Reconfiguring Exploitative Abuses for Digital Markets

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Abstract
In the era of digital markets, services are increasingly available to consumers ‘for free’. Consumers nevertheless offer considerable value to online platforms that can collect an unprecedented amount of personal data from their users. More data allows for better targeted advertising, which translates into higher profits for online platforms. Online platforms’ extensive data collection coupled with their rapid growth has attracted the attention of competition authorities. The German competition authority investigated Facebook, finding early 2019 that Facebook abused its dominance by improperly combining user data that it collected. Against the background of this decision, this paper considers how an exploitative abuse could be established in digital markets and what the implications are for the boundaries between competition law and data protection law. The paper finds that an abuse of dominance requires a causal link between the company’s dominance and the abusive data protection practices. The paper also questions if it is relevant whether Facebook’s data collection practices violate data protection rules for finding an abuse of dominance. Finally, the paper argues that competition law is in principle not a suitable enforcement tool for data protection problems, given that both fields of law address different problems.

Keywords: Abuse of Dominance, Data, Competition Law, Data Protection

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1. Introduction

In the era of digital markets, services are increasingly available to consumers ‘for free’. This is possible because many online companies operate on two-sided markets, serving both consumers and advertisers. Consumers do not pay a monetary price: the online platforms generate revenue through advertising.

This by no means implies that consumers do not represent monetary value to the online platform. Consumers, rather than a monetary price, offer their personal data. Online platforms are able to collect an unprecedented amount of personal data about their customers by asking them for data and by tracking their online behaviour. The more data firms have on their customers, the better they can target advertising to a potentially interested audience. The more targeted the viewer, the more advertisers are willing to pay for advertising space. This way, consumers’ personal data translate into revenue for online platforms.

The potential for success with this data-centred business model is apparent. Many of today’s market leaders revolve around collecting and analysing data, using algorithms to analyse, predict and take strategic decisions. These market leaders, such Google, Facebook and Amazon, have become so successful that they have largely taken over their respective markets.

The market dominance of these companies has been attributed to their efficiency, but also to the characteristics of two-sided markets, which often display network effects, and to the power flowing from owning massive amounts of data. It is therefore not surprising that digital markets, and especially their market leaders, have attracted the attention of competition authorities.

Competition authorities face the question of how to deal with the peculiarities of digital markets. In respect of dominant companies, the question arises of what constitutes an abuse of dominance in a market where consumers do not pay a monetary price. The German competition authority, the Bundeskartellamt (BkA), faced this question in its investigation into the data collection practices into Facebook. It rendered its decision in February 2019, ruling that Facebook abused its dominance by improperly combining user data that it collected.

This paper assesses the BkA’s decision and its implications for the law of abuse of dominance in the EU. The paper first asks how an exploitative abuse could be established in digital markets, and then considers where the boundaries between competition law and data protection law should lie.

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As to the first, the paper evaluates the BkA’s approach of finding an exploitative abuse in Facebook’s violation of data protection law. An infringement of data protection law should not automatically infringe competition law, merely because it is committed by a dominant company.\(^5\) For this to qualify as an abuse of dominance, one would need to establish a link between the dominant company’s market power and the exploitative conduct. In the context of Facebook this would mean that a causal relationship exists between Facebook’s dominance and its data collection policy, or at the very least, that its data collection policies would further entrench Facebook’s dominance. Such a link should prevent that competition law is used to fill in for weak enforcement mechanisms or sanctions in other fields of law.

In this context, the paper also considers whether it is relevant if Facebook’s data collection practices violated data protection law in the first place. Given that abuse of dominance rules prohibit behaviour for dominant companies that would otherwise be allowed, it is not obvious that such a violation of another law would be relevant. If Facebook’s terms and conditions could indeed be an abuse of market power even if they respect data protection law, this raises the question of how far competition law is to meander into other fields of law.

More broadly, the BkA’s investigation raises questions as to the scope and limits of competition law. With new EU data protection rules recently having taken force, one could wonder why a data collection issue should be investigated under competition law at all. At the same time, competition law allows for targeted enforcement of dominant companies on top of other legal obligations, and sanctions that can achieve a real change in online business models.

Finally, the paper argues why it is relevant to demarcate these legal areas, even if in digital markets their respective scope may overlap. From an economic point of view, competition law and data protection law in principle address different problems. Data protection law aims to mitigate the results of information asymmetries, whereas competition law deals with problems flowing from market power. If competition in the market is weak, consumers have no choice but to accept prices and terms offered to them. But even in competitive markets consumers may accept unfavourable deals, because it would take an unreasonable amount of time and effort to familiarize themselves with all the terms and conditions and to fully comprehend these. In the context of Facebook, one could ask whether it could not collect similar data if it were not dominant, simply because users are unaware of its collection – something the BkA in fact argues.

The paper proceeds as follows. Section 2 summarizes the Bundeskartellamt’s investigation into Facebook, followed by an overview of the German legal background in section 3. Section 4 discusses the goals of competition law and data protection law, and their respective economic rationales.

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2. Bundeskartellamt investigation

2.1 The Facebook investigation

The German Bundeskartellamt launched an investigation into Facebook in 2016 on the suspicion that Facebook abused its possibly dominant position in the market for social networks with specific terms of service on the use of user data. In December 2017, the German competition authority published a preliminary assessment notice, limiting the alleged abuse of dominance to Facebook’s collection and use of data off Facebook. The data collection on third-party websites that have Facebook ‘like’ or ‘log-in’ options also affects non-users of Facebook, who did not give their express consent for this data collection.

On February 6th, the Bundeskartellamt rendered its decision, finding that Facebook abused its dominance by improperly combining user data that it collected. The BkA imposed far-reaching restrictions on Facebook’s processing of user data in the future, including a requirement that Facebook must obtain “voluntary consent” from consumers before using such data.

Facebook’s business model distinguishes this case from ‘traditional’ excessive pricing cases. Facebook allows users to connect to friends and family ‘for free’, without them having to pay a monetary price. Instead, users accept to transfer their personal data to Facebook in exchange for services. One concern is that this transfer of personal data is disproportionate for the service users get in return. This would make the data collection practices of Facebook a form of excessive pricing. A second concern is that users have little to choose with respect to the data collection practices. They give their consent, but the question is how meaningful this consent is if no alternatives are available on the market. The Bundeskartellamt’s investigation into Facebook may turn into the first case where data protection violations may be used as benchmark to assess an exploitative abuse of dominance.

2.2 Questions raised

The 2017 press release raises several questions for the scope and interpretation of EU competition law. A first question is whether it is relevant if Facebook’s practices violate data protection rules. The press release states that Facebook can unrestrictedly collect every kind of user data from third sources, attribute it to a user's Facebook account and use it for numerous data processing activities. The press release notes that “Facebook's terms of service are at least in this aspect inappropriate and violate data protection provisions to the

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6 Bundeskartellamt, Press Release, ‘Bundeskartellamt initiates proceeding against Facebook on suspicion of having abused its market power by infringing data protection rules’

7 Case B6-22/16, see press release of 7 February 2019, Bundeskartellamt prohibits Facebook from combining user data from different sources, available at [https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html?nn=3591568](https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html?nn=3591568)
disadvantage of its users.” The Bundeskartellamt finds that users cannot be assumed to have effectively consented to this form of data collection and processing.

With respect to data collection on the Facebook network itself, the Bundeskartellamt leaves open whether this also constitutes a violation of data protection provisions and the abuse of a dominant position. The question is if it matters for the assessment under competition law whether data protection rules were violated. This leaves two options. If it does, the investigation concerns data protection violations potentially qualifying as an abuse of dominance. If it does not, it concerns competition law potentially go beyond data protection law obligations for dominant firms.

One could argue that a violation of another rule is not relevant for competition law proceedings, as competition law generally sanctions behavior that is otherwise legal. There is therefore no need to consider a violation of other laws. Nevertheless, this forces us to think about the concept of ‘abuse’ and its scope. With the growing importance of digital markets we are likely to increasingly see abuses that do not concern excessive prices but instead abusive terms and conditions. We then are more likely to enter other areas of law, raising questions of their scope and interrelation. In short, we need to ask how broadly or narrowly ‘abuse’ is to be defined. This will determine the scope of competition law as compared to data protection law and other fields.

A second issue raised by the press release concerns the direction of the causal link between the abuse and the dominant position. According to the press release, the Bundeskartellamt “holds the view that Facebook is abusing this dominant position by making the use of its social network conditional on its being allowed to limitlessly amass every kind of data generated by using third-party websites and merge it with the user's Facebook account.” The press release also cites Andreas Mundt as stating that “Data protection, consumer protection and the protection of competition interlink where data, as in Facebook's case, are a crucial factor for the economic dominance of a company.” This raises the question of whether the Bundeskartellamt is concerned about data entrenching a dominant position, or about abusing a dominant position to gather data. It also poses the question of whether data entrenching a dominant position is relevant to an abuse of dominance case.

### 3. Abuse of dominance

Whereas competition law so far focused primarily on exclusionary abuses, this investigation alleges that Facebook imposed exploitative abusive terms on its users. The Bundeskartellamt relies on Art. 19(1) of the German act against restraints of competition (ARC), which is equivalent to Art. 102 TFEU prohibiting the abuse of dominance on the EU level. The main
requirements of Art. 19(1) ARC are that the company have a dominant position and engaged in an abusive conduct. Art. 19(2) no 2 ARC prohibits the use of trading terms and conditions that the dominant undertaking could probably not demand if there was effective competition in the relevant product market.

This is comparable to Art 102(a) TFEU on exploitative abuses: terms and conditions are unfair if they are a) not necessary to achieve the object of the contract and (b) not proportionate in view of the object. ECJ case law do not provide an exhaustive list of possible unfair contractual clauses in the meaning of Art. 102(a) TFEU. The conditions are that the terms are unilaterally imposed and that they are unfair. In the case of a dominant firm the terms are unilaterally imposed as the firm is an unavoidable trading partner for consumers. Terms are unfair if they are not necessary for the performance of the contract. The ECJ has considered possible objective justifications but has rarely accepted these in practice.9

With respect to data collection off Facebook, the terms are, in any case, unilaterally imposed to non-users who have not given their express consent. The terms could be deemed unfair as they do not appear necessary for providing the services on Facebook. A possible objective justification could be that the transfer of data off Facebook increases the quality of the social network.10

Several reasons can be named for relying on national law rather than on EU law. One is that national law on unilateral conduct may be stricter than EU law (Art 3(2) Reg. 1/2003). Another is that EU progress in this area may have been more difficult, for concern of setting a controversial precedent.11

The Bundeskartellamt relies on the case law of the German Federal Court of Justice, finding that Art. 19 ARC sanctions unfair contractual clauses imposed by dominant firms on final consumers. In the VBL-Gegenwert I and II cases, the Court found that a violation of consumer protection law by a dominant undertaking can constitute an abuse of dominance.12 These cases concerned the provision of retirement benefits and a condition inappropriately impeding customers from exiting a long-term agreement with the dominant supplier, which the Court qualified this as an abuse of dominance. Nevertheless, not every inadmissible clause is automatically an abuse of dominance. This is only the case if the company can impose the clause because of its dominant market position.13 Clauses constitute an abuse when they differ considerably from the level that would be provided in a hypothetical competitive market.14

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9 See also Botta 2018.
10 Botta 2018.
12 VBL-Gegenwert I, para 65, VBL-Gegenwert II, para 35.
13 VBL-Gegenwert I, para 68, VBL-Gegenwert II.
The Pechstein case concerned an agreement imposed by monopolist International Skating Union on athletes for competing in the world championships. Ultimately, the claim that denying athletes the right to carry out their profession constituted an abuse of dominance was rejected.

Comparing this case law to the Facebook case, the bar for finding an abuse of dominance is considerably high. On the one hand, users cannot switch services unilaterally given the importance of network effects. On the other, data protection infringements are also committed by non-dominant digital players. The balancing of interests in this case concerns a social network for leisure purposes, as compared to exercising one’s profession as in the Pechstein case.

4. The scope of competition law

4.1 Competition law

It is generally agreed that the goal of competition law is to maximize consumer welfare. Competition law targets business behaviours that have a net negative effect on consumer welfare. However, in some countries maximizing efficiency and consumer welfare are not the only goals of competition law. Some of the other popular goals of competition law include: ensuring an effective competitive process, creating a level playing field, preserving economic freedom, fostering consumer choice, ensuring fairness etc. The focus on efficiency as the goal of competition law has also been critiqued in evolving scholarship as being too narrow. Some members of the post-Chicago school, for instance, acknowledge the importance of efficiency but believe that the goals of competition law cannot be limited to efficiency and should include other ‘economic’ goals as well such as protecting consumer choice and preventing wealth transfers from consumers to producers.

Some commentators believe that competition laws should incorporate concerns related to the use of personal data and privacy within its analysis. Others consider this misguided, given that consumer protection laws already offer protections for privacy concerns. The argument 

16 International Competition Network 2007, p. 6-21.
20 Balto & Lane 2016, p. 9.
that proponents of expanding the scope of competition laws to include data protection and privacy concerns make, is that competition law (at least in the EU) is primarily concerned with the protection of consumers and hence should include privacy considerations because they affect consumer welfare. Recent European Court of Justice decisions on abuse of dominance have highlighted the continuing importance given to preventing practices that cause harm to consumers. According to Schweitzer, the primary concern of EU competition law is with delivering the benefits of competition to consumers, not necessarily through improved efficiency.

However, harm to privacy does not, on its own, equal harm to competition.21 Ohlhausen and Okuliar distinguish between competition law and consumer protection law by suggesting that: “antitrust laws are focused on broader macroeconomic harms, mainly the maintenance of efficient price discovery in markets, whereas the consumer protection laws are preoccupied with ensuring the integrity of each specific contractual bargain”.22 Another view against including privacy considerations in competition law is that privacy is difficult to quantify compared to traditional factors, such as price and output.23 This raises the issue of how competition agencies will determine the effect on consumer welfare from a change in a company’s privacy policy or data security practices. This concern is compounded by the variety of concepts of privacy and consumers’ heterogeneous views about what they consider to be the optimum level of privacy.

I propose to determine the scope of the goal of competition law by viewing this goal in lights of its economic rationale. From an economic perspective, competition law aims to prevent harm arising from monopoly power. The harm of monopoly power lies in the deadweight loss caused by consumers not being served, despite the fact that they would be willing to pay a price above marginal costs for the particular product or service. If competition in the market is weak, consumers have no choice but to accept prices and terms offered to them. The dominant firm, in turn, has no incentive to offer better prices and terms to consumers. The key point is that this problem disappears as competition becomes more intense. Once other companies enter the market, this behavior by a firm will cause it to lose customers. Competition, in short, is a way to protect consumer interests by ensuring competition in the markets.

4.2 Data protection law

The economic rationale for data protection law is a different one. It aims to protect harm arising from information asymmetries. Consumers are rationally ignorant with respect to standard terms and conditions, as it would take them too much time and effort to read these.

They usually have no choice but to accept them if they want to purchase the good or service, but that does not imply that the consumers do not have an alternative. The reason why firms do not have an incentive to offer more consumer-friendly standard terms and conditions is not that they would have market power, but because doing so would not yield them any benefit. If consumers do not read the terms and conditions, firms would not gain extra consumers by making these terms more consumer-friendly. The key issue is that this problem remains, or potentially even exacerbates, as competition becomes more intense. Data protection law, and consumer law more generally, aims to protect consumer interests by mitigating this asymmetric information problem. Data protection law aims to address broader categories of harm than competition law, seeking to prevent harm to the fundamental right of data protection and the right to privacy.\footnote{Costa Cabral and Lynskey 2017, 18.}

### 4.3 Where both fields meet

Following this approach, cases concerning both fields of competition law and data protection law could be ‘categorized’ based on what type of harm is involved. The type of harm that regulatory instruments aim to prevent or curb can guide the choice of law.\footnote{Ohlhausen, Maureen K. and Alexander Okuliar, “Competition, Consumer Protection, and the Right [Approach] to Privacy” Antitrust Law Journal, Forthcoming (2015), p. 32.} In this context it is relevant to ask whether there is causality between the abuse and the market power. The imposition of standard terms and conditions is not only possible as a result of market power. Another reason for unfair terms and conditions can be the existence of information asymmetries between firms and consumers.

It appears important to require a causal relationship between abuse and market power to legally establish an abuse of dominance. If such a causal link is not required, competition law could turn into an “all-purpose” enforcement instrument for other fields of law, such as consumer law, data protection law, labor law or tax law.

In its Facebook press release, the Bundeskartellamt notes that “Facebook, as a dominant company, must consider that its users cannot switch to other social networks.” Essentially this argues that because Facebook has market power, consumers have no choice, which leads Facebook to degrade their privacy, which can be considered a higher prices for consumers. This concern is clearly rooted in a competition law problem.

The press release also states that “Via APIs, data are transmitted to Facebook and are collected and processed by Facebook even when a Facebook user visits other websites. […] Users are unaware of this.” Here the Bundeskartellamt essentially argues a privacy degradation as a result of an information asymmetry, which is technically rooted in a data protection problem.

This illustrates that, in practice, it may not always be possible to classify the harm of certain conduct or a certain transaction into one of two categories. Nevertheless, this approach helps
us determining the scope of competition law. If not through requiring a clear causal link between the abuse and the dominant position, by clearly defining what constitutes an abuse under competition law: a violation of another rule, or potentially also activity that is not unlawful under other laws.

One may ask what why it is relevant to demarcate the fields, as overlapping legal competences are not unique to the field of competition law. There are legal reasons to be cautious with using competition law for problems covered by other fields of law. First, the application of competition law should be limited to conduct that the rules aimed to protect, or “Schutzzweck” in German law.\textsuperscript{26} Competition law is not intended as an additional enforcement instrument for other fields of law. Using it as an ‘all-purpose’ enforcement tool would undermine legal certainty. Secondly, procedures differ under competition law and data protection law. A uniform application of the law would require data protection violations to be treated as such.\textsuperscript{27}

Remedies also differ considerably between the two legal fields. Art. 83 GDPR generally allows for fines of up to 4% of annual revenue for data protection violations, whereas Art 23(2) Reg. 1/2003 allows up to 10% for competition law violations. One may wonder why the opportunity was not taken with the introduction of the GDPR to not strengthen sanctions under data protection law further. One reason is that the remedies of the GDPR have horizontal application. Competition law remedies, in contrast, are imposed ad hoc, for individual firms. Having strong sanctions applying to firms across the board may be considered unfair, and could deter entry. A solution could be, however, to distinguish obligations as well as remedies under the GDPR based on firm size, allowing for SME exemptions or increasing obligations for dominant firms.

Nevertheless, competition law allows for more targeted enforcement than data protection law. Moreover, it allows for imposing structural remedies next to fines and behavioral remedies. This could be a reason to offer some leeway to competition authorities going after harmful business practices of dominant firms through competition law, even if data protection issues are involved. Overall, it illustrates that the available remedies can further inform us regarding the demarcation between the difference instruments.

\textsuperscript{26} See also Horst Satzky 2018, ‘Missbrauchsaufsicht und Verbraucherschutz im GWB’ NZKart 2018, 554.