future constitution

---Transcript of Talks---

Future Constitution

Technology – Media – Regulation

Münster, 2 July 2019

Dr. Andreas Grünwald

Talk: "German Competition Policy in Light of the Bundeskartellamt's Facebook Decision"

Dr. Andreas Grünwald is a partner at Morrison & Foerster in Berlin and heads the office for German Antitrust practice. His practice includes antitrust litigation, specifically with regard to cartel damage claims. Dr. Grünwald studied law in Würzburg and Münster (Dr. iur.) and was a research fellow at the ITM from 1996 to 2000.

Basic Thoughts

When the German Federal Cartel Office (Bundeskartellamt, FCO) came down with its long-awaited decision on Facebook's data privacy practices in February this year, after a three year investigation, it caught international media attention – far beyond the legal community.

In the FCO's view, Facebook abuses a dominant market position by making its users accept certain privacy terms that do not meet the standards of the EU's General Data Protection Regulation (GDPR). The FCO considers this an abuse of Facebook's dominant position in the market for social media services. As such, the decision raises a number of interesting – and highly controversly debated – questions: Does a "market" for social media services at all exist, and if so, with whom would Facebook compete in this market? Under the FCO's theory of harm, is it required to differentiate between "on Facebook" and "off Facebook" data collections? And, probably most importantly, is the FCO at all competent for applying GDPR standards, or should this not rather be left to the data privacy authorities?

Moreover, the decision also has a competition policy dimension. It comes at a time when on the one hand, the German legislator not long ago – with its 9th amendment of the German Act against Restraints of Competition (ARC) – already introduced additional provisions to allow the FCO to better cope with the challenges brought by digital businesses, such as Facebook. On the other hand, yet another ARC amendment process is already underway. Policy makers, academics and other stakeholders are currently discussing which additional tools the competition authorities would need to ensure third party data access, to better approach platform or "intermediary" markets, and to prevent markets early on from "tipping" towards monopolization. In this context again, the Facebook decision is a key precedent.

You have heard about the Facebook case in one way or another; it made the news, not just in Germany but also internationally. The decision came down this year after three years of investigation of the Federal Cartel office, and basically it was about Facebook's user terms and data privacy terms. If you want to open a Facebook account, you have to accept Facebook's privacy terms and the terms and conditions for using their service. Facebook asks you to provide consent not only if you are on Facebook, but also if you are using other Facebook services, like WhatsApp, Oculus, Instagram, that are affiliated with Facebook. The data that is being generated when you are using WhatsApp to allow Facebook to link it with your Facebook account, transferring data from WhatsApp to Facebook. You have to agree to that, otherwise you cannot open a Facebook account. Even if you are on third party sites – sites that are basically not related to Facebook – like Spiegel Online for example, and you click the like button. The data that is being generated from this third party site is also being transferred to Facebook and linked with your Facebook account. These are the two key elements that you are being asked to accept.

This was taken up by the German Cartel Office. There have been other investigations into Facebook from other angles, but this was the specific German angle. The allegation was that Facebook abuses its dominant market position by forcing you to accept these terms, which you would not accept if Facebook was not as dominant and you had a choice between social networks. This choice doesn't really exist. That was the theory of harm for the abuse of dominance in this case. This case is interesting in many aspects. It is a novelty case for the German Cartel Office but more broadly to competition policy in Europe. One element is the market definition. How to define the market? That is the first interesting question here. The Cartel Office came to a very narrow market definition saying there is a distinct product market for social media and social networks that are being used in a private context rather than a business context. If you think of LinkedIn, if you think of Xing: those networks are all social networks but the Cartel Office does not consider them to be in the same market as Facebook. They say it is a different market from the demand side perspective because if I am a user and I want to engage socially, I will not use LinkedIn, rather will I go on Facebook. There were some others, there was Google Plus which doesn't exist anymore, there was Lokalisten – a German Network started by ProSiebenSat1 - which also doesn't exist anymore, and a few others.

In the end the market was defined very narrowly, it mainly consisted of Facebook – not much alternative there. And as a next step: what is the market share of Facebook? With this definition of the market, it is almost a hundred percent. When it came to the market position of Facebook the Cartel Office looked at daily active users, monthly active users, registered users, as a parameter to define the market strength. Facebook has a market share of 95% in Germany. The Cartel Office also considered: Does it have to be wider? It is based on the language barrier: if you live in Germany you typically engage with other German users. The Cartel Office basically didn't consider Facebook to be an international platform – which is interesting, but it was done for definition purposes. For market dominance you need 40% of the market share, clearly given in the case of Facebook. So market definition, assessment of market strength and then the really interesting part of the decision is: Is it abusive what they are doing? Being a dominant market player per se is not illegal. Abusing this position is the critical part. I said it at the beginning, the theory there was, these data privacy terms are illegitimate – they may not be illegal, but they are more than what the user would typically accept if the network were not as dominant.

Why is it a German Case and not a European one? There was a BGH precedent case of "Konditionenmissbrauch" (abuse by terms of condition). The BGH decided: if you are a

dominant company – independent of the field – and you use terms of conditions that are too restrictive – this can be from a competition point – this can constitute an abuse of dominance. The Cartel Office was using this precedent saying this is what Facebook is doing. They are using privacy terms which are too extensive.

The decision from the Cartel Office is about 300 pages, and 100 pages are purely data privacy law. So it takes some explanation to why they the competition office is assessing data privacy. There are data protection offices, quite a number of them actually. So why does the Cartel Office apply data privacy standards? It doesn't really matter what the conditions are about – also privacy conditions. If they constitute an abuse of dominance it becomes a competition matter because it is linked to a dominant market position.

This will be tested in court, Facebook is challenging this decision. Facebook will definitely question the legal authority of the Cartel Office. But this is the official position of the Cartel Office.

Then they used the new standards from the GDPR as a benchmark to assess whether these privacy terms from Facebook were acceptable or not. The distinction they made was between collecting data on-Facebook and off-Facebook. They say, when you are signing up for Facebook and create an account, in a way you are engaging with Facebook's business model. You know it is an advertising financed service, it is free for the user, you don't pay for it. Therefore you accept that when you are on Facebook, that the data you are generating, is collected by Facebook. In the view of the Cartel Office this is acceptable. This would be the "on-Facebook part" of collecting data.

What was not acceptable was the "off-Facebook part". Facebook is asking you - when you want to open an account - to share your WhatsApp-Data, your Instagram-Data, your data that is generated on Spiegel Online. All that is transferred to Facebook as well. That is something that you do not expect as a user. The Cartel Office deduces that you cannot be asked to accept this. This is where they draw the line between what is acceptable in terms of data collection of Facebook and what is not acceptable. Again, all this under competition law terms using the benchmark from the GDPR.

The proceedings were held as administrative proceedings, so there was no fine in the end. As a competition authority, the Cartel Office - just like the European Commission - always has the choice between only asking a company to stop a certain behavior or at the same time like the Commission did in the Google cases to also issue a fine. There was no fine in the Facebook case, but Facebook was asked to change these data transfer proceedings, e.g. to stop transferring data from WhatsApp to Facebook. All the users that are on Facebook accepted this because otherwise they wouldn't have been allowed on Facebook. The Cartel Office says that this consent is invalid, you may no longer use this consent and you have to stop said practice. This doesn't have to happen immediately, there is a twelve-month transition period.

It has been challenged at the Higher Regional Court of Düsseldorf [*Ed.: recently the Düsseldorf Court overruled the Cartel Office's decision on August 26, 2019, VI-Kart 1/19*], most likely it will end up at the BGH or the Supreme Court as well. It will be discussed for a while.

Maybe a closing remark on this case before moving on to the current discussion: The Cartel Office put a lot of effort into this case. Even before they started the investigation they created a think tank, specifically looking into these digital business models, platform businesses and multi-sided markets. Facebook was not the only company they were looking at, but undoubtedly the most prominent and most controversially debated. Where does this case lead to? It is interesting to see the timing of the case. The decision

came along earlier this year at a time when not long ago - in 2017 - there was the last amendment of the German Competition Law (9. GWB-Novelle) where the legislator for the first time introduced requirements and clarifications with regard to digital businesses. An example: there had been a long discussion in German Competition Law whether there can be a market where you don't pay for a service. Traditionally there was the view that only if you pay for something there can be a market. If there is no market, how can you establish market dominance? That creates a lot of problems. One example was free TV, as in advertisement financed television. There was a market between the television broadcaster and the advertising industry. But you watching "ProSieben" for free was not considered to be a market. This view has been overcome, and there have been cases – on the German as well as on the European Level – to change this concept and acknowledge that there can be a market even without monetary payments. There is the discussion about data as a currency. You are using Facebook for free but you are using data as a payment. This was taken up by the legislator in 2017 with the 9th amendment to the competition law. It now says "to assume a market for competition purposes it doesn't have to be a market where there is a payment". This helped the cartel office to make their findings in the Facebook decision. Right when the decision came down there was a new discussion starting. It was about the 10th amendment of the German Competition Law (GWB), coming in the next weeks, announced for July 2019. The idea is to take it one step further, to give the competition office a more suited toolbox to handle cases in the digital businesses. Competition law normally has two sides, the supplier side and the demand side. But you have more and more specifically digital business models where there is an intermediary in between. If you think about Amazon marketplace for instance you have the third party sellers offering their products on Amazon. In between there is Amazon facilitating the marketplace. The idea is to acknowledge this specific role of the intermediary – in this example Amazon – as a dominant market player, and that the intermediary can abuse his position. It is more or less a clarification but it is an important one.

Another element is to lower the intervention threshold against a dominant market position. The cartel office argues you may have a situation where – especially digital – companies are doing very well but are not yet dominant in legal terms, but they are getting very close to it, and once they are dominant it is a winner-takes-it-all-situation: lock-in effects come in place and the whole business model will tip into a monopoly market. To prevent that at an early stage it is argued that we need tools to intervene at a point where the business is not yet dominant at all but it is becoming dominant and we need to intervene early on to prevent the monopolization of the market. It is a far-reaching concept and it goes quite beyond classical competition theories. So it will be interesting to know how it will work out in the future, but this is what is being proposed in the future reform.

Furthermore, it is argued that we need data access rules in competition law. It comes with a traditional concept of essential facilities if you think about an infrastructure based industry – railway or energy networks. To take that as a starting point to apply to data sets: you have a company that has a big data pool, also creating rules that let other companies participate in that data pool. For instance, for things like connected cars or internet of things and so, there is traffic data being generated and the whole kind of ecosystem will only work if the data pool is available to everyone. And it is being argued at the moment to introduce these kind of rules to competition law.

There is a separate proposal on the table. It is being proposed at the moment mostly by the Social democrats. Just last week there was a proposal, they called it „Daten-für-alle-Gesetz" (data-for-everybody-law). The idea there is to rather make that kind of a sector-

specific piece of legislation and not really use it in competition law. So it will be interesting to see how this plays out – whether really competition law is being used to introduce these data access rules and if so competition law is per definition sector-agnostic. So it is not just digital businesses generating data, it's insurance companies, it's energy companies, it's utilities companies. If you have a general data access rule in competition law you would have to apply it basically to every business. I don't know if this is really the idea behind it because the whole reform at the moment is very much driven by this Big-Tech-company idea, so by this political will to regulate big technology companies, but not necessarily everybody who owns data.

But there is a lot more in the proposal and there is a lot more to come over the next month but just as a snapshot I think I will stop it here and have you discuss.

Dr. Sarah Hartmann

Talk: "Restrictions on Online Media during Elections [insert clickbait title here]"

Dr. Sarah Hartmann is a senior fellow at the ITM where she obtained her doctorate degree. Her research mostly focuses on broadcast regulation, media regulation in general and data protection –principally in the context of a constitutional frame. She currently is doing a clerkship at a telecommunications and media association in Brussels.

Basic Thoughts

Generation Z, born after 1997, has reached the age of voting eligibility over the last years. It is the first generation of digital native voters. Accordingly, they can be effectively mobilized through channels other than traditional broadcast and print media.

The latest prominent conflict in this context involved a blue-haired YouTuber and the new federal chairwoman of the German CDU. In the week before the European Election, a viral video titled "Destruction of the CDU" by Influencer Rezo garnered over 12 million views. After historically low election results for her party, Annegret Kramp-Karrenbauer criticized the video as an attack on political culture and dialogue, stating that a (hypothetical) public appeal of this kind by newspapers would have been "a clear manipulation of public opinion" during election periods and a conversation about adapting rules from the analogue sphere to digital media was necessary.

Her reference to alleged restrictions on the press during election periods was poorly chosen. While linear broadcasting is indeed subject to certain obligations of impartiality under German law, these do not apply to print media. Non-linear audiovisual media services, like YouTube channels, are currently also exempt from these requirements, except for a prohibition of political advertisement.

Allusions to new or adapted rules for online media during elections must be understood in a wider context. They entail the question of whether non-linear AVMS should be treated "tv-like" or "press-like". This has become a kind of "Gretchenfrage" of current media policy. In the duality of media regulation, the "short leash" for broadcasting is being justified to this day by limited capacities, high access thresholds and its exceptional impact on public opinion compared to other media. Seeing as internet-based audiovisual services are not dependent on limited resources and do not require infrastructural investments, their regulatory treatment hinges solely on their potential to influence public opinion to a similar degree as linear services.

As I have argued in connection with the material scope of the recently reformed AVMS directive, it is time for a shift from categorical regulatory treatment of non-linear vs. linear services to individual consideration of specific services' influence on public opinion as defined by their reach. Applying this principle to the YouTube channel in question fails to demonstrate significant relevance compared to the daily reach of TV stations.

Restrictions on freedom of opinion and freedom of the media must remain the exception, not the rule, especially during pivotal moments in the democratic process such as elections. Traditional issues in this context concern equal access of parties and candidates to airtime for campaign advertising and televised events, such as election debates. In a medium that can be freely accessed, there are no corresponding scarce

resources to distribute equally. Provisions of general law protect parties and candidates against defamation, but not against criticism.

For the time being, these safeguards are sufficient and appropriate for non-linear services. It seems likely, however, that certain services will match or surpass TV's reach and level of influence in the coming years. A new approach for defining the material scope of media regulation will be crucial to ensure suitable policy.

Let's go back a few months: we've seen the European elections 2019 and the, I would say, most interesting thing about this election is that there is this emergence of a new generation of voters. We have generation Z, born after 1997. I'm not sure if you are present in the room – probably not [laughter in the crowd because one student raised her hand]. That is going to change quickly in the next couple of years and they are becoming eligible to vote, to participate in elections. That of course changes the whole political and democratic process as well. Because they are truly the first generation of full digital natives maybe. They do not simply get their information from the morning paper or the evening news.

I have recently witnessed this on a personal level. I have a 16-year old cousin, so he was not eligible in Germany to vote or in the European election but he will be in two years. And earlier this year, I was told, he left the house very early on a Saturday morning and as we all know, that is kind of conspicuous. So, where was he heading? He was heading to a protest in the city centre actually, against article 13 of the EU copyright reform that was then still on its way. And he left the house saying: "Politicians want to break YouTube!" So, that was something I was surprised by because I had no idea that he was politically interested. To be honest I don't think he had ever been to a protest before. It dawned on me then that apparently he had different channels where he got his information, where he was being mobilised effectively and also as a sign of the fact that YouTube apparently is not only for cat videos anymore. Which we also saw more recently and a lot more prominently actually when there was this whole conflict around the video "Die Zerstörung der CDU" (the destruction of the CDU) by blue-haired YouTuber Rezo, which I'm sure you've all heard about. This video was uploaded a little over a week before the European election and during this week leading up to the election it garnered up to around twelve million views [animated exchange if everybody saw the video]. After the election the new federal chairwoman of the German CDU – side note: the election results for the CDU and CSU were not very good – she criticised this video as an attack on political culture and political dialogue. She said that if seventeen newspapers had done the same, if seventeen newspapers had published a public appeal not to vote for a certain party or to vote for a certain party before an election, that this would have constituted a clear manipulation of public opinion.

Therefore, in her opinion a conversation needed to be held about implementing new rules for online media or to transpose rules that allegedly already exist in the analogue sphere to digital media. To me it is a lot less clear what this "clear manipulation" of public opinion is supposed to be. We have to keep in mind that this is the very role of the media. The role of the media is to be a factor into the process of public opinion forming. On the other hand, of course there are - as we all know - inherent dangers to mass media when it comes to the formation of public opinion. So it is a very fine line to draw between influence which is good, and undue influence or manipulation which is bad. And this line might be a fine line but this line has been drawn for the traditional media - for broadcasting and print media - by law and also by case law over decades. Let us take that as a starting point.

Let us look at two scenarios. Let us imagine broadcasters refuse to air campaign spots for certain parties. And I am not talking about situations where they refuse to do so because of the content of the campaign spot, but just because they don't like the party. Or let's imagine that broadcasters offer air time to political parties in order for them to air their campaign spots but they determine the fee to be quite high. So high, in fact, that only very well established parties or individual candidates who have a lot of money, would be able to afford those fees. Well, under the current framework both situations in broadcasting could not happen, because there is a general ban: there is a provision of political advertising in broadcasting under German law.

The only exception from this is in the periods from elections in which broadcasters are obligated to air campaign spots for all parties participating in the election. The fee is kept for private broadcasters at the level of their own expense, well, for public service broadcasters they are obligated to air the campaign spots for free actually. Overall broadcasters are obligated to act in a non-partisan way. They are obligated and required to be impartial, objective and neutral.

Let's got back to the scenarios and look at them again, only this time it is not broadcasters. It is newspapers, like in the example given by Annegret Kramp-Karrenbauer. The situation is entirely different, because newspapers as print media are not subject to the same restrictions as broadcasters. They can be partisan, they can choose to print political advertising and they can refuse to print political advertising. So the question is: Why is TV being treated so differently, why is broadcasting being treated so differently from print media? The traditional answer to this – and this is not something specific in the context of elections but overall in media law – we can break down into three factors.

First, broadcasting is different from other media because broadcasting has very high thresholds for entry. So we have access issues pretty much. Secondly, broadcasting is limited. We have a limited number of resources, a limited number on a technical level of capacities for channels. The third and most important factor is the exceptional impact of broadcasting, that broadcasting is thought to have on public opinion when compared to other media. This is what justifies broadcasting to be regulated quite strictly compared to other media. What we are talking about here of course is online-media. So how does online-media fit into this equation? Specifically online-media like this YouTube video by Rezo. This YouTube video in European law terms is a non-linear audio-visual media service, which in the German terminology is tele-media with TV-like content. There are no specific provisions concerning elections for this type of content. However, the general ban on political advertising does apply to this kind of tele-media, to this type of media service. Other than that, the online media YouTube channels of course are free to be partisan, they are not subject to any requirement of objectivity and they can choose and express their own political affiliations.

The more interesting question of course is: could this be changed? Or maybe, should this be changed? Should we apply more restrictions to online-media? Should we model restrictions like in broadcasting for online-media? Well, if we go back to the three factors that I pointed out, that justify a higher level of regulation, it is very easy to see that two of the three factors are actually non-present in the case of online media. Like a YouTube channel. We do not have high thresholds for entry and we do not have limited technical capabilities. So the question hinges completely on the level of impact on public opinion that these services have when compared to TV. That is the only factor that is actually able to justify or would be (able) to justify a higher level of regulation than what we have right now. I would argue that we actually need to make this the focus of the material scope of media law. We need to stop looking at whole categories of services. So, linear

services vs non-linear services, TV vs online, new vs old media. We need to start looking at the actual specific and individual services. The level of impact on public opinion is of course more of an abstract concept and it is very hard to measure. The only thing that we could use that is quantifiable, that is measureable would be the reach of the services – the number of users or the audience that it actually reaches on an average daily basis over a certain period of time. If we apply this to this YouTube video or this YouTube channel and compare the average daily reach over a period of six months including, of course, the period where the video was viral in May, we can easily see that this is more on the level of a big German newspaper like the FAZ. This, of course, by itself is impressive, but far below the audience that individual programs like news programs on TV reach on average. From this, I would conclude that at the moment, the system that we have for regulating online media – when it comes to elections – is actually well-balanced. There is no necessity for a higher level of regulation**.** We don't have issues with access or the distribution of resources and we already have the prohibition of political advertisement.

In addition, it is very important to keep in mind that outside of media law there are safeguards in general law. So, political parties, political candidates just like everyone else are protected against defamation. This, of course, does not include protection against criticism. If we look at the future, it is an entirely different matter. Because it is not very hard to imagine that we will reach a point where non-linear services will actually reach or surpass the reach, the level of influence, the impact that TV currently has. At that moment in time, it will be crucial that we find a new approach to define the material scope of media law. Not just for elections but in general. In order to do this, it is important to stop looking at what old media is and what new media is, and to start looking at what we actually need to do to regulate. This, of course, can be applied not only to audio-visual media and also not only to editorial media, but also to platforms and intermediaries. Because if we think about the last couple of years, especially in connection with elections, in connection with political discourse, most of the discussions we've had have surrounded issues like social bots and disinformation and this has always been in connection to platforms and social media like for example Facebook. On these platforms, there is no editorial control about the content as a whole. Factually, they do reach a very large audience. They reach a much larger audience than any individual YouTube channel for example. It would not be hard to imagine that one could find a certain angle of regulation for these platforms as well. For example, just to get the discussion started maybe, I would say: why not transpose the ban of political advertisement that is currently being implied to TV, to linear broadcasting and to non-linear, to the media with TV-like content. Why could we not just implement this for Facebook for example? Why not ban political Facebook ads all together? Because we have seen, the campaign expenses of German parties on Facebook were actually published for this year's election and we have seen that there are quite big differences. Is that fair? On TV it is the same thing. I would say that this is probably one of the bigger challenges for the future. To get a grip on transposing rules for intermediaries.

---

future constitution

Prof. Dr. Russell Miller, LL.M.

Talk: "The Case for Users' Rights"

Prof. Dr. Russell Miller, LL.M. (Frankfurt a.M.) is a professor at the Washington and Lee law faculty. His teaching and scholarly research focuses on public law subjects (such as Constitutional, Administrative and International Law), Comparative Law Theory and Methods, and German Law and Legal Culture. Prof. Dr. Miller also is the co-founder and Co-Editor-in-Chief of the "German Law Journal".

Basic Thoughts

No one disputes that we are in the midst of a revolutionary socio-technological-cultural shift as tumultuous and transformative as the one that took place in the Industrial Revolution. The world is being reshaped and re-ordered by a dynamic of dizzying development in technology and media. Web 3.0, Digital Nativism, the Social Media Age, and the Internet-of-Things are changing society – and us as individuals – in dramatic and unpredictable ways.

Some of the markers of this revolution include our involuntary, deeply invasive, and thoroughly integrated cohabitation with and within networked technology. But there is more. The new paradigm exists as an almost inconceivable massive and manipulative market that commodifies our attention and behavior for the immense profit of a number of monopolistic technology and media enterprises.

How law and regulation should respond to this revolution is a [the] pressing question of our age. Constitutional law is not excepted from this challenge. Constitutionalism has been here before. In response to the Industrial Revolution, for example, the American constitutional order pivoted from its liberal orientation to a framework that could accommodate the increasing need for an intervening, regulatory state. The Supreme Court's Lochner-era jurisprudence gave way to Carolene Products and a framework of differentiated rights interests and federal centralization. Economic liberties would benefit from less rigorous constitutional protection and the rights promoting equality and democratic participation would enjoy more rigorous constitutional protection.

The German courts' recent engagement with challenges to ad-blocking technology presents valuable insight into the possibilities and pitfalls of the constitutional evolution that will be necessary to make constitutionalism relevant for the coming age. The lessons include:

- The increasing significance of the German doctrine of mittelbare Drittwirkung – still relatively unheard of in American constitutional law;

- The acknowledgment of the involuntary, unavoidable, deeply invasive nature of our integration with technology and digital media;

- The recognition that market actors strategically facilitate, manipulate, and capitalize on our digital/media integration for profit – making users the (and their data) the net's true commodity and not the services these market actors provide;

- The recognition of the resulting power asymmetries between technology and media firms, on one hand, and users (all of us), on the other hand. This is accompanied by the state's declining regulatory capacities in this sphere, suggesting the need for a constitutional regime reinforcing of self-help measures;

 The increasing significance of negative freedoms – such as the constitutional guarantee of negative informational freedom (Article 5) and the "right to be let alone" provided by the right to freely develop one's personality (Article 2 and Article 1).

In the ad-blocking cases the first and second instance courts took measured steps towards each of these points. The Federal Court of Justice, in its case from 2018, retreated from them. Most disappointingly, the BGH failed to: (1) appreciate the involuntary nature of our network integration; and (2) the predatory, profit driven nature of technology and media firms' interests in the web.

I can seize this, because you could have hardly said something more appropriate to set my contribution. So I thank you! We have designed this so that we've heard a couple of examples of, what I would refer to as, traditional regulatory responses through state framed statutory regimes. An attempt to control what you're describing in one sliver is a total revolution of not just media and technology but our way of being. Look, I am just a public lawyer. I'm here to hopefully give a little confirmation for my suspicion about the technological story that's being told here. And it's really true that we're in kind of a revolution, that media is consumed differently and provided differently, also structured and financed in a different way than it used to be. All of that is different; we are really in a revolution. Don't we need something new and can the constitution do that for us? Instead of saying "No, we can stretch cartel law to do all of this". You [pointing to Andreas Grünwald] sound a bit suspicious, how far can we stretch this thing and still call it cartel law. You [pointing to Sarah Hartmann] sound a little more optimistic. Maybe we can use the old media concept and regime to capture this revolution. So I want to propose at least the possibility that we have some options for a new regulatory approach. The main shift I would urge – at least away from the two models that we've heard – is that we ought to try to empower the users in this Wild West that is the new technological landscape to regulate their experience in the internet for themselves. It turns out that this isn't my idea, that there already is a technology in place that achieves this. It is ad-blocking technology. I will tell you a little bit about it. I'm not a great expert in the technology. I've tried to understand how it works in the internet. I'm going to just stretch the model of what ad-blocking technology could be to make the claim that at very least it stands for a new proposal – not with some innovation or stretching of the old regime – that users in the internet ought to be empowered to determine their own fate in the internet.

I would like to lay the basis for the argument for the proposal. I want you to reflect a little bit on the question: Are we really in a tumultuous revolution with respect to a wide range of our assumptions such that would justify the proposal I am making? That we have to be able to think about other regulatory mechanisms – in fact, even maybe users as empowered regulators themselves? I say that from a constitutional sense with respect to our question about the future of the constitution, because at least the U.S. constitution had to make dramatic and radical changes with respect to the last big revolution – the industrial revolution. It was such a dramatic change in our constitutional culture that many constitutional scholars in the United States refer to the constitution we have now - post 1920 – as the third constitution. The revolution in constitutional law took place as the industrial revolution shifted us away from local, liberal markets to mayor massive producers and a nationwide market. What did the society need in the face of the dramatic social shift from local production to massive national markets? What did the constitution had to accommodate? You know, what had to happen? When the economy of a market changes that dramatically from buying bread from your local baker who you know to buying bread from a conglomerate producer

based in a faraway place. What regulatory change had to take place? The New deal policy! And what I am describing is a shift to the paradigm that you two described: that the state had to intervene as the regular. Before, if you didn't like the bread you'd stop buying it. You could control that for yourself, but if it is a conglomeration, the state had to intervene and regulate – that is the paradigm we've been talking about. So the U.S. constitution had to live through this shift produced by a major upheaval of the industrial revolution, and the constitutional shift was from an old 1787 extremely liberal paradigm to a regulatory welfare-state model. That is now that we identify with the new deal of 30s and the 40s. So there is a shift from liberalism to a 'Wohlfahrtsstaat', a regulatory state. And there was a very distinct shift that took place in order to achieve this. The shift that took place in constitutional doctrine to make the possibility for that future constitution was that the Supreme Court had to say: 'We are no longer going to respect and recognize property rights with the same rigour'. That means we respect and protect other kinds of rights, like a right to equality and democratic participation. If we continue to enforce property rights vigorously, it is going be hard to pull off the new deal and state regulation, because businesses will constantly say it is my property. The Supreme Court – and it almost broke the Supreme Court – eventually had to say we are going to deemphasize property rights and continue to give greater protection to rights like democratic involvement and equality. It is a huge revolution. So I know that constitutionalism can confront these revolutionary moments and adapt, and I wanted to just confirm whether we are in the midst of an equivalent revolution. It is a social revolution: the way society is structured, the way we interact with one another, all of that is changing and it is driven by technology, but I wouldn't say just by technology, but by our involuntary deep immersion and integration with technology.

That is my first thesis that we're in the midst of this revolution. If I'm right then we might need at least an alternative in constitution providers with that. To wrap up this entry point: Are we in a revolution? I would invite you to help me try to imagine what that is. How would we characterize our new socio-technological-political paradigm? What does it look like? There is now deeply invasive technology that can know completely who we are and where we are and what we are interested in, all the time. Deeply invasive technology: that is unimaginable, unheard of before and we are thoroughly and completely integrated into this deeply invasive technology; so much so that I have suggested that it is involuntarily. We don't have a choice anymore but to participate thoroughly in this deeply invasive technology. And I would add a third element to the revolution, which is that our thorough integration into this deeply invasive technology is at the same time being monetized, it is being marketized. As we heard, it is about us generating data for value. So it is just not a chance that there is deeply invasive technology into which we're all thoroughly integrated, but that this is part of – I don't even mean this in a sinister sense, but as a fact – that it is part of a market strategy. In the same way that tobacco producers wanted to make tobacco more attractive and addictive, the deeply invasive technology, that we are all thoroughly integrated to, operates to draw us in in a cognitive sense. But I'd say it works now in a practical sense: that at my university, you have to have a Facebook account to register for class for example. So there are practical necessity, it is no longer voluntary. So those would be my elements of a paradigm that is revolutionary, that suggests we need some other constitutional order. So how could we respond to that, if you agree that we are in a revolution?

I can refer to one example. I hope it will be a hopeful example, which is the ad-blocking cases that unfolded here in Germany and I'm really grateful that they unfolded here in Germany, because I guess you're hearing Americans say: 'We don't need so much state. Get rid of the state, we can take care of our own'. I know how it must sound like it is

obvious that an American comes up with a solution that minimizes the state. And I'm so grateful that this possible response actually is a German phenomenon so that you know I'm not just invoking it out of my native neo-liberal impulse as an American. I don't know if you're familiar with the technology of ad-blocking. Are here a few users? You don't have to raise your hand. You can block this question, if you want to, if you're particularly involved with ad blocking technology. But most of the services involve an AddOn to your Browser that allows you to either completely exclude all advertising or to tailor the nature of the advertising that you receive while engaging with the internet. You should try it; it's a miracle, alright. So that's the nature. It is a browser-AddOn that allows the user to determine her experience of the internet and at the same time dictates how much data she is generating for that consumptive market that wants to collect that information. It is a radically self-empowering technology. Can you imagine who finds it not so great? Who finds ad-blocking technology not so great?

Everybody who is making any revenue whatsoever on the internet, particularly through advertising, objects to this. In particular, I would say, the traditional media. When I say "traditional media" in Germany, whom do I mean? Axel Springer, right? So it is traditional media who find this objectionable. They brought cases to court across Germany under private law and I had to weigh in the UWG. That should not have happened to me as a public lawyer. I can tell you a little bit about the outcomes of the cases under the UWG. In most cases, the ad-blockers won. They won even though they were found to be in competition with the publishers who needed to distribute their advertising. But they won, because in most instances the courts concluded under the UWG that it was not a targeted attempt to be unfair towards the publishers.

The ad-blockers had their own interests that were driving their behaviour. It was not driven by the interest of actually harming. That is a residual consequence of the ad-blockers. What interested me however was the first element I would refer to all of us as the constitutional possibilities for this new world order that I think we might need, and it is a distinctly German phenomenon. It is well known to all of you but it is completely alien to the American constitutional landscape and that is "mittelbare Drittwirkung". We don't have that, we have a constitution that only applies to limit the power of the state and has nothing to do with personal private disputes. The first lesson I can take from the Ad-blocking cases, as I try to empower the users, is that the German constitution can actually speak to the parties in ways that other constitutional regimes cannot. – So, thank you, Germany! – And thank you Lüth-Entscheidung for giving us the possibility of saying: I know that we are talking about the internet and the market and all kind of other stakeholders, but not the state. The constitution still nevertheless has a role to play here. This would be a major shift for the future of the constitution, that is must be more horizontal - maybe not more for all of you but for the rest of us. The constitution must become horizontal.

So because of that tradition and that doctrine in Germany these unfair competition laws involve little snippets of constitution in applying the UWG. That would be the first demand for this new rule here. What we found, when the conversation turned to constitutional law in the context of these ad-blocking cases, was a willingness on the part of the Landgerichte but also the Oberlandesgerichte, that decided these cases, to read the UWG extremely broadly. They were willing to say that unfair competition doesn't just involve the publisher, and it doesn't just involve the ad-blocker, and it doesn't even just involve the consumer of either of those services, but that unfair competition law in Germany should address a broader public as a stakeholder in fair competition. This is an invitation for the constitution, through horizontal effect, to begin to consider not just consumers of these services but all of us – to consider users of the internet that happen

to be all of us. The courts in the first and second instance were willing to give competition law this broad reading and this way invite the user into the horizontal sphere – the glow – of the constitution.

From there, the courts applied a mostly theoretical doctrine of the constitution. From there, it starts to point to the direction where you were suggesting, one that isn't so frequently applied constitutionally, but the inverse of the right to express opinions happens to be the right to exclude the reception of opinions. This is the negative informational freedom. That one should be empowered to exclude information if she wants. This would emerge apparently under the doctrine as was discussed in the Landgerichte and in the Oberlandesgerichte that this would be a product of an inverse reading – a shadowy opposite – of the affirmative promises of Art. 5 (1) GG. If you get to express opinions, you get to exclude opinions. In conjunction with the general right to personal autonomy that you find in Art. 2 (1), which contains some elements of the right to be left alone. It is the conjunction of these two things what I think might be a way of horizontal effect embracing all of us as users empowered by the constitution to exclude the impacts we might experience of this revolution on our own terms to empower us.

That was my hopeful enthusiastic possibility until the case went to the BGH in Karlsruhe. There, the court was not so interested in the constitutional matters and decided – also in favour of the ad-blockers as had been the case in the lower instances – but the court ultimately decided that it was kind of a constitutional "Unentschieden" between the possible constitutional issues. In making that conclusion the court seemed to subscribe to complete misunderstanding of the nature of our lives in the internet. So for example, it said, publishers certainly have a constitutional interest in being able to publish their content and I understand that the constitution extends to some level protection of the revenue they need to achieve. But the court said it is not so unproblematic; they can generate revenue in some other ways. They could combat ad-blocking through the use of some other technologies. There are of course "ad-blocker-blockers" that publishers can deploy which have produced ad-blocker-blockers-blockers. But the court said: "you're not entitled to get the money the way you always got it." So maybe there is not so much of a constitutional problem.

On the other hand – on the part of the users – the court is still willing to embrace the users. The court said they volunteered to expose them the same way you described with signing up for Facebook – they volunteered to expose themselves to these advertisers. By volunteering, by accessing the website they understood that they were participating in this market. My main frustration with that conclusion is that I think it misses the deeply integrated involuntary nature of our engagement with the internet. Is it really true that we choose to avail ourselves as data products for access to these services? So this is the unhopeful conclusion, except that the publishers have moved across the street in Karlsruhe to the Federal Constitutional Court and there is a chance that the court will take the case and perhaps revive the possibility of a stronger rule for users to be empowered by the negative informational freedom. That is the deal I can offer you as a way of changing the rules, and not just new powers for the state but power for users to engage with the internet.
