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Consumer data rights and competition – Note by Germany

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More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/consumer-data-rights-and-competition.htm>

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1. Introduction

1. Services and enterprises of the digital economy have gained in importance in past years and have become the focus of attention among competition authorities, the public and policy makers alike. Changes in information technology and the way data is collected and used have raised a number of issues which lie at the intersection between competition, consumer and privacy law enforcement. This note addresses how businesses use and collect consumer data (Section 2) and if there are market failures with respect to consumer data (Section 3), the role of competition law enforcement (Section 4) and the role of competition advocacy (Section 5). It concludes with a summary of the main points (Section 6).

2. How businesses use consumer data

2. It is not a new phenomenon that businesses rely on data. Customer data have always been an important source of information. But the digital economy and technological progress have revolutionized the possibilities to collect, process and commercially use data¹ in almost every business sector. Now, it is possible to process an increasing amount (large volumes) of data in a short time (high velocity).

3. While data might be a spill-over product of doing business in certain markets, the development in digital markets has resulted in many business models that are strongly data-driven. It can also be observed that a number of firms achieve extremely significant turnovers based on business models which involve the collection and commercial use of personal data. Two of the best known examples are probably search engines and social networks.

4. Data can be gathered in different ways, with more or less effort, which can in turn have an impact on its economic value, for instance in relation to the issue of scarcity of data.² Besides collecting as much data as possible (or as economically sensible), the collection of data from as many different sources as possible is playing an increasingly important role, increasing the variety³ and scope of datasets.

5. At first glance, many services like search engines seem to be free of charge. But in reality the consumer gives his personal data away in return.

6. Many of such data-driven business models also rely on positive network effects. The term network effects refers to how the use of a good or service by a user impacts on the value of that product for other users. Such effects may be direct – when the benefit that users of one group get from a specific service depends on the number of other users from

¹ See in-depth discussion with regard to the term “data” in the joint paper of the Bundeskartellamt and the Autorité de la Concurrence on “Competition Law and Data”, p. 4, available at <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.html?nn=3591568>.

² See in-depth discussion in the joint paper of the Bundeskartellamt and the Autorité de la Concurrence on “Competition Law and Data”, p. 6.

³ Together with the terms “volume”, “velocity”, and “value”, this completes the list of the “v”s which are sometimes used to characterize the term “big data”, see joint paper of the Bundeskartellamt and the Autorité de la Concurrence on “Competition Law and Data”, p. 4.

this group using the service – or indirect – when the value of a service or product for a specific group of users increases (positive network effects) or decreases (negative network effects) with the number of users of another group.⁴

7. For instance, customers prefer services which many others use. Consequently, customers attract even more customers, which means access to more data for the respective undertaking. As a result this undertaking is able to optimise its services making them even more attractive. Better services in turn attract more customers leading to more consumer data and so on (“snowball effect”).⁵ Consequently, gathering, processing and monetizing data is key in the digital economy and personal data is of particular importance.

8. As a result, access to data combined with positive network effects can bring major benefits for an undertaking, but also for its customers. Besides the improvement of existing services and products as well as enhanced efficiency, access to data, catalyzed by algorithms,⁶ can also enable firms to exploit new business opportunities and therefore contribute to innovation. Moreover, access to data and network effects may also boost competition on a market as they may cause the rapid growth of new market players.⁷

9. It can also be advantageous for consumers if undertakings use their data to improve or develop products and services that meet their expectations. In addition, using consumer data allows offering popular services that often appear to be highly convenient from a consumer perspective.

3. Are there market failures with respect to consumer data?

10. The possession of large amounts of data itself does not raise competition concerns. However, in particular in connection with digital business models, access to data is often a highly relevant parameter of competition. It can also be a factor which contributes to market power and to competition concerns that are not seen in other markets.⁸ Those concerns can also go beyond competition law and affect consumer and data protection as well as privacy rights.

11. Markets where the collection and use of data are important are often highly concentrated. In several cases this can partly be attributed to the above-mentioned network effects.⁹

12. While an increase in a firm’s user share enables it to collect more data, leading to higher quality and further increasing its market share, smaller competitors might attract

⁴ See Bundeskartellamt’s working paper on “Market Power of Platforms and Networks”, Executive Summary, p. 3, available at: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Zusammenfassung.pdf?__blob=publicationFile&v=4.

⁵ See joint paper of the Bundeskartellamt and the Autorité de la Concurrence on “Competition Law and Data”, p. 13.

⁶ See joint paper of the Bundeskartellamt and the Autorité de la Concurrence on “Algorithms and Competition”, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Algorithms_and_Competition_Working-Paper.html

⁷ See joint paper of the Bundeskartellamt and the Autorité de la Concurrence on “Competition Law and Data”, p. 28.

⁸ See joint paper of the Bundeskartellamt and the Autorité de la Concurrence on “Competition Law and Data”, p. 12.

⁹ See Bundeskartellamt’s series of papers on "Competition and Consumer Protection in the Digital Economy", 2017 paper on “Innovations – challenges for competition law practice”, p.25, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Schriftenreihe_Digitales_II.html?nn=10321672.

fewer customers and as a consequence have access to fewer data. Therefore, they might not be able to keep up, for example, when it comes to targeted advertising. This can result in high barriers to market entry. Other companies not having the data could have strong competitive disadvantages on the respective market, and newcomers would not get the chance to enter and compete on the market.

13. Such a trend could lead to a “winner takes all” effect and harm competition by converging to a monopolization of data-related markets (“tipping”).¹⁰

14. Subsequently, the consumer will be the loser of such a development as he has given away his data unrestrictedly to a monopoly and cannot choose between competitors because of the monopolization.

4. The role of competition law enforcement

15. Generally, the supervision of data protection does not lie in the responsibility of competition agencies. However, the handling of data as well as data protection issues could have a strong impact on competitive issues and therefore could matter for competition law proceedings.

16. Generally, consumers prefer services with better privacy conditions, even if they do not always act accordingly (“privacy paradox”). Therefore, if customers have a choice regarding the control of their privacy level, privacy can become an important parameter of competition.¹¹ Privacy law such as the European GDPR¹² reflects fundamental values such as the right of informational self-determination. When assessing the appropriateness of data collection terms of a dominant company, these data protection principles matter. Consequently, it appears to be indispensable to examine the conduct of dominant companies under competition law, also in terms of their data processing procedures. Monitoring data processing activities of dominant companies is therefore an essential task of competition authorities in data-driven markets.

17. This is what the Bundeskartellamt did when it examined the conduct of Facebook. During its investigation the Bundeskartellamt closely cooperated with leading data protection authorities in clarifying the data protection issues involved.

18. In its decision of 6 February 2019 the Bundeskartellamt prohibited Facebook from making the use of the Facebook social network by private users residing in Germany, who also use its corporate services WhatsApp, Oculus, Masquerade and Instagram, conditional on the collection of user and device-related data by Facebook and combining that information with the Facebook.com user accounts without the users’ consent. The same applies to terms making the private use of the social network conditional on Facebook being able to combine information saved on the “Facebook account” without the users’ consent

¹⁰ See Bundeskartellamt’s series of papers on “Competition and Consumer Protection in the Digital Economy”, 2017 paper on “Big Data and Competition”, p 5, available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Schriftenreihe_Digitales_II.html?nn=10321672.

¹¹ See joint paper of the Bundeskartellamt and the Autorité de la Concurrence on “Competition Law and Data”, p. 25.

¹² Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=DE>.

with information collected on websites visited or third-party mobile apps used via programming interfaces (“Facebook Business Tools”) and use this data.¹³

19. Facebook has excellent access to competitively relevant data. Facebook’s comprehensive data sources are highly relevant for competition as a social network relies on such personal data. In addition, the specific data facilitates highly personalised advertising. Combined with the direct and indirect network effects, this access to data constitutes another barrier to market entry for a competitor’s product that can be monetised.

20. The Bundeskartellamt found that using and actually implementing Facebook’s data policy, which allows Facebook to collect user and device-related data from sources outside of Facebook’s social network and to merge it with data collected on the Facebook network, constitutes an abuse of a dominant position on the social network market in the form of exploitative business terms pursuant to Section 19(1) German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen, GWB)¹⁴. Taking into account the assessments under data protection law pursuant to the GDPR, the Bundeskartellamt came to the conclusion that Facebook’s business terms are inappropriate terms to the detriment of both private users and competitors.

21. The responsibility and consistency regulations in the GDPR do not rule out that the Bundeskartellamt can assess whether data processing terms infringe the GDPR.

22. Also, data protection regulations do not suspend abuse control which is more specific. These regulations do not include final provisions regarding dominant companies, i.e. they only allow data processing by dominant companies to be examined by data protection authorities based on the direct data protection regulations, or the existing enforcement options under civil law (German Act against Unfair Competition¹⁵ or legislation on business terms). However, they do not include the prohibition of abusive practices which applies in particular to dominant companies. The GDPR does not explicitly state that its provisions are final, so it cannot be assumed that it leaves no further scope for examination by other authorities and under other aspects.¹⁶

23. The Bundeskartellamt examined whether Facebook’s data policy is appropriate based on the data protection assessments of the GDPR. It came to the conclusion that Facebook’s comprehensive processing of personal data from other corporate services and Facebook Business Tools violates European data protection requirements pursuant to the GDPR and is subject to the affected users’ consent pursuant to data protection requirements. The Bundeskartellamt holds that the violation of data protection requirements found is a manifestation of Facebook’s market power.

24. Facebook appealed against the Bundeskartellamt’s decision. The Higher Regional Court of Düsseldorf granted a suspension in August 2019. Subsequently, the Bundeskartellamt appealed on points of law to the Federal Court of Justice. The legal proceedings are still pending.

¹³ Bundeskartellamt’s Facebook decision of 20 February 2019 (B6-22/16), available at: <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.html?nn=3591568>.

¹⁴ Available at: http://www.gesetze-im-internet.de/englisch_gwb/.

¹⁵ Available at: https://www.gesetze-im-internet.de/englisch_uwg/.

¹⁶ See Bundeskartellamt’s Facebook decision, recital 535-558.

5. The role of competition advocacy

25. Generally, competitive markets help achieve the goals of consumer and privacy policy and enforcing consumer and privacy laws may help make markets more competitive in particular by enabling consumers to make well-informed decisions about their choices.¹⁷ Therefore, keeping markets open and preserving choice should be the core mission of competition authorities. To assure this, competition authorities need to adapt to new business models and competitive parameters.

26. The current debate about the appropriateness of competition remedies related to data and the fitness of competition policy for the digital age is also reflected in the process for the 10th amendment to the German Competition Act. While the last amendment in 2017 introduced an additional threshold for merger control which is not based solely on the turnover of the companies involved but primarily on the value of the transaction¹⁸ as well as clarifications regarding platforms and networks, the German legislator is planning to take further adaptations with the upcoming amendment.

27. In January 2020 Germany's Ministry for Economic Affairs has published a draft that aims at strengthening abuse enforcement against large dominant market players and at allowing the Bundeskartellamt to react faster with more powerful tools.¹⁹

28. Thus, the draft proposal contains a wholly new rule on undertakings of paramount significance for competition across markets (Section 19a draft bill).²⁰ The provision stipulates that the Bundeskartellamt can establish that a company that is active to a significant extent on a multi-sided market is of paramount significance for competition across markets. When establishing this position the Bundeskartellamt will take into account several factors like dominance on one or more markets, vertical integration, access to data and the role as gatekeeper. If the Bundeskartellamt issues an order declaring an undertaking as being of such paramount significance the undertaking can be subject to stricter rules. For instance, the authority can prohibit to impede competition by obstructing interoperability between products or services or the portability of data.

29. Beyond this proposal, the draft bill also aims at enhancing traditional rules on abuse of dominance. Firstly, the legislator has proposed an amendment of Section 18 German Competition Act on how to assess market power by introducing "intermediation power" as a new factor. Secondly, the draft allows interventions below the dominance threshold provided that dependence on strong platforms exists (Section 20(1) German Competition Act). The scope of the section is currently limited to small and medium-sized enterprises (SMEs) and will be extended to larger companies in future as these can also depend on digital platforms.

¹⁷ See in-depth discussion in the Bundeskartellamt's background paper on "competition and consumer behaviour – conflict or coherence between consumer protection and competition law", available at: https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_2016_Wettbewerb_und_Verbraucherverhalten.html?nn=3590858 (only in German).

¹⁸ See Note by Germany for the "Roundtable on Start-ups, Killer Acquisitions and Merger Control Thresholds" in 2020.

¹⁹ Available at: <https://www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.pdf>. (An unofficial version in English is available at: <https://www.dkart.de/en/blog/2019/10/14/der-referentenentwurf-zum-gwb/>).

²⁰ Taking up recommendations from several national and international reports like the German "Commission Competition Law 4.0" but also the Furman report and the Special Advisers' Report for Commissioner Vestager.

30. Furthermore, the draft proposal contains two rules regarding access to data. Firstly, the draft intends to broaden the German essential facility doctrine (EFD) pursuant to Section 19(2) German Competition Act. Until now, the EFD was limited to (physical) networks and infrastructures. With the amendment the EFD will apply to all goods and commercial services, including access to data. Besides, the need to operate on an upstream or downstream market as a competitor of the dominant market will be removed. Secondly, the draft clarifies the role access to data can play in the context of relative market power (Section 20(1a) German Competition Act). According to the explanatory notes, this amendment is mainly focused on cases where the applicant undertaking has a substantial role in the creation of the data but is not granted access to it by the other undertaking that effectively controls the data.

31. The draft proposal also intends to prevent market tipping at an earlier stage by making it possible for the Bundeskartellamt to intervene if an undertaking with superior market power on a market impedes the independent attainment of positive network effects by competitors and thereby creates a serious risk that competition on the merits is restricted to a considerable extent (Section 20 (3a) draft bill).

32. The draft proposal also lowers the requirements for interim measures enabling the Bundeskartellamt to react even faster (Section 32a German Competition Act).

33. So far, the draft proposal does not contain any new provisions with regard to merger control and data.

34. It remains to be seen to what extent these proposals will be implemented and if the final draft will contain provisions with regard to data in the context of merger control. Hopefully the bill will strike the right balance between the risk of potential chilling effects and the desirable pro-competitive impact on digital markets.

6. Conclusion

35. The changes in data practices and business models pose unique challenges to competition policy. In order to meet those challenges it is indispensable to share knowledge and expertise among national competition agencies on how to address issues that may arise at the intersection of competition, consumer and privacy law enforcement.²¹ In addition, everyone can benefit from a close cooperation of competition authorities and other regulatory authorities like data protection authorities.

36. The role of competition advocacy will, among other aspects, be to ensure that the aims of consumer and data protection policies do not harm competition.

37. The role of competition authorities will be to keep markets open for new players, ensure fair competition and thus innovation and sufficient choice and last but not least protect consumers and competitors from the abuse of market power.

²¹ The International Competition Network (ICN) has already started a Steering Group Project on “Competition law enforcement at the Intersection between competition, consumer protection and privacy” in 2020.