Looking for answers …

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A simple premise, first …

In market economies, often law infringements turn into an unfair competitive advantage that infringers enjoy against their rivals

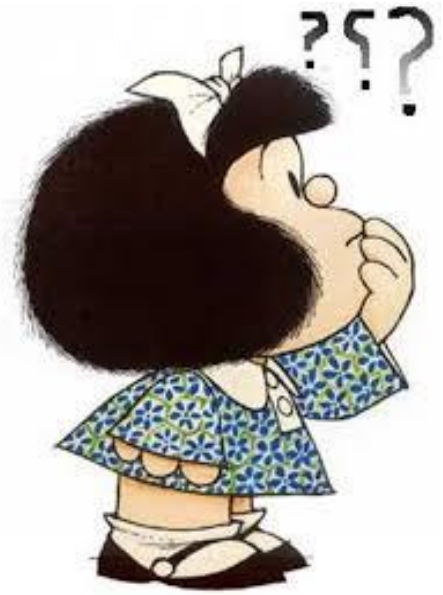
- A (dominant) firm that does not comply with environmental law …
- A (dominant) firm that does not pay taxes …
- A (dominant) firm that does not obey to safety rules …
- A (dominant) firm that infringes data protection law …

→ … benefits from lower costs …

… and, hence, may … enjoy a higher markup, cover up its inefficiencies … or even make lower prices and devote more resources to develop innovation … with the ultimate result of **increasing consumer welfare** but **smiting its rivals**

A question, then

Should antitrust law intervene to prevent dominant firms from gaining such unfair advantages?



Actually, I believe this is not a good question for lawyers, judges, or officers … at most, this could be a question for legislators, policy makers … and legal scholars

Why?

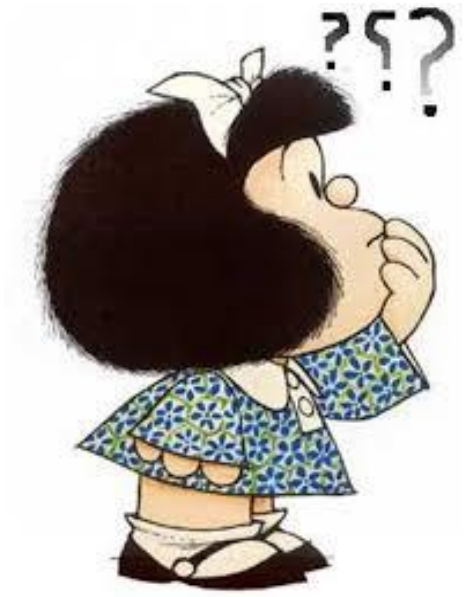
For the sake of the rule of law principle,

antitrust law cannot be applied outside its own boundaries

If the finding of an infringement requires some conditions to be met, you cannot charge anybody with that infringement if those conditions have not been met

Therefore, the question becomes …

When does current **Art. 102(a)** allow prosecuting the infringements of other pieces of law?



The Facebook case suggests that …

A dominant firm that infringes data protection law violates antitrust law as well, if the terms and conditions of its data policy are unfair …

… that is … if, in a competitive market, those terms and conditions would not exist, because they:

- **unnecessarily limit the freedom of the parties,**
- **are unjustifiably unrelated to the purpose of the contract,**
- **are disproportionate,**
- **are unilaterally imposed or**
- **are seriously opaque.**

But, the Bundeskartellamt applied another approach:

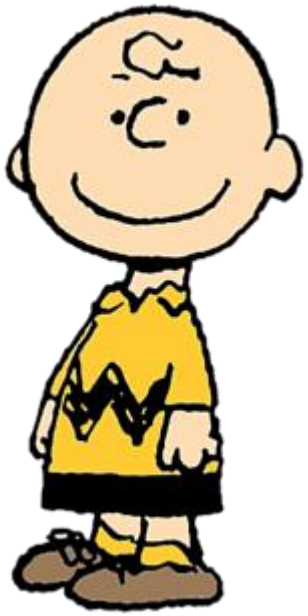
(1) Facebook infringes data protection rules because its users have no control on their data; and

(2) such a privacy violation is an abuse, because Facebook is dominant

The Bundeskartellamt's approach is questionable for two reasons, at least

The legal reason (Düsseldorf Court)

1. No 'as if' test was carried out, though art. 102(a) requires it
2. No enough evidence of loss of control – thus, no violation of data protection law
3. Anyway, no connection between such data protection violation and dominance
4. Anyway, '*Dominant undertakings carry a special responsibility only for competition, rather than for compliance with the entire legal system by avoiding any violation of the law*' – G. Colangelo, CPI, 2019



The policy reason

Antitrust authorities cannot be super-regulators presiding over the respect of any piece of law

Thus, the (tempative) answers to Marco's questions

1. Revival of exploitative abuses?

2. What remedy?

3. Why quashed on appeal?

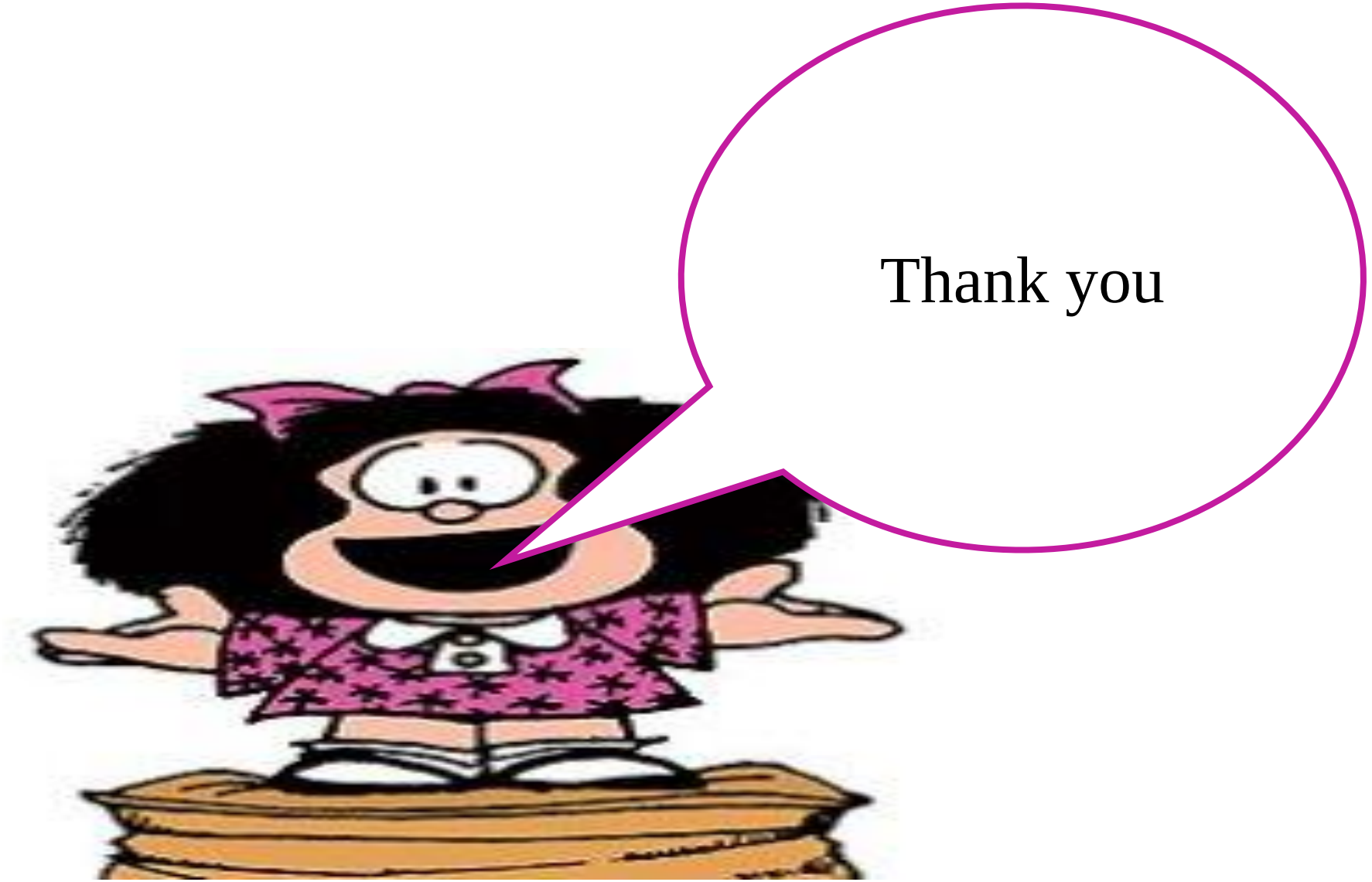
4. Antitrust and other pieces of law?

1. The Bundeskartellamt did not apply art. 102(a)

2. Proportionate

3. Inconsistent with current law and not well-supported

4. Antitrust law cannot be called to fill the gaps of regulation


Thank you