on the part of Facebook,[49] the FCO's ensuing investigation worked towards compelling the platform to take steps to reassess, and absorb, consumers' vantage points, and to adjust the platform's policy in a manner that would otherwise scarcely have been possible in a concentrated marketplace.[50] Similar concerns appeared to have inspired the European Commission's (EC) *Google (Shopping)* investigation to condemn a dominant search engine's discriminatory treatment of competitors vis-à-vis its own complementary services in its search results. While the EC found that users were attracted by the rank, not the actual relevance, of search results, and users had simultaneously been shown to trust in the perceived editorial integrity of Google's brand to rank search results by relevance, the EC held the platform was liable to its users' calls rather than simply falling back on their commonly supposed ability to switch to other (readily available) services. As in the FCO's *Facebook* investigation, here, the EC worked towards ensuring that users could continue to provide the platform with useful information about their search behaviour while at the same time reinstating their ability to choose from search results that best revealed their preferences and expectations, given that they held the view that search results were listed on the basis of a measure of relevance that was applied equally to the ranking of competitors' products.[51] We also see authorities acting on behalf of users as affiliates in ongoing investigations, for instance, when they scrutinize accusations that Apple in its App Store systematically downgrades competitors' promotions or makes them more expensive; that Apple allegedly attempts to limit the ability of competitors to inform users of alternatives, or even blocks competitors from presenting their offers;[52] or when they probe Amazon's purported use of customer data to exploit its position as a platform and a seller, by appropriating business information of third-party dealers to privilege its own private label products to ultimately supplant those of rivals.[53] In each of these examples, authorities have identified concerns relating to the segment's quality – issues that consumers as affiliates and contenders disapprove of – and the consumer's permission to push back, even to resist, the platform's policy, is thought to subsist precisely because they are members, not outsiders, of the segment.[54]

Consumers are also influential in exercising authority in this way because they benefit from being able to express the gist of their concerns precisely to the platform. The consumers' status as insiders gives them standing to contest (parts of) the platform's policy with which they are dissatisfied. Rather than choosing to switch to another supplier, consumers can express opposition in relation to their favoured segment, ground their demands on an authority's or court's past skill, knowledge and expertise, and convey disapproval in a manner that is clearly intelligible to the pertinent decision-makers.[55] Furthermore, consumers who voice dissatisfaction through administrative action do not have merely the ability to contest their favourite segment but also have the means for doing so. As the platform's members whose voice is articulated by an authority or court, consumers are in a position to make use of the materials and facts they legitimately obtained through administrative action to prevail in their dispute.[56]

Consumers are also able to set the agenda in this way, compelling market leaders to partake in implementing a strategy the market might otherwise fail to adopt. Although switching, in ordinary circumstances, is viewed as the appropriate avenue for bringing market incentives into line with what consumers actually desire, in concentrated marketplaces, dominant actors typically do not have to adjust. Consider again Facebook's terms of service. Prior to the FCO's investigation,

[47] Kuenzler (n 40).

[48] 'Facebookers Approve the New Policy, but Still Hate Redesign' (2009) The New York Times, 24 April 2009, sec Technology; 'Facebook Tries to Become a Democracy' (2009) The New York Times, 26 February 2009, sec Technology.

[49] Rebecca Tushnet, 'Content Moderation in an Age of Extremes' (2019) 10 Journal of Law, Technology and the Internet, 1; Eric Goldman, 'Facebook Isn't – And Shouldn't Be – A Democracy' (2012) Forbes, 17 December 2012, sec Tech.

[50] Bundesgerichtshof (June 23, 2020) KVR 69/19. The dispute is ongoing but awareness among users with respect to Facebook's data-gathering practices is growing. Perhaps because of delays in implementing consumers' demands, user activity is shrinking despite the size and significance of Facebook's network, Alison Durkee, 'Facebook Faces Shrinking Popularity, But Researchers Warn It May Be "Too Big to Fail"', Forbes, 11 August 2020, sec Business.

[51] Case AT.39740, *Google Search (Shopping)*; Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, 10 November 2021, paras 561–563.

[52] Case AT.40652, *Apple – App Store Practices (e-books/audiobooks)*, ongoing; Case AT.40437, *Apple – App Store Practices (music streaming)*, ongoing.

[53] Case AT.40462, *Amazon Marketplace*, ongoing; Case AT.40703, *Amazon Buy Box*, ongoing.

[54] Case AT.39740, *Google Search (Shopping)*, paras 312–313. Here, the analogy of consumers being members of a segment suggests insight is achieved as a result of institutional channels of influence, akin to a principal-agent relationship, rather than resulting in mistake because the defining feature of an organization is centralized coordination, Hirschman (n 12).

[55] Kuenzler (n 43).

[56] Massimo Motta, Martin Peitz and Heike Schweitzer, *Market Investigations: A New Competition Tool for Europe?* (Cambridge University Press, 2022). Current reforms in the UK, Germany and the EU, for instance, afford authorities a greater extent of investigative powers in relation to big technology companies, Competition and Markets Authority, 'New Watchdog to Boost Online Competition Launches' (2021) Press Release, 7 April 2021; Bundeskartellamt, 'Amendment of the German Act against Restraints of Competition' (2021) Press Release, 19 January 2021; European Commission (n 42). This does not mean that the role of competition authorities in enforcing consumer influence is treated as secondary to consumers' role in administrative proceedings, but the actual influence of consumers in the procedure of these cases – particularly in finding proper remedies – is indeed growing.

as a result of growing pressure by policymakers to investigate Facebook's business practices, Facebook involved its users in helping to design the platform's terms, but only to the extent that such proposals were consistent with Facebook's advertising-driven business model. Owing to the platform's dominance, Facebook was in a position to silence users' calls before their criticism could reach the market and managed to preclude the market mechanism to attune the platform's policies to the expectation of consumers.[57] Consumers who are given an opportunity to voice their dissatisfaction towards the platform, and compel the platform to adjust, therefore possess a distinct type of influence as compared to switching. They remain members of their segment and may nonetheless force engagement with their preferences and expectations, putting their views into effect in a manner that the market would otherwise discard.[58]

Lastly, consumers are influential because they act collectively, rather than on their own. That is, consumer influence as a result of administrative action caters to a whole range of interests that differ from the private interests of consumers who switch to other places. Consumers who help to adjust, by way of administrative action, the terms and conditions of agreement of a dominant platform, including the platform's method of doing business or the design of the platform's products, use that authority not just to further their individual objectives, but to generate a competing vision of their favoured segment.[59] In this way, even when consumers contemplate their private interests, they engage meaningful collective issues that will have much broader implications on the market's functioning than if they simply switched to an alternative.[60]

2.3. *Consumer influence in practice*

The previous sections made it plain that we can distinguish between no fewer than three accounts by which consumers can exert an influence on the market: a) sovereignty as a matter of fact, b) legally imposed sovereignty, and c) consumer influence through administrative action. Significantly, in the present context, each notion has a real-world equivalent, such as when consumers migrate or multi-home (autonomously) between different platforms,[61] when interoperability or data portability remedies are proposed to reinstate consumer switching between leading actors,[62] or when authorities and courts compel dominant undertakings, on behalf of consumers, to integrate into their business different terms and conditions of service.[63]

Typically, consumer influence is based on sovereignty and switching. Even in big technology markets, consumers may exert some sway on companies by choosing from a variety of different services, applications, ecosystems of products and the like. In some contexts, however, authorities intervene to give way to the consumer's voice, but such interventions are exceptional and do not make up the rule. Still, when authorities do intervene in that manner, they integrate consumers' views into the market by forcing dominant companies to adjust their modes of doing business. Here, consumers are not sovereign in the customary sense, nor do they have the capacity to reach their goals autonomously through switching.[64] Instead, and precisely for this reason, consumers exercise authority through administrative action.

One may, of course, dispute the suggested classification. As mentioned at the outset, despite the fact that there is some consensus view in legal scholarship that competition law should be seen through the lens of the consumer, it might seem unusual to frame competition enforcement actions as comprising, almost exclusively, different avenues of consumer influence. Furthermore, in various jurisdictions, public officials have proposed or taken unprecedented regulatory measures, seeking to comprehend the technicalities of online platforms and digital advertising, and designing suitable regulatory mechanisms to confront excessive market concentration.[65] These initiatives at times blur the suggested distinctions, for instance when they: lay down (near) self-executing ex ante obligations for gatekeeper platforms to refrain from combining personal data sourced from their core platform services with personal data from third-party services without users' actual consent; allow end users to obtain services that are complementary to the core platform's service through business users' own software applications; or compel such platforms to refrain from treating more favourably, in ranking services, products offered by the gatekeeper vis-à-vis similar products offered by competitors.[66] Such hesitancy is understandable and reasonable, and the proposed typology is, as stressed previously, only a loose one. But there are good rea-

[57] See sources quoted (n 48).

[58] Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, 10 November 2021; Hirschman (n 12); Adrian Kuenzler, 'Intellectual Property on the Cusp of the Intangible Economy' (2021) 16 Journal of Intellectual Property Law and Practice, 692.

[59] Collective action by consumers can be organized in several manners – by consumers themselves, companies, and administrative authorities – which influence how their interests are represented. In the digital economy, consumers must work together as a collective to move concentrated markets forward, to the extent that competition law is required to involve an effort to clear the channels of consumer influence, Kuenzler, 'Competition Law as a Catalyst for Collective Market Governance: Gauging the Discursive Benefits of Intensified Administrative Action' (n 16).

[60] Francis Fukuyama et al., *Report of the Working Group on Platform Scale* (Stanford, 2020) (this includes addressing the role of social media as echo chambers, the fuelling of polarization by new technologies, and the ability of platforms to undermine democracy).

[61] See for the regulatory counterpart DMA paras 13, 25, 27, 60.

[62] See in particular DMA Article 6(7), (9) and (10), Article 7.

[63] Bundesgerichtshof (June 23, 2020) KVR 69/19; Case AT.39740, *Google Search (Shopping)*; Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, 10 November 2021.

[64] To some degree even in highly concentrated platform markets consumers enjoy some narrow degree of autonomy – such as when they can decide to be part of a dominant social networking platform or to abstain from it altogether, OLG Düsseldorf, Order of 26 August 2019, VI-Kart 1/19 (V). But this is no longer sufficient in an environment where it becomes increasingly difficult to avoid dealing with digital companies in everyday life and where these companies personalize their offers across the board by collecting and exploiting consumers' data.

[65] House of Representatives, 117th Congress (2021), Bill H.R.3816; European Commission (n 42); German Act Against Restraints of Competition, Article 19a; UK Government, 'Government Unveils Proposals to Increase Competition in UK Digital Economy' (2021) Press Release, 20 July 2021.

[66] DMA Article 5(2), (3), (4) and (5), Article 6(5).

sons for viewing competition policy debates through this lens. In particular, the proposed taxonomy may help resolve several purported inconsistencies between competition law and data privacy in online advertising.

3. Why pursuing different strategies counts

Both in theory and in practice, there are several competition enforcement strategies available, not just one. On the face of it, this appears to be a trivial point. But a great deal of competition policy is based on the supposition that one single theory is required to govern all of them. Debates around competition law enforcement in online advertising perhaps best exemplify this point. They demonstrate that markets ought to be more responsive to the fact that there are various strategies for authorities and courts to pursue, not just one. *First*, competition policy debates often have a win-or-lose attribute to them, to the extent that distinct notions of competition seemingly preclude each other. When viewed from the perspective of the consumer, disputes are usually based on the idea that different channels of influence ineludibly supplant or displace themselves. As a result, competition policy has largely disregarded the notion that different forms of influence can also be complementary.[67] Most of all, authorities and courts afford consumers influence from within rather than only from without a particular segment. The consumer's position as managerial insider then enables others to make better choices between different segments.[68] In concentrated marketplaces, competition law enforcement does not necessitate an either/or alternative. Instead, such markets frequently entail a situation in which something is simultaneously true for one approach and for another. *Second*, if we paid heed more earnestly to the many facets that enforcement of competition law can take, we would recognize that there is a great deal more to express about competition theory and doctrine. The weight given in much of the literature on competition law, for instance on breaking up dominant undertakings (which, on some occasions, may be a rational strategy to pursue) has caused competition policy to disregard the many other possibilities in which consumers and authorities may 'govern together', acting in the best interests of the market.[69] At present, much of the existing doctrine inevitably falls short of considering the available alternatives, including the benefits that reside in mutually supportive competition law enforcement strategies by which authorities and courts act on behalf of consumers.[70] Debates around big technology firms' market dominance therefore frequently persist in repeating the identical exhausted debates regarding competition law's purported role in pursuing one single objective that have overshadowed the discipline for decades.[71] *Third*, acknowledging the different forms that competition law enforcement takes in practice would help to lower the stakes arising from existing quarrels. While we often think we need one single theory to make a certain policy consistent, existing arguments are put to better use when attempting to find a resolution in a specific context. Non-specific findings that give preference to one theory or another can almost never be convincing. Above all, competition policy might devote more time to gauging the type of strategy that will match a particular setting most appropriately, and dedicate a bit less energy to furthering one single and unifying paradigm.[72]

3.1. *Switching and integration: substitutes or complements?*

Debates around privacy and competition provide instructive examples of how switching and integration coalesce. Too often, disputes in competition law have an either/or character to them.[73] Consequently, competition policy has neglected reasonable intermediary standpoints between the available strategies. When policymakers push for the implementation of one approach or another, they start out from the presumption that distinct strategies are substitutes. They typically assume that integration will undermine switching, or that switching will replace integration.[74] There might evidently be situations in which this understanding is accurate.[75] By and large, however, competition policy has paid scant attention to the possibility that these strategies operate as complements rather than as substitutes.

Take online advertising markets as an example. In one view, targeted online advertising provides substantial benefits for users, advertisers and publishers. Among these benefits is the ability to place advertisements on websites to financially support the use of online services for free. Particularly with targeted advertising, advertisements no longer need to reach an overly broad audience and advertisements no longer need to become irrelevant to a significant proportion of consumers. If advertisements are better directed to users, advertisers will

[67] Maureen K Ohlhausen and Alexander P Okuliar, 'Competition, Consumer Protection, and the Right [Approach] to Privacy' (2015) 80 Antitrust Law Journal, 121; James C Cooper, 'Privacy and Antitrust: Underpants, Gnomes, the First Amendment, and Subjectivity' (2013) 20 George Mason Law Review, 1129.

[68] Kuenzler (n 19).

[69] There is much less of a discussion emphasizing breaking up dominant undertakings in Europe than in the U.S., see Eleanor M Fox and Donald I Baker, 'Antitrust and Big Tech Breakups: Piercing the Popular Myths by Cautious Inquiry' (2021) Competition Policy International, 25 October 2021; but see J Kwoka and T Valletti, 'Unscrambling the Eggs: Breaking Up Consummated Mergers and Dominant Firms' (2021) 30 Industrial and Corporate Change, 1286; another important issue, beyond the scope of this article, is how to better commingle data protection and competition rules, see Competition and Markets Authority and Information Commissioner's Office, *Competition and Data Protection in Digital Markets: A Joint Statement Between the CMA and the ICO* (London, 2021).

[70] But see for a proposal Erik Hovenkamp, 'The Antitrust Duty to Deal in the Age of Big Tech' (2022) 131 Yale Law Journal, 1483.

[71] Belabouring this point already, Robert H Bork, 'Antitrust and Monopoly. The Goals of Antitrust Policy' (1967) 57 American Economic Review, 242.

[72] See Daniel A Crane, 'The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy' (2013) 79 Antitrust Law Journal, 835; Agustin Reyna, 'Breaking Down Silos in Public Enforcement: Lessons from Consumer-Facing Markets' (2021) Cybersecurity.

[73] See Douglas (n 36); Lemley (n 36).

[74] Ibid.

[75] Competition and Markets Authority and Information Commissioner's Office (n 69).

be focused on those who value them the most.[76] Equally, online advertisers can track the success of their campaigns more accurately than they could with other forms of advertising, and can generate more economically sustainable opportunities for other firms to compete in markets that they otherwise would not have had an ability to participate in.[77] This serves to elevate the quality of services and inspire the provision of new and innovative products.[78] It also facilitates the supply of services that would not be viable under subscription-based or paid-for business models, and prevents other services from undergoing significant drops in usage.[79] In particular, small and medium-sized publishers, including news and print media organizations that have turned to digital versions of their products, have been shown to crucially depend on a well-functioning online advertising market that can provide them with the revenue, reach and feedback necessary to keep their organizations economically viable.[80] Equally, low-income individuals who are users of advertising-driven offers may not be in a position to sign up for a (variety of) remunerated version(s) of the same product(s).[81] Hence, a fair and contestable online advertising market will enhance rather than reduce the ability of actors to monetize their content. Such a market will also create the appropriate conditions for consumers to pick their favoured products – the main mechanism praised by advocates of sovereignty that exists in a well-functioning economy.

This view stands in stark contrast with the claim put forth by those concerned about user privacy. Here, targeted advertising is all about the capacity of platforms to collect, analyse and sell consumers' data with the most precision, and to track users across the internet.[82] The issue is that any effort to render online advertising markets more contestable will create a more invasive and less privacy-protective backdrop for consumers.[83] Seen from this perspective, competition and privacy inevitably diverge. As authorities attempt to render online advertising markets more contestable, users will have less privacy because a greater number of data brokers will employ ever-more invasive tracking technologies to stay apace with their competitors. Paradoxically, on the other hand, if a market becomes dominated by a handful of big technology companies, that same (harmful) incentive to compete will disappear.[84] Admittedly, concerns around privacy abound mainly in markets with advertising based on information targeted at users. If advertisers received no information about users but instead were forced only to bid on information about the content users look at, advertising would naturally rely on less privacy-invasive surveillance.[85] The paradox can be resolved, however, if we no longer rely exclusively on switching but instead also consider the possibility of integration. As the decision taken by the FCO in *Facebook* demonstrates, to the extent that privacy is important, integration will force dominant undertakings to yield control of the collection, storage and transmission of consumer data to the platform's users. This puts consumers in a position to safeguard privacy and anonymity as they see fit, and other services will be expected to adopt the same technology, providing increased privacy protections and better product offerings across the market.[86] While some users will remain indifferent towards the platform's data sharing with third parties, others will decide to opt out. The upshot is a market in which revenues from online advertising

[76] Catherine E Tucker, 'Online Advertising and Antitrust: Network Effects, Switching Costs, and Data as an Essential Facility' (2019) Competition Policy International, 17 April 2019.

[77] Ceren Budak et al., 'Understanding Emerging Threats to Online Advertising' (2016) 16 Proceedings of the 2016 ACM Conference on Economics and Computation, 561.

[78] Such competition in the advertising market will also help to promote a variety of different business models such as freemium apps vs licence-based software, online marketplace services vs direct retail channels, peer-to-peer services vs directly provided offers, or advertisement-supported content distribution vs online subscription services, David S Evans, 'The Online Advertising Industry: Economics, Evolution, and Privacy' (2009) 23 Journal of Economic Perspectives, 37. A greater variety of product services will also enable users to better match their preferences with different product/service attributes, Sophie C Boerman, Sanne Kruikemeier and Frederik J Zuiderveen Borgesius, 'Online Behavioral Advertising: A Literature Review' (2017) 46 Journal of Advertising, 363; Néstor Duch-Brown et al., 'The Impact of Online Sales on Consumers and Firms: Evidence from Consumer Electronics' (2017) 52 International Journal of Industrial Organization, 30.

[79] Jonathan E Cook and Shahzeen Z Attari, 'Paying for What Was Free: Lessons from the New York Times Paywall' (2012) 15 Cyberpsychology, Behavior, and Social Networking, 682.

[80] Budak et al. (n 77).

[81] Advertisers themselves have benefitted from online advertising-supported services, first, by having an increased amount of advertising space available and, second, by being able to better reach out to the relevant audience, Evans (n 78).

[82] Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Hachette, 2019).

[83] Douglas (n 36); Lemley (n 36).

[84] Ibid. The argument that concentrated online digital advertising markets will restrict output of personal data and hence cater to privacy may be dismissed as speculative because it is difficult to anticipate the forms of oligopolistic competition. Every dominant undertaking on one side of the platform may be insignificant in advertising on the other side if they compete with many other platforms. It may therefore be the case that dominant undertakings instead increase data extraction rather than output, particularly where concentrated markets create economies of scale for data extraction.

[85] Some studies demonstrate that contextual advertising may lead to an overall increase in revenues for publishers since contextual advertising does not inevitably rely on intermediaries comprised of demand and supply side platforms that do the tracking and take considerable cuts from the returns gained by publishers. In addition, contextual advertising may sometimes be more effective, particularly when a purchase depends less on a person's characteristics such as their age, income or location but more on situational or contextual circumstances, Incorporated Society of British Advertisers, *Programmatic Supply Chain Transparency Study* (2020). Conversely, but for essentially the same reasons, abandoning targeted advertising might turn out to be neither fully acceptable nor entirely feasible since the current backdrop of digital markets relies heavily on targeted advertising. What is more, in some jurisdictions with less stringent privacy laws than Europe, actual demand for advertising that no longer relies on tracking might nonetheless be low so that actors that rely on targeted advertising vis-à-vis those that do not obtain a bigger piece of the remaining pie.

[86] Kuenzler, 'Competition Law as a Catalyst for Collective Market Governance: Gauging the Discursive Benefits of Intensified Administrative Action' (n 16).

need not necessarily decline across the board; rather, online advertising markets will grow more contestable, spurring new forms of (privacy) innovation and affording firms who cater to consumers' privacy a competitive advantage over others. This in turn will generate an improvement in the quality of third-party services, enabling firms to take advantage of consumer heterogeneity by differentiating and benefitting from different privacy practices.[87] Most of all, market actors will have incentives to adopt a blend of different monetization strategies, and will encounter additional opportunities to expand their customer segments, thereby reinstating the ability of those consumers who care for more individualized product offerings to switch. On the whole, combining different enforcement strategies works towards maintaining users' privacy while at the same time rendering online advertising markets contestable.[88]

Consider, in this context, the counterargument that other actors (including news organizations) stand to benefit from big technology platforms when they charge supra-competitive rates for advertising space. In a market dominated by a few big technology companies, smaller rivals could either charge a lower price and take sales away from their overpriced monopoly competitors or could shield under big technology firms' higher price umbrella and charge more for their own advertising territory.[89] A related argument maintains that enabling users to opt out from dominant platforms' data tracking rather than structurally separating them will only reinforce big technology companies' grip on digital markets, and will ensure that these companies always have an edge over potential new competitors.[90] As with the issues analysed earlier, these seemingly irreconcilable contradictions materialize only when one fails to recognize that several competition enforcement strategies may coincide at once: the former argument – that smaller actors will gladly shield under big technology companies' high price umbrella – fails to consider that the extraction of supra-competitive rates may rest on abusive business practices and deprive competitors of direct advertising opportunities. For instance, dominant platforms such as Google and Facebook have been alleged or found to divert a substantial amount of internet traffic away from publishers to their own websites; to coerce news outlets to agree to policies that keep readers in their own environment so as to obtain all information and advertising revenue generated by that content surreptitiously; and to rank inferior rework of publishers' original content more prominently in their search results to deprive competitors of lucrative advertising opportunities.[91] The blind spot is a failure to consider that dominant platforms' business practices in online advertising may themselves be based on anti-competitive behaviour and so may be in need of closer scrutiny by authorities and courts.[92] The latter argument – that the ability of consumers to restrict the flow of personal information will only reinforce the dominance of big technology companies – equally fails to contemplate the possibility of some constructive coexistence of several competition enforcement strategies at once. Where break-ups, interoperability or data portability measures are deemed to be the most pertinent remedies that authorities and courts impose, this will result in broadening rather than restricting the flow of private information, and will do little to target abusive steering of internet traffic from competitors to platforms' owned and operated properties to safeguard the viability of other actors.[93] What is more, the argument ignores the fact that protecting privacy, which is becoming increasingly more significant to consumers, creates new business opportunities and amounts to a competitive advantage for those actors that are responsive to consumers' interests. Here again, focusing on one single strategy will inevitably produce conflicting tensions between privacy and competition. However, as explicated previously, if we consider integration to subsist alongside switching, the paradox disappears. In short, sovereignty and integration must work as complements rather than as substitutes so that consumers are in a position to influence the market more specifically than if they were only able to resort to switching.[94]

3.2. *Turning a blind eye to integration*

Competition policy has long been reluctant to recognize the importance of integration.[95] For instance, the possibility that digital platforms can give ample consideration to users' privacy while still serving targeted advertisements is frequently seen as too ambitious to be realistic. Indeed, it is now almost commonplace to presume that the online advertising ecosystem is fundamentally harmful to consumers and profoundly contradicts their vested interests.[96] Since any type of targeting, in this regard, is manipulative and wasteful, some observers have proposed a curbing of the total amount of advertising consumed and to do away, at least in part, with targeted

[87] Alexander Bleier, Avi Goldfarb and Catherine Tucker, 'Consumer Privacy and the Future of Data-Based Innovation and Marketing' (2020) 37 International Journal of Research in Marketing, 446 (demonstrating, among other things, that giving users more control over privacy increases revenue from advertising).

[88] Ibid.; Competition and Markets Authority and Information Commissioner's Office (n 69). Note, however, that even if online advertising runs efficiently, this does not mean that all publishers benefit. In the past, as a form of disruptive competition, print and other advertising modes lost out from online advertising. Moreover, if the consumers in online advertising markets are the advertisers not the advertisements' targets, a well-functioning market may not work to the targets' advantage but to the advantage of the buyers of the advertisements – which may or may not coincide when the advertised products benefit or harm consumers (eg in the case of predatory loans or gambling).

[89] Lemley (n 36).

[90] Douglas (n 36); Teachout (n 8); Wu (n 31).

[91] See sources quoted (n 4).

[92] Ibid. Previous reliance on large platforms as a source of internet traffic has deprived smaller actors of access to their own customers.

[93] Michal S Gal and Oshrit Aviv, 'The Competitive Effects of the GDPR' (2020) 16 Journal of Competition Law and Economics, 349.

[94] Jack M Balkin, 'Information Fiduciaries and the First Amendment' (2016) 49 UC Davis Law Review, 1183.

[95] Neil Richards and Woodrow Hartzog, 'Taking Trust Seriously in Privacy Law' (2016) 19 Stanford Technology Law Review, 431.

[96] An insightful survey of the discussion is provided by Ramsi A Woodcock, 'The Obsolescence of Advertising in the Information Age' (2018) 127 Yale Law Journal, 2270.

advertising.[97] Essentially, the advertising market should be divided up, and a certain amount of advertising impressions exchanged in online markets allocated to different industries, licensing fewer impressions than are currently in use – akin to regulatory programmes designed to limit harmful waste by cap and trade.[98]

But there is an important difference to be drawn between an outright ban on advertising and giving way to integration – that is, to probe what practices of advertising, directed at consumers, work in favour of or against their interests.[99] First, cap and trade at least implicitly presumes that *all* advertising is purely manipulative in character and that the ability of companies to track, collect and analyse users' behaviour functions exclusively to sway them.[100] This is a very strong presumption based on which specific conclusions about a particular institutional arrangement that ought to govern the entire advertising market should be drawn. In particular, it would be too objectionable to claim that consumers are entirely susceptible to manipulation and that they are completely vulnerable to exploitation, despite the fact that digital platforms frequently are in a position to alter the informational environment in which consumer decision-making occurs.[101] Equally, it would be too objectionable to maintain that all consumers are entirely sovereign, that they are rational calculators seeking an optimal mix of product features, functions and attributes in the market, and that they can always make a sound distinction between the goods and services they require so that advertising is obsolete.[102] Both of these conditions would be too strong and too contentious to presume a particular institutional arrangement based on them. Instead, consumers in the marketplace are often torn between the variety of offers that platforms, intermediaries, sellers and other actors submit when making a decision.[103] The result is that we do not have to arrive at a clear-cut choice that either involves banning or not banning targeted advertising altogether. Rather, we have to try to demarcate some positive and negative market effects of advertising to presume a specific institutional arrangement, accounting for the manner in which targeted advertising functions, the incentives it creates for businesses, and the repercussions it has on consumers and society at large.[104]

Importantly, investigations by the UK Competition and Markets Authority (CMA), the EC and 48 U.S. State Attorneys General illustrate that the online advertising market requires closer scrutiny, not because advertising is inherently suspicious, but because dominant platforms have transformed the backdrop of surveillance capitalism to their own advantage and to the detriment of other actors and consumers.[105] More to the point, these investigations have exposed how Google as one single company simultaneously operates the leading trading venue for online display advertising as well as the leading intermediary services that buyers and sellers on the advertising market use to trade. Google itself is one of the largest sellers of advertising space and receives superior trading information from its own intermediary services. It steers buying and selling orders to its own exchange and websites, granting preferential treatment to its own services in auctions, and sharing superior trading information and speed through its Google-owned intermediaries. This undercuts competitors' fair and equal data access, speed and trading information within Google's own mesh of advertising auctions, and enables Google to capture surplus that would have accrued to third parties instead. Google's practices also have harmful repercussions on competitors' incentives to innovate and invest in content generation, and may spawn unanticipated negative spill-overs for society and consumers.[106] A major casualty in this process are news publishers, whose online advertising revenue has been unable to offset the dramatic drop in print returns, and the publishing industry's overall ability to invest in high-quality journalism.[107] To the extent that quality journalism suffers over time, the harms resulting from such behaviour impinge on civic engagement and undermine the functioning of democracy, especially at the local level.[108]

[97] This argument has been advanced as an autonomous regulatory proposal and has in view a more sweeping alternative that overrules integration gleaned from administrative practice in synergy with consumer switching, James C Cooper, Jane R Bambauer, Joshua D Wright, John M Yun, 'Re: Accountable Tech Petition for Rulemaking to Prohibit Tailored Advertising (Comment to the Federal Trade Commission)' (2022); for an elaborate discussion of this argument, see Ramsi A Woodcock, 'The Fourth's Estate' (2021). This article does not claim that (partial) bans on targeted advertising, particularly for public interest reasons, including targeted advertising to minors and vulnerable users, bans on tracking categories relating to religion, political affiliation or sexual orientation might not be sensible or effective or that we might not need new tools and regulatory instruments to address the risks posed by such advertising, European Commission, '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', COM(2020) 825 final (DSA). Neither does it follow from the appropriateness or inappropriateness of a particular regulatory scheme that integration is always an adequate competition remedy. The point is rather that the productive role competition law can play in such disputes is frequently overlooked.

[98] Ibid.

[99] See sources quoted (n 4).

[100] Corwin D Edwards, 'Advertising and Competition: An Evaluation of Exhortative Programs' (1968), 11 Business Horizons, 59; Zuboff (n 82).

[101] Kuenzler (n 27).

[102] Ibid., at 159–163.

[103] Ibid., at 187–193.

[104] See John A Rawls, *A Theory of Justice* (Harvard University Press, 1971), 20.

[105] Sources quoted (n 4).

[106] Tim Cowen, Claire Barraclough and Joshua Koran, '"Privacy Fixing" After Texas et al v. Google and CMA v. Google (Privacy Sandbox): Approaches to Antitrust Considerations of Privacy' (2021) Competition Policy International, 26 January 2021; Oliver Latham, Mikaël Hervé and Romain Bizet, 'Antitrust Concerns in Ad-Tech: Formalizing the Combined Effect of Multiple Conducts and Behaviours' (2021) 17 European Competition Journal, 353; Dina Srinivasan, 'Why Google Dominates Advertising Markets. Competition Policy Should Lean on the Principles of Financial Market Regulation' (2020) 24 Stanford Technology Law Review, 55.

[107] Fiona M Scott Morton and David C Dinielli, *Roadmap for a Digital Advertising Monopolization Case Against Google* (Omidyar Network, 2020).

[108] Competition and Markets Authority (n 4). Divestiture of part of Google's business along the lines of previous acquisitions such as Google/DoubleClick cannot be ruled out as an effective remedy because intermediary advertising servers can be structurally

Here, a pure property rights-based approach to advertising – a conception that follows strictly from an exclusive emphasis on switching – would drastically constrain efforts to think through a number of issues that feature prominently in contemporary disputes around online advertising markets.[109] It leads to the now commonly held belief that reliance on competitive market forces is always in tension with the goal of incentivizing online platforms to safeguard users' trust to enable them to operate in accordance with consumer interests, and that policymakers should either fully tolerate or wholly outlaw online advertising rather than enabling competition authorities and courts to scrutinize its positive and negative market effects on behalf of consumers.[110]

Second, an absolute prohibition on online advertising is not even essential to achieve privacy, nor may reliance on a system of cap and trade render a functioning online advertising market obsolete. Online advertising, like advertising generally, includes a variety of different methods, ranging from display advertising (visual-based advertisements displayed on the website of a publisher, such as a banner on the top of a newspaper webpage promoting a product) to search advertising (text advertisements displayed above or below the search results of a search engine each time a user enters a search query). An outright ban on one or another method will incentivize online platforms to shift their activities to other forms of advertising such as when direct advertising (bilateral negotiations with advertisers in order to sell advertising space at a given price) was replaced by contextual (advertising that depends not on the user but on the content of the website) or targeted advertising, respectively.[111] Furthermore, there are many other forms of advertising that it would either be unfeasible or make no sense to ban altogether, such as branding, the sale of products in exclusive venues, influencer marketing and so forth. And such advertising is often much more subtle, persuasive or manipulative than targeted advertising because it cannot easily be recognized by consumers. It is precisely for this reason that the adverse effects of online advertising, which crucially impinge on users' privacy, can better be addressed by being upfront, putting *consumers* in a position to control the collection, storage and transmission of their personal data across platforms themselves.[112] Moreover, even if the total amount of advertising were capped, companies would still have to rely on a functioning advertising market to auction off impression rights. Worse still, if the infrastructure of this market were dominated by a handful – or one single – company and its own technology, the market might warrant even closer monitoring by regulators or authorities of competition law.[113] Cap and trade – an overall reduction in big technology firms' profits gained from online advertising to free resources that can be reinvested in other ventures – considers product quality (including high-quality journalism) only as an accidental by-product of the proposed regulatory system. It does not target competitors' concerns around revenue-sharing resulting from dominant firms' exclusionary practices, nor can it deal with users' diverse privacy interests specifically. More to the point, under a system of cap and trade, the existing ills of online advertising may remain in place, and may even be exacerbated when the shrinking size of the market offers fewer opportunities for small and medium-sized enterprises to subsist alongside dominant undertakings.[114] A more promising path forward, then, is to address dominant actors' clash of interests, by, for instance, granting competitors equal access to the leading advertising exchange, mandating disclosure of revenue shares and service fees charged in advertising intermediation, or by establishing a code of conduct designed around a set of core principles that define what conduct is acceptable for firms involved in online advertising.[115] Rather than outlawing online advertising altogether, this view accentuates the necessity of a greater extent of integration in terms of modifying existing segments.[116]

If we picture consumers helping to administer a segment by wielding a strong form of voice – contesting and opposing a platform's policy from within – the presumed incongruences disappear. Take the inquiry into Google's plans to remove third-party cookies from its popular Chrome browser or Apple's update of its mobile operating system to require users of competitor applications to assent to being tracked as examples.[117] Both changes limit the quantity of user data available to other firms. However, these changes also run the risk of further entrenching the control of big technology firms over users' data and of rendering it more difficult for other

separated from the advertising exchange. This might be straightforward as there are presumably no offsetting beneficial network effects.

[109] Wolfgang Kerber, 'Specifying and Assigning "Bundles of Rights" on Data: An Economic Perspective' (2021); see for a discussion of this approach Nicolas Economides and Ioannis Lianos, 'Restrictions on Privacy and Exploitation in the Digital Economy: A Market Failure Perspective' (2021) 17 Journal of Competition Law and Economics, 765.

[110] See Dogan and Lemley (n 9); Lemley and Feldman (n 9).

[111] Geoffrey G Parker, Georgios Petropoulos and Marshall W van Alstyne, 'Digital Platforms and Antitrust' in Eric Brousseau, Jean-Michel Glachant and Jérôme Sgard (eds), *The Oxford Handbook of Institutions of International Economic Governance and Market Regulation* (Oxford University Press, 2019). Direct advertising is time-consuming, requires a dedicated salesforce to conduct negotiations, leaves publishers with the risk of unsold inventory and possibly disadvantages the large number of smaller websites with available advertising space that cannot practically all reach advertisers.

[112] Bundeskartellamt, Decision of 6 February 2019; Bundesgerichtshof (June 23, 2020) KVR 69/19.

[113] See Lesley K McAllister, 'The Enforcement Challenge of Cap-And-Trade Regulation' (2010) 40 Environmental Law, 1195; Nikos T Nikolinakos, *EU Competition Law and Regulation in the Converging Telecommunications, Media and IT Sectors* (Kluwer, 2006).

[114] Srinivasan (n 106).

[115] Competition and Markets Authority (n 4); DMA Article 5(9) and (10) and Article 6(8) and (10) provide advertisers, publishers and business users with information on, amongst other things, the price paid for an advertisement, including access to advertising metrics and usage data held by gatekeeper platforms. This will, at least partly, diminish the data advantage of dominant advertising intermediaries.

[116] Sources quoted (n 16).

[117] Competition and Markets Authority, *Online Platforms and Digital Advertising. Market Study Final Report. Appendix G: The Role of Tracking in Digital Advertising* (London, 2020); Nicas (n 3); Stern (n 3); Herrera (n 4).

firms to compete.[118] Instead of letting other companies collect consumers' data on their own, big technology companies simply plan to do the tracking themselves. Admittedly, Google's proposal intends to allot consumers into an anonymous cohort of similar users based on common interests and make that cohort data available to other actors for advertising purposes. Equally, Apple's update requires third-party applications to ask users of Apple's operating system to assent to being tracked. This may constitute an advance towards greater user privacy while still enabling advertising. But a result of the companies' dominance in the browser and mobile operating systems market is that fewer companies will acquire their own user profiles, and where user data is provided to them at an unacceptably low level of granularity, frequency or immediacy by dominant companies, marketers (and publishers) will eventually flock to big technology companies' owned and operated inventory because they have unique data advantages that other actors cannot replicate.[119] Although these proposals involve exchanging fewer user data to third parties, they simultaneously entail that virtually all consumer data are handled by dominant companies themselves, rendering their software and devices the key bottlenecks for online advertising on the internet.[120] In an already concentrated market, this means that big technology companies are afforded an even greater extent of control over the advertising ecosystem, enabling them to unilaterally modify their browser algorithms, automated grouping processes or usage of consumer data for privileged consumption.[121]

Here again, the customary notion that either switching or integration gets to undermine the other will prove fallacious. Both must govern instead. Where big technology firms render third-party data obsolete, companies that possess more first-party data will gain an edge. If the practices of these companies turn out to be abusive, to safeguard privacy and to render markets more contestable, consumers must be able to exert some influence on their terms and conditions of agreement, their methods of doing business and on the design of their products and services.[122] This brawny form of voice enables users to compel dominant platforms to cease tracking them across third-party websites and applications for their own advertising objectives;[123] it simultaneously permits authorities to render advertising markets more contestable because affording users some meaningful degree of control over whether and for what purposes their personal data is collected, processed and sold will prompt other actors to adopt more compelling privacy safeguards as well and will create new opportunities for them to compete.[124] To the extent that users are given a greater extent of control over the platform's terms and conditions of agreement, privacy will itself become an important aspect that market actors are required to consider in competing for new customers. This generates incentives for the development of new technologies, tools and product features, including the adoption of more privacy-protective business models. This is not to argue that there may never be a tension between privacy and competition. Rather, the point is that different avenues of consumer influence increasingly interact, and, at times, promote converging interests.[125]

Here, then, is another aspect which competition policy has overlooked in contemplating integration. Consumers must no longer be understood to act exclusively as outsiders of a segment. Rather they are instrumental in helping to (re)configure predominant segments and can play an important role as insiders to put a check on too-powerful actors in the market. To be sure, resorting to switching and/or regulation – efforts to address surveillance-driven business models by way of crafting public policy or by divesting big technology companies into smaller entities that are forced to compete with one another to render it more likely to provide what users want – is not ill-considered or misplaced. But if existing business practices turn out to be abusive and/or predatory, integration as an ad-

[118] Ibid.

[119] Ibid. Under Google's FLoC proposal, websites can still match anonymous cohort data with individual information as users will still be tracked, and such tracking will occur exclusively in the user's browser.

[120] Ibid.

[121] This may ultimately lead to a shift in which actors are incentivized to gather first-party data through paid subscription models. Although such a shift might enable creative individuals to rely on more dependable income from their supporters, commentators also worry that this foreshadows the end of an independent and open web, Tien Tzuo and Gabe Weisert, *Subscribed: Why the Subscription Model Will be Your Company's Future – And What To Do About It* (Penguin, 2018), and may eventually facilitate the exploitation of inexpensive labour by those who accumulate vast data troves, resembling a 'gig economy' for digital content.

[122] UK Competition and Markets Authority, *Mobile Ecosystems. Market Study Interim Report* (London, 2021).

[123] There is a difference between bestowing upon users opt-out rights relating to big technology platforms' data-gathering activities and bestowing upon users such rights relating to third-party websites and applications. Because of their dominance, Apple's and Google's proposals have the potential to alter the landscape of the online advertising market as a whole, D 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) Competition Policy International, 27 May 2021. Consequently, integration enables users to influence the quality of the online advertising ecosystem directly, by allowing other actors to participate in the market on more equal terms. In cases such as *Google (Shopping)* or *Facebook*, integration worked to prevent deterioration in quality of the incumbent firms, which subsequently benefitted the market's quality overall.

[124] Conversely, more effective data protection can also increase competition for rivals and ensure that new innovation benefits consumers, Competition and Markets Authority and Information Commissioner's Office (n 69) (emphasizing, in addition, the importance of responsible design in devising default settings).

[125] Empirical observations show that only a small fraction of users of Apple's latest mobile operating software update (6% in the US, 15% worldwide) are choosing to allow companies like Facebook and its attendant services to scoop their personal data and to sell them to third parties, see Estelle Laziuk, 'iOS 14.5 Opt-in Rate' (2021) Flurry Analytics, 18 May 2021. Other evidence suggests that most third-party websites and advertisers will not see an economically significant decrease in revenue (on average 4%) if they shifted from targeted to contextual advertising, Veronica Marotta, Vibhanshu Abhishek and Alessandro Acquisti, 'Online Tracking and Publishers' Revenues: An Empirical Analysis' (2019). However, such a shift might imply lower advertising prices for third parties, which in turn could result in these savings being used to invest in ways to reach customers in more privacy-protective manners, Greg Bensinger, 'Americans Actually Want Privacy. Shocking' (2021) The New York Times, 20 May 2021, sec Opinion.

ditional channel of consumer influence sensibly requires that dominant undertakings modify or transmute them.[126] Much of competition policy has ignored this possibility – a channel of influence by which authorities and courts with appropriate expertise enable consumers to give effective vent to their dissatisfaction. Here, switching and integration do not displace each other; instead, both notions are put in some productive coalescence.[127]

It is not just competition policy that would gain from a more careful consideration of integration. Think about privacy law itself. A great deal of contemporary legal scholarship is concerned with autonomy or individual privacy – that is, the right to be left alone – and is focused on how best to *limit* the stream of personal information.[128] But there are social dimensions of privacy as well, and narrowing down privacy to a right to be left alone neglects the fact that users in the digital economy are also concerned about *appropriate* information flows.[129] Sharing, communicating and contributing information must be viewed as an indispensable aspect of consumers' privacy so that users do not only limit information flows, but modify the manner in which they communicate with others depending on a given situation.[130] In that respect, the issue of how to safeguard privacy might be even more obscure, and we have essentially no doctrine or theory that accepts, much less represents, a remedy that demands that dominant companies modify the design of their platforms with a view to granting users rights to influence the way they present themselves to others on the internet.[131] This view of privacy is fundamentally at odds with simply limiting a platform's access to personal data – by facilitating consumer switching between distinct providers. Instead, it recognizes social and collective dimensions of digital privacy, which arguably include affording users some control over the manner in which their desired stream of information flows, to take preventive action and to ensure such information cannot be construed out of context.[132] Consumer influence, to this extent, must be associated with integration in that authorities and courts pay close attention to a platform's technical architecture that fashions meaningful acts of broadcasting, audience segmentation and command over the social situation in which personal information spreads.[133]

Affording users some control over the flow of personal information confronts the broad, collective aspects of digital privacy. These involve not only permitting users to opt out of being tracked, but also requiring them to have control over the manner in which digital platforms help to steer attention, construe meaning and pass along personal information at different times to different audiences. In this context, both switching (the ability to abscond and join a different platform with different properties) and regulation (a simple ban on some aspects of advertising) turn out to be far less meaningful than integration, particularly when platforms are characterized by their own unique communities of users so that they have essentially become markets unto themselves. Perhaps, then, we ought not to think about privacy and competition in terms of how they diverge but should instead consider that consumer influence through administrative action might sometimes be a more appropriate path to pursue. Although competition policy has long been preoccupied with the question of how switching can be ensured, a promising alternative by which users of digital platforms remain free to articulate their wishes must also involve integration.

3.3. *A relational approach to competition law enforcement*

One might object to the notion that for competition policy to be focused on multiple competition enforcement strategies all at once is a virtue. After all, the most effective check on markets is the ability for consumers to choose between different alternative options, and competition law typically aims at facilitating this goal. Hence, in a given case, authorities and courts inevitably end up pursuing this strategy over another.[134]

Yet that response appears to be inadequate to confront the specific challenges that digital markets pose. In practice, authorities and courts need not follow one single enforcement strategy. And, as a matter of fact, they rarely ever do. As illustrated at the outset, rather than focusing on switching (al-

[126] Bundeskartellamt, Decision of 6 February 2019; Bundesgerichtshof (June 23, 2020) KVR 69/19; Case AT.39740, *Google Search (Shopping)*, 27 June 2017; Case T-612/17, *Google and Alphabet v Commission (Google Shopping)*, 10 November 2021; Case AT.40652, *Apple – App Store Practices (e-books/audiobooks)*, ongoing; Case AT.40437, *Apple – App Store Practices (music streaming)*, ongoing; Case AT.40462, *Amazon Marketplace*, ongoing; Case AT.40703, *Amazon Buy Box*, ongoing.

[127] There are many other possibilities in which digital advertising markets may profitably be brought to bear. One could adopt rules that enable only contextual targeting (ie, targeting based on websites visited or keywords entered) rather than behavioural tracking (ie, tracking based on scraping as much data about users as possible on the internet). Some observers claim that if advertisers have to spend money to become visible in a certain context rather than to target particular users, this will benefit publishers that produce high-quality content and drive out those that simply aim to capture users' attention. Or the construction of more contestable markets that offer better opportunities for alternative business models to compete might still allow for targeted advertising but may help to move the current backdrop of surveillance capitalism towards more privacy-protective ecosystems of products and services, Balkin (n 94).

[128] Katherine J Strandburg, 'Monitoring, Dataification and Consent: Legal Approaches to Privacy in the Big Data Context' in Julia Lane, Victoria Stodden, Stefan Bender and Helen Nissenbaum (eds), *Privacy, Big Data and the Public Good: Frameworks for Engagement* (Cambridge University Press, 2014), 5–43; Andrei Marmor, 'What is the Right to Privacy?' (2015) 43 Philosophy & Public Affairs, 4.

[129] Kuenzler 'On (Some Aspects of) Social Privacy in the Social Media Space' (n 16).

[130] Daniel J Solove, 'The Meaning and Value of Privacy' in Beate Roessler and Dorota Mokrosinska (eds), *Social Dimensions of Privacy: Interdisciplinary Perspectives* (Cambridge University Press, 2015), 71–82.

[131] Julie E Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday Practice* (Yale University Press, 2012).

[132] Viktor Mayer-Schönberger and Kenneth Cukier, *Big Data: A Revolution That Will Transform How We Live, Work, and Think* (John Murray, 2013).

[133] Luciano Floridi, *The 4th Revolution. How the Infosphere is Reshaping Human Reality* (Oxford University Press, 2014).

[134] Ginsburg (n 10).

though alternatives were just one click away), the FCO in *Facebook* examined the platform's excessive amount of data collection and its attendant risks to user privacy owing to a lack of effective competition.[135] The CMA and the EC are investigating whether Google's update to exclusively rely on the collection of first-party data might have adverse effects on competition in digital advertising, including user privacy.[136] Where large platforms' claims to improve privacy may implicate exploitative or exclusionary behaviour, authorities justifiably have identified concerns about anti-competitive activity – despite the ability of consumers to switch.[137] These concerns arguably fall at the other end of the spectrum between exit and voice.[138] They also demonstrate that the conventional framework is no longer rich enough to deliver a satisfying formula to do justice to an alleged encroachment of a variety of interests (both private and public) that the digital economy implicates.[139]

We may even overrate the theoretical significance of hewing to one single competition enforcement strategy. Over the past few decades, courts have regularly moved back and forth between different competition law accounts,[140] while some theorists have claimed that only a strategy based on switching can be 'neutral' to the extent that it ensures that the market itself truly caters to consumers' preferences.[141] Advancing such a claim, however, engages a very strong causal arrangement in which affording consumers an opportunity to switch is superior not only in a given set of circumstances but rather in an overwhelming range of contexts to warrant exclusive sponsorship. In its place, a more critical debate needs to relocate competition law enforcement in actual business realities.[142] This does not mean that we should ignore the benefits of a unified and coherent theory.[143] But a stated commitment to scientific inquiry also suggests that we constantly revise existing principles and assumptions in light of new empirical evidence.[144] In that sense, a more apposite contention must mean that no single principle or set of principles can play a definite role in competition law analysis. Rather, enforcement of competition law must be contingent, with rules and doctrines being justified by the interaction between a multiplicity of theoretical and empirical findings that may sometimes reinforce and qualify each other or may sometimes defeat and cancel one another out. For instance, enforcement of competition law in digital markets is clearly shaped by considerations around switching, but also bears the mark of integration.[145] Accordingly, most commentators would probably refrain from making the kind of strong assertion that theorists expressed in the past. Even the most fervent proponents of sovereignty would admit that a simple reliance on switching cannot effectively capture all of the issues that digital markets raise. Those who acknowledge a role for integration, on the other hand, unquestionably would admit that integration can only have a supporting function to keep an excessive amount of private control in check. And although integration has long been neglected as an additional channel of consumer influence, hardly anyone is intent on shunning it altogether.[146]

Rather than grasping some theorists' claims as strong causal assertions about the constraints linked with one image of the market or another, then, the claims are better viewed as statements about how most adequately to poise discrete avenues of consumer influence. The quarrel does not revolve around whether a single enforcement strategy should govern competition law altogether but around the conditions under which authorities and courts should prioritize one enforcement strategy over another. However, even here we can observe an inclination of policymakers to elevate one concept above the other. Issues around particular disputes are usually framed as claims for a greater extent of sovereignty and switching or as demands for heavier reliance on authorities and courts to monitor the operation of free markets. Such demands invariably encapsulate contentions around weighting the costs and benefits of more or less intervention and/or regulation.[147] But they are equally prone to being exceedingly contingent and contextual, and it is hardly ever possible to get to the bottom of them at the abstract level in which they are typically stylized. Even if one or another approach is prioritized under such an assessment, this implies that it is appropriate (or inappropriate) for some authority or court intervention to take place, given the specific circumstances of a case. Whenever such allowances are made, they have been proposed against the backdrop of some very specific considerations in which a particular practice occurs.[148] Even here, claims about market governance are distinct statements about context rather than about all-purpose general-

[135] Bundeskartellamt, Decision of 6 February 2019.
[136] Sources quoted (n 4).
[137] Autorité de la concurrence, Décision 21-D-11, 7 June 2021, Google AdX; Autorité de la concurrence, 'Targeted Advertising/Apple's Implementation of the ATT Framework' (2021) Press Release, 17 March 2021; Comisión Nacional de los Mercados y la Competencia, 'Study on the Competition Conditions in the Online Advertising Sector in Spain' (2021) Press Release, 26 July 2021; Australian Competition and Consumer Commission, 'Digital Advertising Services Inquiry – Final Report' (2021) 28 September 2021.
[138] Hirschman (n 12).
[139] Jan Eeckhout, *The Profit Paradox. How Thriving Firms Threaten the Future of Work* (Princeton University Press, 2021).
[140] One can clearly imagine an explanation for why authorities and courts would invoke sovereignty in some instances and integration in others, Kuenzler (n 19).
[141] Instructive in this regard is Ginsburg (n 10).
[142] Thomas Philippon, *The Great Reversal. How America Gave Up On Free Markets* (Belknap Press, 2019).
[143] Herbert J Hovenkamp, *The Antitrust Enterprise. Principle and Execution* (Harvard University Press, 2008).
[144] Philippe Aghion, Céline Antonin and Simon Bunel, *The Power of Creative Destruction. Economic Upheaval and the Wealth of Nations* (Belknap Press, 2021); Philippon (n 142); Eeckhout (n 139).
[145] Sources quoted (n 4).
[146] See Shira Ovide, 'How Klobuchar and Hawley See Things When It Comes to Technology' (2021) The New York Times, 13 May 2021, sec On Tech (discussing two books on antitrust law by US senators who are on the opposite sides of the political spectrum and yet agree on stronger scrutiny of big technology companies by antitrust authorities and courts).
[147] William P Rogerson and Howard Shelanski, 'Antitrust Enforcement, Regulation, and Digital Platforms' (2020) 168 University of Pennsylvania Law Review, 1911.
[148] John A List, 'Homo Experimentalis Evolves' (2008) 321 Science, 207.

izations.[149] Questions around the most appropriate forms of market governance inevitably are tinged with considerations arising out of particular conditions rather than mere scholarly skirmishes between different visions of authority. While competition policy debates have their merits, arguments around the most appropriate forms of consumer influence should not be viewed as involving mutually exclusive substitutes but as containing mutually reinforcing complements.

4. Conclusion

Competition policy has long assumed that there ought to be one single account to govern competition law disputes in their entirety. This is a justifiable but at times problematic supposition and its outcomes, particularly in digital markets, are frequently dissatisfying. Where competition policy presumes that distinct channels of consumer influence are substitutes for one another, competition law is disposed to overlook the manner in which they work constructively together. Competition law commentary regularly emphasizes comprehensively the consumer's sovereignty to switch, but this emphasis has led competition policy to neglect the different ways in which integration as an additional channel of consumer influence can appreciably contribute to a well-functioning market system. Insofar as disputes about distinct avenues of consumer influence have been framed as quarrels between different theories, a great deal of competition policy has given inadequate weight to the conditions in which those avenues may be beneficial.

A more thorough contemplation of the different channels of consumer influence enables policymakers to recognize that the aims of competition law are inexorably diverse. Rather than adhering to one single goal, authorities and courts must pick and choose between multiple enforcement strategies to make sense of the digital economy's multi-layered values. As a matter of fact, recent litigation practice demonstrates that authorities and courts tread warily when they attempt to reconcile the different interests of dominant platforms, competitors, users and consumers. They pursue a range of different avenues at once, with the aim of accommodating idiosyncratic values such as privacy and competition.

Declaration of Competing Interest

There are no conflicts of interest to declare.

Data availability

No data was used for the research described in the article.

[149] Michael Abramowicz, Ian Ayres and Yair Listokin, 'Randomizing Law' (2011) 159 University of Pennsylvania Law Review, 929.